REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 10 OF 2018

CTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon N N Njagi PM delivered on 9th July, 2010 in Naivasha CMCR No 2496 of 2009)

JUDGMENT

Background

1. The appellant was convicted and sentenced to life imprisonment on two counts, namely, incest and indecent act with a child contrary, respectively, to sections 20 (1) and 11(1) of the Sexual Offences Act.

2. Dissatisfied with the determination, the appellant has appealed on the following amended grounds filed on 4th June 2020, in place of the grounds in his original petition of appeal :

> *a) That the appellant was a child and ought to have been informed of his right to representation by counsel and ought not to have been sentenced to life imprisonment;*
>
> *b) That there was no penetration and that the complainants' ages were not proved; and*
>
> *c) That the sentence of life not being mandatory, was in this case meted unlawfully.*

3. The state opposes the appeal. Both parties filed written submissions, which they highlighted orally. I have considered the parties' representations.

Analysis of the Evidence and determination

4. The court's duty is to re-evaluate the evidence on record and to come to its own conclusions without ignoring the trial court's conclusions, and noting that it this court did not have the opportunity to see the witnesses and hear the testimony; See (**Okeno v R [1972] EA**).

5. On count 1, the particulars were that between 16th and 22nd September, 2009, in Naivasha District, the appellant caused his penis to penetrate the vagina of JO1, a girl aged ten (10) years. Count 2 was that between the aforesaid dates the appellant unlawfully caused his penis to penetrate the vagina of JO2, a girl aged eight (8) years. In each case, there was an alternative charge of indecent act with a child.

6. The evidence was as follows. After a voir dire examination, trial magistrate found JO1, intelligent enough to give sworn testimony. She said testified as PW1. She said she was ten years old. She recalled that between 16-22nd September, 2009 she did not go to school. She said she had come home from playing with her sister JO2, and other children. As they had lunch, the accused, who is her step brother, entered the house. He gave B and O, her younger brothers, money to go and buy mandazi. Whilst JO1 was washing the dishes and JO2 had just left the house, The appellant grabbed JO1. He forcibly removed her underwear, and inserted his penis into her vagina. She felt pain, and the appellant told her to leave the house.

7. According to JO1, JO2 then came to the house. The door was closed, and when JO2 emerged from the house she was crying. She told JO1 that she had been defiled by the accused. JO1 further testified that the appellant has been having sex with her since she was in class three (3). She and JO2 therefore went to report to her head teacher, Mrs G. The matter was then reported to the police, and she was taken to hospital,

and later to a safe house.

8. In cross examination JO1 stated that the appellant stayed with them and was her step brother; that he warned her that if she screamed he would kill her. She was therefore afraid to report to her father; and that there was nobody in the compound to report to.

9. JO2 impressed the trial magistrate as intelligent enough and knows the purpose of telling the truth. She testified as PW2. She said that on 22nd September, 2009, she and JO1 had been playing and returned home for lunch. They had lunch with her two brothers, B and O, and as they washed the utensils, the appellant who was her step brother came in. He sent her brothers to buy mandazi, and thereafter forced her to lie on the mat. She refused, but the accused removed her clothes by force, removed her long trouser partially and penetrated her vagina with his penis. She felt a lot of pain and later went to report to her teacher Mrs G. She was taken to hospital by the teacher and the incident was reported to the police. According to her, the accused did it only once.

10. In cross examination she said she did not change her clothes or underwear when she went to report to the teacher; she confirmed that the appellant was staying with them, but was chased away by her father. The complainant was later taken to a safe house after the report was made.

11. PW3 was RWK, a teacher. She recalled that another teacher, CO reported to her on 22 nd September, 2009, that JO1 Had been defiled by her step brother. She called the child who confirmed that she was being defiled by the accused over lunch hour. She took the child to the police station to report. In cross examination, she confirmed the original source of the information as being from JO1's class teacher

12. Dr Margaret Wainaina testified as PW4. She was the one who filled in the P3 forms for both JO1 and JO2. She gave the age of JO1 as 10 years. She found that JO1's hymen had been broken; that the genitalia were otherwise normal and that there was no vaginal discharge or spermatozoa, HIV and Syphilis tests were negative, and there was penile penetration.

13. As for JO2, PW4 testified that she was 8years old; that she had been sexually assaulted, and he vagina bruised; the hymen was broken; and although there were o spermatozoa and pus cells, the injuries were about one (1) week old. She produced the P3 forms and laboratory forms as exhibits 2a and 2b in respect of both girls.

14. Police Constable Evaline Mudeva testified as PW5 was. She was at the crime office in the police station on 22/9/2009 when the defilement report of two young girls was minuted to her. The report was that they had been defiled by their step brother. She took the children to hospital and and got a P3 form. She then charged the accused after recording statements of the witnesses. In cross examination she said she arrested the accused when she called him to the police station.

15. PC William Chelimo PW6, accompanied PW5 to investigate the case. He testified that he picked the complainants from the safe house and went with them to their father's home at County Council Estate. There, they explained how they were defiled by the accused. He further stated that while at the scene, he arrested the accused.

16. PW7 DEA, the father of the two complainants, testified that his children were daughters JO1 and JO2, and sons BA and IA who lived with him; that the two girls were defiled by the appellant when they were at home; that the accused is also his child, who had been staying with his late mother; that the appellant had come to his home at age 14; that he was on duty at work when the incident happened and he was told whilst at work; that the children were then taken to a safe house.

17. In cross examination he stated that he was in the house at night but the children did not inform him of the defilement; that the accused was staying in the living room.

18. The appellant gave his defence through an unsworn statement. He said he was a watchman living in Nairobi; that on the material dates he was in Nairobi; that he was arrested and put into cells when he came for the hearing after being called by the OCS Naivasha; that he knew nothing about the offence; and that it was not true that he had committed the offence.

19. I have carefully considered the evidence on record, and determine as follows.

Whether the appellant was a child at the time of the offence

20. On this issue, there is no evidence on record as to the age of the appellant at the time of the offence. Although, as argued by the appellant, PW7 testified that the accused was his child and came to live with the PW7 when he was 14, and that PW7 also stated that the accused had lived with him for two years, no evidence that clearly confirms the age of the appellant was availed. Further, the issue did not arise at the trial and cannot therefore become a subject of appeal unless the point arose on account of the emergence of new or fresh evidence.

21. It would be a proper to allow an appeal against conviction as being unsafe, if the grounds of appeal submitted refer to fresh evidence which was not adduced at trial. Here, the appellant has not availed any evidence with the grounds of appeal. Indeed, he himself stated at the hearing that he was a watchman in Nairobi at the time.

22. The power to allow an appellant to adduce additional evidence on appeal is discretionary and is stipulated under the provisions of ***Section 358(1)*** of the ***Criminal Procedure Code***. The said provision stipulates that:

> ***"In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court."***

23. The court has not been called upon to invoke section 358 CPC, and in any event there is no indication of any fresh evidence that is sought to be availed concerning the age of the appellant at the time of the commission of the offence. The principles for the invocation of new evidence are summarized in the locus classicus case by the Court of Appeal in ***Elgood v Regina (1968) E.A. 274*** which adopted the principles enunciated by Lord Parker C.J in ***R. vs. Parks (1969) All ER at page 364*** as follows:

> ***"a. That the evidence that is sought to be called must be evidence which as not available at the trial.***
>
> ***b. That it is evidence that is relevant to the issues.***
>
> ***c. That it is evidence that is credible in the sense that it is capable of belief.***
>
> ***d. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."***

24. On issues not raised in the trial at the lower court, the Court of Appeal held in **John Kariuki Gikonyo v Republic [2019] eKLR** that:

> ***"…we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal."***

25. The Court relied on the decision in ***Alfayo Gombe Okello v. Republic* [2010] *eKLR Criminal Appeal No. 203 of 2009*** **where it was held** as follows:

> ***"….the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."***

26. Using the same reasoning, this ground of appeal therefore fails.

Whether there was proof beyond reasonable doubt of penetration and of the ages of complainants

27. The evidence of the two children appears to me to be rather confusing. First, JO1 testified that JO2 had left the house when the accused came into the house and sent her brothers out to buy mandazi. Thus, she was alone in the room when defiled. After being defiled she was told to go out by the accused.

28. JO1 said after being defiled, the accused went and called JO2 in, and she was told to go out. JO2 then entered the room and the door was closed. After a while she came out crying, and told JO1 she had been defiled.

29. JO2's testimony, however, was that she and JO1 were in the house cleaning utensils when the appellant came in and sent the boys out to buy mandazi. The accused then forced her to lie on a mat and defiled her. It is not stated whether she went out and left her sister in the house then came back and was defiled.

30. Both JO1 and JO2 testified that they reported the incident to their teacher Mrs G; and JO2 said that the teacher took her to hospital. That lady was not called to testify. Instead a PW3 RWK, a teacher testified as the teacher to whom the report was made. She did not mention Mrs G in her testimony, or even whether she knew Mrs G. Instead, she said she was told of the incident by another teacher, one CO, who showed her JO1. CO was also not called to testify. PW3 testified that it was she who took JO1 to the police station.

31. In his judgment, the trial magistrate determined that PW3 RW was the teacher who was informed by the complainants of the defilement. This is inconsistent with the evidence on record. There is a gap as to which teacher actually received the information that led to the complaint.

32. The trial magistrate also believed the evidence of the complainants' father, PW7 who stated that they were defiled by the accused, and that he was on duty when they were defiled. He did not say how he came to that knowledge. Further, the trial magistrate did not take into account the fact that, in cross examination, PW7 said the children did not inform him about the defilement. How then did he find out? Why did he not report the incidences? If his evidence is true, this is a person who was not worthy of being in parental protection and guidance of the children, and was a danger to their welfare. Was he perhaps involved in the defloration of the children?

33. I also find the evidence of the complainants to be inconsistent and therefore not wholly reliable. Granted they are children, but whilst the trial court found them to be intelligent enough to testify, it did not bother to deal with the inconsistencies that brought their evidence into doubt. Were the complainants in the room together when defiled or were they separated before defilement? If they were together, did one witness the other being defiled on the material date?

34. The overall inconsistencies further spill into the arrest scenario. PW5 PC Evaline, stated that she arrested the accused in court, as the accused had another case where he had defiled JO1. On the other hand, PC William Chelimo, PW6, said he went to the complainants' house where they explained how they were defiled. He stated that the accused was there at the scene and it was there that he arrested him. He reconfirmed this arrest in cross examination.

35. With regard to the age of the complainants, this must be proved in sexual offences as stated by the Court of Appeal in **Maripett Loonkomok v Republic [2016] eKLR**:

> ***"The question of age, as we have stated earlier is a question of law under the Sexual Offences Act, at least to prove that the victim was a child at the time of defilement and also for purposes of sentence. However the question whether the complainant was 9, 10 or 13 is a question of fact with which we can only interfere if it is demonstrated that the High Court made conclusions of fact on no evidence at all or that the conclusions were perverse in nature. It follows that to constitute a question of law the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjectures and surmises."***

36. In the case of **Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000,** it was held that**:**

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …."***

37. In the present case, PW1 Dr Margaret Wainaina stated the ages of JO1 and JO2 in the medical reports as 10years and 8years respectively. The two complainants also indicated their ages as such respectively, in the voir dire examinations. Accordingly, I am satisfied that age is not in doubt herein.

38. As regards the medical evidence concerning the defilement of the complainants, doubt that they were both defiled. In both cases, the hymen was missing, and in the case of JO2, there were bruises to the labia majora. The doctor assessed the injuries to be one week old.

39. The PRC forms for both complainants indicate that there were several incidences of defilement. For JO1 the first is indicated to have been on 20/9/2009, the second on 21/9/2009, in both cases when she had gone home for lunch. JO1 in her testimony, however, said that she had been defiled only once. This suggests either carelessness on the part of the doctor or inconsistency on the part of JO1. As for JO2, the PRC form indicates three instances of defilement on 20/9/2009, 21/9/2009 and 22/9/2009, all occurring when she had gone home for lunch. Does the evidence constitute proof beyond reasonable doubt?

40. The evidence Act Cap 80 of the Laws of Kenya at section 107 (1) provides that:

> ***"whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist."***

As to what constitutes the burden of proof beyond reasonable doubt, the case of **Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373**, which has been widely adopted in Kenyan courts, provides as follows on the point:

> ***"That degree is well settled. It needs not reach certainly, but it must carry* a *high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."***

41. Coming back to the present case, I find that despite the inconsistencies in the evidence of the two complainants in respect of the facts surrounding the actual incident of defilement, I also note that both complainants alleged that the accused, whom they knew, was the person who defiled them. It is not in dispute that the accused lived with the complainants. And they were very familiar with him. It is also not alleged, and there is no evidence, that the accused was the victim of a set-up, a malicious complaint or a scheme consisting of a complaint based on false information.

42. To that extent, there is sufficient evidence to uphold the charges of defilement contrary to section 8(2) of the Sexual Offences Act. Accordingly, the appeal on this ground fails.

Whether the sentence meted was mandatory and or lawful

43. The appellant submitted that the trial court in meting sentence took the perspective that the sentence was mandatory, instead of treating the words *"shall be liable to life imprisonment…"* in section 20(1) of the Sexual Offences Act, to mean that the sentence to be meted on him was graduated up to a maximum of life imprisonment. Section 20 provides:

> ***" 20. (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, <u>sister,</u> mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years: Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.***

44. It is clear that the appellant has assumed that the charge with which he was charged was, or should have been, incest by a male person under section 20 of the SOA. However, he was charged with two counts of defilement under section 8(1) as read with section 8(2) of the SOA. Thus, the concurrent sentences of life imprisonment by the trial court in this case were meted under section 8(2) of the Sexual Offences Act. The provisions are as follows:

> ***"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."*** (Emphasis added).

45. From the above provision, there is no doubt that the sentence for defilement as against a child of 11 years and below is life imprisonment.

46. In relation to the age of the victim of a sexual offence, the Court of Appeal in the case **of Hadson Ali Mwachongo v Republic [2016] eKLR** stated as follows as regards sentencing:

> ***"Before we conclude this judgment. It is necessary to say a word on computation of the age of the victim. The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the severer the punishment. Where the victim is aged 11 years or less, the prescribed punishment is life imprisonment. A Child of 12 to 15 years attract 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment. Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 13 years, etc, as at the date defilement to be treated as 11 years old or as more than 11 years old? If the victim is treated as more than 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed. In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the Appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old? ….***

47. In this case, the evidence is that the appellant was the son of the PW7. He said so in his testimony:

> ***"The accused CO is my son. Accused is my child…"***

In the course of the proceedings the accused was referred to as the step brother of the complainants. Similarly, the trial court found that:

> ***"PW8, DEA did confirm to this court that the accused was his son…"***

The accused's father did not make the distinction between stepson and son. He asserted that he was his son, and therefore the complainants were his sisters.

48. The accused therefore fits into the category of a person who should properly have been charged with incest under section 20 of the SOA, for doing ***"…an act which causes penetration with a female person who is to his knowledge his …., sister,"*** in terms of section 20(1) of the Act.

49. From that perspective, the accused should have been charged with incest as a son of PW7 the father of the complainants. I therefore substitute the charge to a charge of incest under section 20, and convict the appellant with two counts of incest with his sisters who were under the age of eighteen years.

50. The sentence shall be imprisonment for eighteen years for each count to run concurrently. I would point out that the appellant shall be entitled to the benefit of Section 46 of the ***Prisons Act***, in the event that he fulfils the conditions thereof. Section 46 of the Prisons Act provides that:

> ***"(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences."***

Disposition

51. Ultimately, and for all the above reasons, I allow the appeal only to the extent that the charge meted by the trial court of defilement, is substituted with that for incest under Section 20 of the Sexual Offences Act, and the sentence of life imprisonment is substituted with a term of imprisonment of eighteen (18) years to run concurrently from the date when the appellant first took plea.

Administrative directions

52. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

53. A printout of the parties' written consent, if any, to the delivery of this judgment shall be retained as part of the record of the Court.

54. Orders accordingly.

Dated and Delivered at Nairobi this 7th Day of October, 2020

RICHARD MWONGO

JUDGE

Delivered by Videoconference in the presence of:

1. CTO - the Appellant in person

2. Ms Maingi for the DPP

3. Court Clerk - Quinter Ogutu