REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL APPEAL NO. 18 OF 2018

FNK...APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(Being an Appeal from Original conviction and sentence of Hon. E. Kimilu PM

in Naivasha CMCR No (S.O.) 21 of 2017 delivered on 8th November, 2018)

JUDGMENT

1. The Appellant was charged and convicted for the offence of incest contrary to **Section 20 (1)** of the **Sexual Offences Act**. He was sentenced to life imprisonment. The particulars were that on 12th March, 2017 at [Particulars Withheld] Village in Gilgil, he caused his penis to penetrate the vagina of MN a child aged 15 years who was to his knowledge his was niece.

2. In his appeal, the Appellant who is unrepresented raises several grounds: that the prosecution did not discharge its duty of disclosure as provided by **Article 50 (2)** of the **Constitution**; that the complainant despite being a minor was not subjected to a voir dire examination; that the trial court allowed production of evidence by persons who were not the makers thereof; and thus that penetration and age of complainant were not proved; and that his defence was improperly dismissed.

3. The state opposes the appeal; and seeks that the conviction and sentence be affirmed. Counsel argues that the trial record shows that a pre-trial hearing was held and the issue of statements dispensed with; that a trial is not vitiated by the failure to hold a voir dire examination; and that the minor in this case was not a child of tender years.

4. Further, the DPP submitted that the doctor who produced the medical evidence had worked with the examining doctor who had proceeded on leave and knew his handwriting, that the procedure in **Sections 77** and **33 (b)** of the **Evidence Act** were followed thus making the documents admissible. Finally, that the defence evidence was properly evaluated and dismissed by the trial court.

5. This court's duty as a first appellate court is to re-evaluate the evidence availed at trial and come to its own conclusion not ignoring the trial court's conclusions and noting that this court has not had the advantage of hearing the witnesses observing their demeanour. (**Okeno v Republic [1972] EA 33**).

6. Briefly, the prosecution evidence was made out by four witnesses. PW1 the complainant MN, had her evidence taken in camera. She said she was 14 years old and was staying with her grandmother. The accused who is her uncle came to the house and demanded, and took away, his chicken, then left. After a while her grandmother went to a neighbour's house. It was then that the accused returned. She hid under the bed and the accused told her to come out or he would kill her.

7. When she came out he grabbed her hand and took her to another uncle's house. Eventually, he took her back to his house and told her to be obedient. Her aunt was not in the house and he took her to his bed. He commanded her to remove her pant. She declined. He removed it by force, laid her on the bed and penetrated her vagina using his penis. He did this until the following morning, then kicked her out of the house.

8. The complainant reported the incident to her neighbour Mama N, and they proceeded to report to her son K. Eventually other relatives came to know of the incident and there was discussion whether to report to police. Finally, the following day, when her sister came with her husband, they took her to Gilgil Police Station where a report was filed. They were referred to Gilgil District Hospital where she was

examined and some forms were filled.

9. In cross-examination by the accused, she confirmed that the accused defiled her on 10th March, 2017; that she had not been told to plant the charge; and that he was drunk.

10. PW2, Anna Njoroge the Assistant Chief of Gilgil Sub County testified that she received a report of a pupil who had been defiled. She went to [Particulars Withheld] Primary School where the victim was identified by her teacher. They interrogated the complainant who confirmed she had been defiled by the accused. Later PW2 learned the accused had been arrested.

11. PW3 Dr. Salim Seif testified as the medical doctor at Gilgil Sub-County Hospital where he worked for five years. He had the P3 Form for MN who was 15 years old. It had been filled by his colleague Dr. Mariga with whom he had worked with and was familiar with his handwriting and signature. He applied to produce the report; and there being no objection it was produced as P. Exhibit 1 with PRC Forms as P. Exhibit 1 (a).

12. The P3 Form shows that the complainant was examined on 15th March, 2017. It was signed on 10th July, 2017. Her hymen was found to be broken and she had a whitish discharge but no physical injuries were noted. The complainant's age was assessed and age assessment report was produced as P. Exhibit 2.

13. The Investigating Officer was Inspector Rita Wanekaya, PW4 from Gilgil Police Station. She testified that she had been defiled by her uncle on 10th March, 2017 at her grandmother's house; that the accused had come home drunk and threatened them; that the grandmother ran out of the house leaving MN inside. He locked the door from the outside and returned later. He threatened MN who was hiding under the bed and she came out; she tried to persuade him not to harm her; later he took her to his house where he defiled her.

14. PW4 stated that MN reported the incident after two days, and they issued her a P3 Form and told her to go to Gilgil Hospital. There, she was examined and it was confirmed she had been defiled. The accused had been arrested by members of the public on 15th March 2017. She charged him with incest. MN's mother was not willing to record a statement but had reported to the area Chief who recorded a statement.

15. The accused's unsworn testimony was that on 15th March, 2017 he went as usual to the quarry where he is a casual labourer. In the evening he went to his mother's house and after supper at around 9.00pm, about ten (10) men came to the house and arrested him. He was taken to the station, as he was questioned by a neighbour why he had a grudge against his brother. He replied that they had a dispute relation to land given by their father. He also stated that his brother and the wife were the ones who planned his arrest.

Disclosure of Statements and Documents

16. The record shows that on 16th March, 2017, the court ordered that statements be supplied to the accused. On 15th March, 2017, the accused requested statements and exhibit. The prosecution said it did not have any and requested for a pre-trial date. On 22nd September, 2017 the State Counsel told the court that the Investigating Officer was to get the witness statements recorded. Then on 22nd September, 2017 the pre-trial was conducted. The accused was present.

17. The trial commenced on 22nd September, 2017 in the presence of the accused. He cross-examined PW1. On 18th January, 2018 PW2 testified and PW3 and PW4 testified on 5th April, 2018 and 20th July, 2018, respectively. The accused cross-examined each of them. In the case of PW3 the doctor, the accused asked a pointed question about the whitish discharge from MN's vagina.

18. It is not argued by the Appellant that he was unable to mount his defence for lack of statements documents or exhibits. His argument is that:

> **"……despite the Appellant's prayers to be supplied with witness statements, there is no evidence on records that indeed he was given witness statements."**

This is an argument based on a technicality that the record is silent as to whether the statements were given to the accused.

19. Whilst the **Constitution** at **Article 50 (2) (j)** gives any accused person the right to be informed in advance of and have reasonable access to the evidence the prosecution intends to rely on, there are no statutory provisions indicating how this is to be practically achieved. What the courts must keenly guard against is the continuance of proceedings in circumstances where the accused has not been informed of the evidence or is denied access to it as this would lead to prejudice to the accused.

20. As already indicated there was a pre-trial hearing on 22nd September, 2017. It is at such pre-trial that pending matters and scheduling time frames are agreed. The accused was present. When the hearing was fixed on 23rd August, 2017 for 22nd September, 2017, he did not object or indicate he had not received the witness statements. He thereafter fully participated in cross-examination and, in the case of cross-examination of PW3, he asked a pointed question regarding the whitish discharge suggesting he had access to the P3 Form or the PRC Form.

21. There is ample authority that the mere technical failure to record that the accused has been provided witness statements and exhibits does not per se, amount to a violation of **Article 50 (2) (j)** of the **Constitution**. [See Prof, Ngugi J. in **Fappyton Mutuku Ngui v Republic [2012] eKLR**. Similarly, there is even authority that the redaction in a witness statement to exclude personal particulars does not amount to contravention of **Article 50 (2) (j)** of the **Constitution**. (See **In the Matter of Application for orders for Witness Protection [2014] eKLR**).

22. I am therefore not persuaded that the Appellant's right under **Article 50 (2) (j)** of the **Constitution** to the prosecution documents were violated in this regard.

Failure to conduct Voir Dire

23. Section 19 (1) of the **Oaths and Statutory Declaration Act** is the provision under which voir dire examinations are underpinned to determine the child's understanding of the nature of an oath. The provision states:

> **"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure**
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> **Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."**

24. The record discloses that a voir dire examination was not conducted for the complainant. Her testimony was adduced in camera. She said she was 14 years old but the Medical Age Assessment produced by the doctor showed she was aged 15 years.

25. In **Maripett Loonkomok v Republic [2016] eKLR** the Court of Appeal at Nyeri stated that:

> **"It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be violated."**

Maripett reviewed cases going back to **Kibageny Arap Kolil v Republic [1959] EA 82** which approved that held *per curiam*, that:

> **"There is no definition in the Oaths and Statutory Declaration Ordinance of the expression 'child of tender years' for the purpose of Section 19. But we take it to mean, in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years."** (Emphasis added)

26. The Court of Appeal in **Maripett** then stated:

> **"It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that:**
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> **"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction." (See Athumani Ali Mwinyi v R Cr. Appeal No.11 of 2015)**

27. The record shows that MN stated her age to be 14 and the Medical Age Assessment found her to be aged 15 years. Applying the law that she was not under 14 years, there was no legal requirement for her to undergo a voir dire examination. In addition, in light of the separate corroborative medical evidence, I am not persuaded that the failure to conduct the voir dire examination invalidates the trial. This ground also fails.

Production of documents

28. The Appellant challenges the production of the medical evidence by Dr. Seif who was not the author thereof. However, I note that the prosecution made an application – which the Appellant did not object to – to produce the said evidence on grounds that the author, Dr. Mariga, was Dr. Seif's colleague and that he knew his handwriting and signature; and that Dr. Mariga was away on leave.

29. I agree with the prosecution that **Section 77** and **33 (b)** of the **Evidence Act** entitle the court to receive the evidence of a medical practitioner made in the ordinary course of business where the maker is dead, incapable of giving evidence or cannot be procured without an amount of delay or expense.

30. With regard to the PRC Form which Dr. Salim Seif also introduced, I think the same was sneaked in. The only application made by the State Counsel was:

> **"to produce the P3 Form on behalf of the maker who is away on leave. He is familiar with his handwriting and signature."**

I have perused the PRC Form which was signed by one Kinyanjui and PW2.

31. This form was not covered by the application made by the State Counsel. Accordingly, the said PRC Form could not be produced by Dr. Salim Seif under the Evidence Act as there is no indication that the Doctor knew the signatory. The report is therefore expunged from the

record. The expungement does not, however, affect the evidence in the P3 Form.

Defence Case Not Considered

32. The Appellant's argument that his defence was not considered centres around the fact that he alleged that there was a land dispute that triggered his brother to start this case. He asserts the trial magistrate did not consider that evidence.

33. I have perused the trial magistrate's judgment and agree with the Appellant that she did not make an assessment of it and reach any conclusion thereon. However, the judgment shows that she considered the fact that the accused evidence confirmed he was MN's uncle.

34. My evaluation of the Accused's unsworn evidence is that there was no way in which the alleged land dispute could be taken into account and evaluated unless there was a possibility of cross-examination, or other witnesses availed who could give light on it. This is not to say that it was for the accused to disprove the prosecution's case.

35. The accused's evidence taken in light of the overall evidence adduced in the trial does not provide an alibi in respect of where he was on the material date, 10th March, 2017. It is also clear from his evidence that he often went to his mother's house and would eat there, facts that were also adduced in the prosecution evidence. Ultimately, the accused's evidence does not counter the evidence of the prosecution in any way.

Sentence

36. The Appellant's argument here is that the life sentence meted against him was harsh. He points out that the evidence show he was drunk and points out that the evidence shows he was drunk and the trial court did not consider whether he was so intoxicated as to be unaware of his actions. He cited a string of cases on intoxication. However, the defence of intoxication is raised by an accused person not by the prosecution or the trial magistrate. When giving his defence he was silent about where he was at the material time.

37. He further argues that **Section 8 (2)** of the **Sexual Offences Act** only provides that he *"shall be liable to imprisonment for life."* This point has been argued in numerous cases and the law is settled that where the law provides the sentence one is liable to, the trial court has discretion to impose a sentence upto the maximum to which the accused is liable. Thus, the trial magistrate was entitled to mete a life sentence.

38. The Accused's mitigation was as follows:

> **"I am innocent. I deny the charge."**

There is no indication in the record that the trial magistrate took the mitigation into account. All she said was that she had evaluated all the evidence on record and the nature of the offence, then meted the sentence.

39. Since the Supreme Court's decision of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** whose principles were followed in the Court of Appeal case of **Dismas Wafula Kilwake [2018] eKLR** relating to sexual offences, the present progressive jurisprudence requires that a trial court must pay attention to individual aspects of the case when handling the issue of sentence even where there are prescribed minimum mandatory sentences. The new practice is to schedule a sentencing hearing at which the various mitigational aspects are brought to the fore by the parties, and considered by the trial court, before it exercises its discretion in the sentence to mete.

Disposition

40. All this was not done at mitigation. Accordingly, I hereby remit back the case to the trial court for a hearing on sentence whereupon, the trial court will re-sentence the Appellant.

41. In all other respects the appeal fails and is hereby dismissed and the conviction and sentence are affirmed.

Other Orders

42 (1) The Probation Officer to avail a Report on Accused to be taken into account in the sentencing.

2) The Prison Service to avail a Report on the conduct of the accused for placing before trial Court.

Administrative directions

43. 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 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.

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

45. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 2nd Day of November, 2020.

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R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP

2. FNK – Appellant present in Naivasha Maximum Prison

3. Court Clerk – Quinter Ogutu