REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

HCCRA NO. 44 OF 2015

RKR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kericho

Sexual Offence Case No. 49 of 2011(Hon. J. R, Ndururi (PM)dated 16th October 2015)

JUDGMENT

1. The appellant, RKR, was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act. The particulars of the offence were that on the 10th day of September 2011 at [Particulars withheld] village in Kipkelion Sub-county within Kericho County intentionally caused his penis to penetrate the vagina of CC who was to his knowledge his niece.

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual |Offences Act. The particulars of this offence were that on the 10th day of September 2011 at [Particular withheld] village in Kipkelion Sub-county intentionally touched the vagina of CC, a child aged 8 years with his penis.

3. He was found guilty of the offence of incest as charged, and was sentenced to life imprisonment in accordance with section 20 (1) of the Sexual Offences Act.

4. Aggrieved by both his conviction and sentence, he filed the present appeal in which he raises four substantive grounds of appeal. He argues, first, that the charge sheet was defective. Secondly, that the trial court erred by relying on a P3 form which stated that the injuries to the complainant were filled in the wrong place. Thirdly, that the arresting officer and investigating officer did not testify, and finally, that the trial magistrate erred by rejecting his plausible defence.

5. The evidence adduced by the prosecution was as follows. The complainant, CC was at home on 10th September 2011 with her grandmother, her brother K, and other children. The appellant took her to a maize plantation and removed her inner wear and did *'tabia mbaya'* to her and she felt pain. He told her not to tell anyone or he would cut her. She went back home and found her grandmother, but she did not tell her as she was afraid that the appellant, 'R' would cut her. Her brother K had seen R take her to the maize plantation and he told her grandmother. Her mother took her to the hospital and later to the police station. She referred to the appellant as 'father' and a close neighbour.

6. The complainant's brother, CK, was at his grandmother's home with his sister C and other children. He saw the appellant call C by beckoning to her, then holding her hand as he led her to a maize plantation. C had later returned home, alone, with her clothes muddied. When their mother returned, she was informed by one of the other children that R had taken C to the maize plantation. C had started crying in the night and told her mother what had happened with R. Their mother had taken C to the hospital the following day. According to K, the appellant was a son of their grandfather.

7. The complainant's mother, PW3, BCK had been informed by K (PW2) about the appellant taking C to the maize plantation. She had taken C, whom she testified was born in 2003, to hospital after questioning her and learning what the appellant had done to her. She stated that R was a brother of C's father, her husband.

8. The medical evidence was presented by Weldon Mutai, a clinical officer at Kipkelion Sub-county hospital. The medical report (P3 form) showed bruises on the complainant's vulva and perineum, and her hymen was broken. The medical examination also showed bleeding. PW3 conceded in his evidence that the injuries sustained by the child were indicated on the wrong page of the P3 form, but this did not connote

that the findings in the form were incorrect.

9. I note from the record of proceedings before the trial court that in the course of the trial, Learned Counsel, Mr. Motanya, came on record for the appellant, and the complainant (PW1) and her mother (PW3) were recalled for cross-examination. The investigating officer did not testify.

10. In his defence, the appellant stated that he went to a bar where he worked within Kipkelion where he stayed for 5 days, then returned home on 14th September 2011. He was arrested at 4.00 p.m on the day he returned home. He denied committing the offence.

11. I have considered the appellant's submissions and the submissions in response by Learned Prosecution Counsel, Mr. Ayodo. I believe I need to consider four issues arising from the grounds of appeal raised by the appellant.

12. He has argued that the charge sheet in the matter was defective. This, he contends is because it does not indicate the exact age of the victim. The appellant, however, is charged with the offence of incest, and the issue of age in incest cases arises only with respect to sentencing, and the age can be stated in the information or proved by evidence:

> ***"(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, sister, 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.***

13. This challenge of the conviction on the basis that the charge sheet is defective therefore has no merit.

14. His second ground is that the trial court erred in relying on the P3 form, while the Clinical Officer had admitted that the injuries sustained by the complainant had been filled on the wrong page of the P3 form. I do not see that any prejudice was occasioned by the completion of the P3 form erroneously. There is no dispute that the complainant was examined at the hospital, and that she was found to have the injuries to her genitalia set out in the P3 form. I believe it would be to lapse back to the old days of technicalities were this court to find that the erroneous completion of the form vitiated the prosecution case.

15. The appellant's third ground is that the arresting and investigating officers did not testify. This is correct. However, I am unable to see what value to the essential facts of the case the investigating officer and the arresting officer would add to the case. The offence was proved by the evidence of the complainant, her brother and her mother, as well as the medical evidence produced by the Clinical Officer. The critical elements in a case of defilement were established- penetration and the age of the complainant. The appellant was not a stranger-he was, in fact, the complainant's uncle, a brother of her father.

16. **In Jeremiah Gathiku Kirungi vs Republic Criminal Appeal No. 73 of 2008**, which was cited in **Gabo Abdi Songolo vs Republic [2011] e KLR – Criminal Appeal No. 195 of 2009**, the court observed that the failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case demonstrate otherwise. In this case, having considered the prosecution evidence on record, I find that the failure to call the investigating officer and the arresting officer did not in any way weaken the prosecution case.

17. The appellant's final ground of appeal is that the trial court erred by rejecting his plausible defence. I note that in its judgment, the trial court observed that the appellant's defence was merely to deny committing the offence, and to recount his whereabouts on the days following the incident, but not on the day of incident.

18. I have considered the appellant's defence as set out in his unsworn statement. He alleges that he was, for five days, at a bar where he worked in Kipkelion at the time of the offence. He returned on 14th September 2011 and was arrested. He was, in effect, relying on an alibi defence. He raised this contention at the defence stage, whereas he should have raised it at the earliest stage so that it could be investigated- see **Karanja vs R (1983) KLR 501** in which the court stated that a person wishing to rely on an alibi defence must do so at the earliest stage in the proceedings, the court observing that:

> ***"…in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought."***

19. The trial court was, in my view, right in rejecting the appellant's defence. He defiled his own niece. She knew him so there was no doubt about the identity of the perpetrator of the offence. He had beckoned to her, an innocent child who regarded him as a father, and he was indeed her father, being her father's biological brother. He was seen by her brother, his nephew, to beckon to her and lead her away into the

maize plantation, only for her to return thereafter, in muddy clothes and in tears. I cannot find anything in his defence that would displace this strong prosecution evidence.

20. In the circumstances, I find that the appellant's appeal has no merit. It is hereby dismissed, and the conviction and sentence upheld.

Dated Delivered and Signed at Kericho this 6th day of February 2019

MUMBI NGUGI

JUDGE