REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 41 OF 2017

RMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Mutomo Principal Magistrate's Court Criminal Case (S.O.) No. 2 of 2017** by **Hon. Z. J. Nyakundi (SPM)** on **22/08/17**)*

J U D G M E N T

1. **RMK,** the Appellant, was charged with **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **6th** day of **April, 2017** at around **5.00 p.m.** in **Ndundune Sub-Location, Ikanga Location, Mutomo Sub-County** within **Kitui County** intentionally and unlawfully caused his penis to penetrate the anus of **BM** a girl aged **2 years** who was to his knowledge his niece.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **6th** day of **April, 2017** at around **7.00 p.m.** in **[particulars withheld] Sub-Location, Ikanga Location** in **Mutomo Sub-County** within **Kitui County** intentionally and unlawfully touched the anus of **BM** a girl aged **2 years** with his penis.

3. Having been taken through full trial he was found guilty, convicted and sentenced to **life imprisonment.**

4. Aggrieved, he appeals on grounds that: The charge was defective for non-compliance with evidence adduced; **Section 31** of the **Sexual Offences Act** was misapplied and he (Appellant) was denied the opportunity to cross examine the witness on adverse evidence adduced; **Article 50(2)(c)(j)** and **(k)** of the **Constitution** was violated; the Prosecution's evidence was inconsistent and contradictory; cogent evidence put up by the defence was rejected, critical and essential witnesses were not availed to testify and **Section 169** of the **Criminal Procedure Code** was not complied with.

5. Facts of the case were that on the **6th** day of **April, 2017,** PW1 **RM** left her children, the Complainant and PW2 with the Appellant, their uncle as she went to the river. She returned to find the Complainant crying. The child was taken to hospital and examined by PW4 **Phillip Matuku Mutua** a Clinical Officer who found her having sustained anal tears which were fresh. The police investigated the case and charged the Appellant.

6. Upon being put on his defence the Appellant alluded to events of **5th April, 2017.** He stated that having escorted his wife to the stage as she was travelling to Kibwezi he went to the farm where he stayed until **6.00 p.m.** He returned home and cooked for the children who ate and slept. At **10.00 p.m.** he was arrested and offered to be released if he surrendered land but he refused. He urged that he was arrested because of a disagreement he had with his brother over land and animals.

7. The State through learned Counsel, **Mr. Mamba** opposed the Appeal. He urged that the minor had tears that were fresh and the Appellant was the only person who was found with the minor on the fateful date; and that the age of the victim was assessed and established.

8. Regarding the allegation that he was denied essential documents, he urged that the Appellant had not indicated that he was denied and having cross examined witnesses it was an indication that he had sufficient time and facilities to prepare his defence; essential witnesses were called and the criminal procedure was adhered to.

9. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. It is urged that the charge was defective because evidence adduced did not support it. The charge as framed is contrary to **Section 20(1)**

of the **Sexual Offences Act** which provides thus:

> ***"(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."***

11. In the case of **Sigilani vs. Republic (2004) 2 KLR** it was stated that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

12. The Appellant was charged with an offence that is known in law. The particulars of the offence were captured in clear terms which the Appellant understood. The fact of penetration of the victim and their relationship was well stated. There was no ambiguity therefore the charge was not defective. The issue of the sentence meted out or evidence adduced in support of the allegations cannot be stated to have amounted to a defective charge.

13. It is contented that **Section 31** of the **Sexual Offences Act** was not complied with. The alluded to provision of the law is in respect of vulnerable witnesses. **Section 31(1)** and **(2)** provides thus:

> ***"(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—***
>
> ***(a) the alleged victim in the proceedings pending before the court;***
>
> ***(b) a child; or***
>
> ***(c) a person with mental disabilities.***
>
> ***(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of—***
>
> ***(a) age;***
>
> ***(b) intellectual, psychological or physical impairment;***
>
> ***(c) trauma;***
>
> ***(d) cultural differences;***
>
> ***(e) the possibility of intimidation;***
>
> ***(f) race;***
>
> ***(g) religion;***
>
> ***(h) language;***
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> ***(i) the relationship of the witness to any party to the proceedings;***
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> ***(j) the nature of the subject matter of the evidence; or***
>
> ***(k) any other factor the court considers relevant."***

14. The learned Magistrate has been faulted for misapplying the provision of law and thereby denying the Appellant from cross examining the witness on the adverse evidence adduced. In his submissions the Appellant cited the case of **Kennedy Chinwani Mulokoto vs. Republic (2011), T.C.K. vs. Republic (2010), Francis Ogoti Otundo vs. Republic (2012)** and **Joseph Kamau Kirobi vs. Republic Criminal Appeal No. 215 of 2009** where it was held that in all these cases both the trial Courts and the first Appellate Court had not given adequate consideration on the question of procedure of appointment and role of an intermediary in a trial and that the Courts erred by deeming that because the mother was giving evidence on behalf of the girl therefore for all intent and purposes was legally admissible evidence.

15. This is a case where an intermediary was appointed. The victim was however a child aged 2 years who did not give any evidence at all or through an intermediary. PW1 **RM** her mother did not give evidence on behalf of the victim. She testified as to what she did as an individual. Therefore, the argument raised by the Appellant is misplaced.

16. It is contented, further, that the trial was not fair as the Appellant was not furnished with Prosecution witness statements, which inhibited him from interrogating evidence by the Prosecution.

17. **Article 50(2)(c)(j)** and **(k)** of the **Constitution** provide as follows:

> ***"(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(c) to have adequate time and facilities to prepare a defence;***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***
>
> ***(k) to adduce and challenge evidence;"***

18. It is an Accused person's constitutional right to have adequate time to prepare for his defence and this include being provided with any documentary evidence, statements that the Prosecution intends to rely on; Adducing and challenging evidence advanced by the Prosecution inclusive.

19. The Court ought to ensure the trial is fair. Failure to perform the legal duty that is usually automatic can only be proved if brought up by the person whose rights were contravened. Looking at the record as a whole, there is no indication that the Appellant was denied documents relied upon by the Prosecution. As correctly submitted by the learned State Counsel, the Appellant was granted sufficient time after the plea was taken to prepare for his defence. He challenged the evidence adduced by cross examining witnesses who testified prior to defending himself.

20. The Appellant faults the trial Court for not giving him the opportunity to call a witness. The record shows he made an Application and was allowed to call the witness on the next hearing date. However, he was not produced in Court and a production order was issued. It is contended by the Appellant that it was recorded that the Accused was present on **19th July, 2017** when he was not in Court. The original record that is handwritten shows that he was not present and a production order was issued. The typed proceedings therefore had an error. Of importance is that when he was produced on the **24th July, 2017** he opted to close his case. He exercised his rights of not calling witnesses therefore the trial Court did not fall into error.

21. The Appellant also faults the Court for not calling critical witnesses like **P,** brother to PW2, the alleged witness and members of public who arrested him.

22. **Section 143** of the **Evidence Act** provides thus:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

23. In the case of **Keter vs. Republic (2007) 1 EA 135** the Court stated that:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

Per the evidence adduced, PW7 left the victim with PW2 and the Accused. On cross examination PW2 stated that **P** was also present as he dressed up the child after the Accused washed her.

24. It is urged that the Prosecution failed to avail essential witnesses because their evidence would have been unfavourable to their case. In this regard the Appellant relied on the case of **Juma Ngundia vs. Republic (1982 – 1988) KAR 454** where it was held thus:

> ***"The prosecution has in general discretion whether to call someone as a witness. If it does not call or summon a vital reliable witnesses without a satisfactory explanation, It runs the risk of the court presuming that the evidence which could be and is not produced would if produced have been unfavorably to the prosecution."***

25. It is not in doubt that after PW1 found the child crying and got an explanation by PW2 she took the child for medical attention. PW4 **Phillip Matuku Mutua** who examined her found tears at the anal region and two (2) deep cuts. One was 2-3 cm deep and another 1-2 cm deep. The tears were fresh and less than 24 hours. The child had clean clothes but they were blood stained. He classified the degree of injury sustained as grievous harm.

26. There was no direct evidence as to who committed the act that caused the child to suffer the injuries. Evidence adduced was therefore circumstantial in nature. In the case of **Sawe vs. Republic (2003) KLR 364** the Court of Appeal held that:

"In order to justify, on circumstantial evidence, the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

27. The Prosecution adduced evidence that was not challenged that PW1 left the victim with the Accused and PW2. PW2 **MM** stated that PW1 left her with the victim and Accused and when she took jerricans to her mother she returned home and found the door closed. The child was crying inside the house and when she called her uncle, the Appellant, he told her to wait as he dressed. When she entered the house she removed the child from the bed and she diarrhoed. The Appellant washed her and **P** dressed her up.

28. PW2 did not know her age but when taken through *voire dire* examination she stated that she was in nursery school. PW1 did not state her age but she stated that **P** was older than **M** (PW1). **Section 19** of the **Oath and Statutory Declaration Act** provides thus:

"(1) 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 Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."

29. Being in Nursery School is a suggestion that PW2 was a child of tender years. Prior to receiving evidence of a child of tender years the Court is duly bound to form an opinion that he/she is possessed of sufficient intelligence to understand the duty of speaking the truth **(See Kiune vs. Republic (2009) eKLR).** After taking PW2 through *voire dire* examination the trial Court formed the opinion that she could be affirmed. Implying that she was seized of intelligence to justify reception of evidence and understood the duty of speaking the truth. The learned Magistrate found the witness truthful and based the conviction on her evidence.

30. On examination, the Clinical Officer concluded that the injuries sustained by the victim Complainant were caused by a blunt object. There had been penetration in her anus.

31. PW2 found the door to the house locked from inside. The Appellant denied having been at the locus in quo in his defence but did not challenge the witnesses on cross examination. Therefore, even if **P** was not called to testify, evidence adduced irresistibly points at the Appellant as the perpetrator of the act that caused penetration into the anus of the child victim thereby defiling her.

32. In the premises, the learned Magistrate did not fall into error in rejecting the defence put up.

33. The learned Magistrate is faulted for contravening **Section 169(2)** of the **Criminal Procedure Code** that provides thus:

"(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."

The Judgment of the trial Court is specific as to the offence the Appellant was convicted of therefore the ground of Appeal in that respect fails.

34. On sentence, the victim was a child under the age of 18 years. In the case of **Bernard Kimani Gacheru vs. Republic Criminal Appeal No. 188 of 2000** the Court stated thus:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

The offence herein attracts a sentence of upto life imprisonment. Taking into consideration the fact that the offender should be rehabilitated, I do confirm the conviction but set aside the sentence which I substitute with **fifteen (15) years imprisonment** to be effective from the date of conviction.

35. It is so ordered.

Dated, Signed and Delivered at Kitui this 15th day of May, 2019.

L. N. MUTENDE

JUDGE