REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 54 OF 2018

JO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment and orders of the Chief Magistrates Court at Eldoret (Hon. S. Telewa, RM) delivered on 31 July 2018 in Eldoret Chief Magistrate's SOCR Case No.11 of 2017)

JUDGMENT

[1] This is an appeal that was lodged herein on **3 August 2018** by the Appellant, **JO**, against the Judgment of the Learned Principal Magistrate, **Hon. S. Telewa, RM**, in **Eldoret Chief Magistrate's SOCR No. 11 of 2017: Republic vs. JO**. The Appellant had been charged with the offence of Incest by a Male contrary to **Section 20(1)** of the **Sexual Offences Act**, **No. 3 of 2006**. He was charged in the alternative with Indecent Act with a Child, contrary to **Section 11(1)** of the **Sexual Offences Act**. He denied the allegations against him and the Prosecution called 6 witnesses in proof of the charges. Ultimately, the Learned Trial Magistrate was convinced that the Prosecution had proved its case beyond reasonable doubt after having heard, not only the Prosecution witnesses, but also the Appellant's defence. He was accordingly sentenced to life imprisonment on **31 July 2018.**

[2] Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on the following grounds:

[a] The Learned Magistrate erred in law and fact by failing to observe that penetration was not medically proved as required;

[b] That identification of the Appellant as the culprit was unsatisfactory and that he was not at the scene;

[c] That the Prosecution case was a facade and purely a red herring;

[d] That the Prosecution case was driven by grudges, blood feud and family wrangles calculated to fix the Appellant;

[e] That the Appellant's right to be represented by Counsel/Advocate as required by **Article 50(2)(g) and (h)** was violated;

[f] That the Complainant was not given an opportunity to testify as stipulated in **Section 208, 308, 151, 302** of the **Penal Code**;

[g] That the life sentence imposed on him is inconsistent with the spirit of the Constitution, especially **Article 50(2)(p) and 25(c).**

[h] That the crucial witness was not called to clear doubts under **Section 150** of the **Criminal Procedure Code;**

[i] That his defence was dismissed without any cogent reason.

[3] Accordingly, the Appellant prayed that his appeal be allowed, his conviction quashed and the sentence set aside. The appeal was urged by the Appellant by way of written submissions. Thus, it was the submission of the Appellant that the medical evidence was wanting, granted that **Dr. Mongare (PW5)** did not provide his reference number or produce the medical notes that formed the basis of his conclusions. He further pointed out that, whereas the offence is alleged to have occurred on **14 January 2017**, the P3 Form has indications that the incident took place in December at unknown time and date. In view of these discrepancies, the Appellant urged the Court to surmise that the allegations against him were fabrications by the mother of the Complainant.

[4] In support of his submission that no medical evidence was adduced before the lower court to connect him with the alleged offence, the Appellant relied on **Nairobi High Court Criminal Appeal No. 471 of 2001: Ben Mwangi vs. Republic** in urging the Court to find that the

evidence against him was mere hearsay which ought not to have been given any weight by the trial court. He also impugned the credibility of the Prosecution witnesses contending that the seven months' delay in registering the complaint with the police was indicative of the conspiracy that he says was hatched against him by the mother of the Complainant and her sister.

[5] Regarding his contention that his right to a fair trial under **Article 50(2)** of the **Constitution** was violated, the Appellant submitted that he was not given an opportunity to address the court before a ruling pursuant to **Section 210** of the **Criminal Procedure Code** was made; and that it is manifest from the record that the trial magistrate was biased. The Appellant cited **Stephen Charo vs. Republic [2015] eKLR** to support his contention that the trial magistrate's Judgment did not accord with the provisions of **Section 169** of the Criminal Procedure Code in that his defence was completely disregarded.

[6] On behalf of the State, Learned Counsel, **Mr. Mulamula**, opposed the appeal contending that the Appellant was duly given an opportunity to cross-examine the intermediary; and that this was after the child, who was aged 2 years at the time, was declared a vulnerable person for purposes of **Section 31** of the **Sexual Offences Act.** Counsel further submitted that there was cogent evidence to prove penetration as was confirmed by the evidence of the doctor, **PW5**. He also pointed out that both the minor and the Appellant were subjected to medical examination and found to have the same kind of infection; which in his view confirmed penetration of the minor by the Appellant. Thus, it was the submission of learned Counsel that all the ingredients of the offence of incest were proved as the Appellant conceded, at line 11 on page 45 of the Record of Appeal, that the minor was his daughter.

[7] On the right to legal representation, it was the submission of **Mr. Mulamula** that at present, the State cannot afford to provide all those accused of criminal offences with legal representation; and that, given the realities of the country's economy, the right can only be progressively achieved in the manner set out by the Supreme Court in **the Gender Case.** On sentence, Counsel was of the view that the lower court had no discretion in the matter. He accordingly urged for the dismissal of the appeal.

[8] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein by Learned Counsel. I am mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32** the Court of Appeal for East Africa held thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[9] The Appellant had been charged with Incest by Male Contrary to **Section 20(1)** of the **Sexual Offences Act**; and the particulars were that on diverse dates between **14th and 15th January 2017** at [particulars witheld] Estate in Tapsagoi Location within Uasin Gishu County, he intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of **SO**. a child aged two and a half years who is to his knowledge his daughter. In the alternative, the Appellant was charged with Indecent Act with a Child contrary to **Section 11(1)** of the **Sexual Offences Act** based on the same facts.

[10] The Prosecution called a total of 6 witnesses before the lower court to prove the particulars of the charges. **PW1** was the village elder, **Isian Adonga Singila**. He stated that he received a report on **17 January 2017** that there was a child within his village who had been defiled by her father. He accordingly caused his arrest and took him to the nearby Administration Police Camp and advised that the minor be taken to hospital. The area Children Officer, **Rael Muchiri (PW2),** told the lower court that she interviewed the minor and that all she told her was that she had been defiled by her father.

[11] PW3 before the lower court is a sister to the Appellant. She confirmed that the minor that was the subject of the lower court proceedings is indeed the Appellant's daughter. Her testimony was that the minor was under her charge since the mother deserted her matrimonial home. She added that on the date in question, she had gone for a funeral and had left the child under the care of her father, the Appellant, for just one day; and that on return, she received the report that the Appellant had defiled his daughter. According to her those allegations were untrue. Consequently, and with leave of the court, she was declared a hostile witness, thus rendering her evidence valueless to the Prosecution case.

[12] PW4 before the lower court was **Jackline Muhonja**, a neighbour of the Appellant's. She confirmed that the Appellant was arrested on allegations of having defiled his daughter. She also confirmed that she reported the incident to the area village elder for his further action. As for the doctor, Geoffrey **Mongare, (PW5),** he told the lower court that the minor was presented to him on **17 January 2017** by neighbours of the suspect on allegations that she had been defiled by her father. On examining the girl, he noted the presence of some yellow discharge and bruises on her genitalia; and that her hymen was torn. He accordingly prescribed some medications for her. He also took urine samples for analysis; and the result showed an infection which was of the same kind noted in the urine of the Appellant, who he also had occasion to examine. He thereafter filled the P3 Form on **18 January 2017**, and made his conclusion that the child had been defiled. That P3 Form was produced as an exhibit before the lower court.

[13] PC Amos Odiero, PW6, confirmed to the lower court that he was then based at **Turbo Police Post** and that the Appellant was handed over to him by members of the public and the village elder on allegations that he had committed incest with his daughter. He issued him with a P3 Form and escorted him to **Turbo Sub-District Hospital** for examination. He then carried out his investigations and, on the basis thereof, charged the Appellant with the offence of incest.

[14] On his part, the Appellant told the lower court that he was at his place of work on **17 January 2017** at about 9.00 a.m. when he was arrested by three police officers; that he was taken to the police station without being told the reason for his arrest; and that he was locked up until **20 January 2017** when he was charged and taken to court. He did not understand why the allegations had been made against him. He confirmed that the minor in question is indeed his daughter and that she was, the material time, staying with his sister, **DO (PW3)** after his

wife left him. Accordingly, the Appellant denied the allegations of incest against him and told the lower court that the person who took the child to hospital lied against him.

[15] In the light of the foregoing, the Learned Trial Magistrate correctly identified the issues for identification to be:

> **[a]** whether the offence was committed; and whether it was committed by the Appellant;
>
> **[b]** Whether the minor is related to the Appellant; and whether she was under 18 years of age at the time.

[16] Upon a re-evaluation of the evidence, there is credible proof in the combined evidence of the village elder **(PW1),** the Children Officer **(PW2),** the Appellant's neighbour **(PW4)** that the girl had been defiled. She was taken to the hospital where she was examined by an independent professional in the person of **Dr. Mongare (PW5);** and **PW5** was of the view that the girl had been subjected to penetration of her vagina. Upon examining the minor, he noted the presence of some yellow discharge and bruises on her genitalia; and added that her hymen was torn. He accordingly prescribed some medications for her. He also told the lower court that he took urine samples for analysis; and the result showed an infection, which was of the same kind noted in the urine of the Appellant. He produced the two P3 Forms as exhibits before the lower court. None of these witnesses, particularly the doctor, had any reason to lie to the lower court about such serious matters.

[17] Regarding the age of the minor, the Appellant rightly submitted that no birth certificate was produced before the lower court. However, she was subjected to age assessment and a report to that effect, marked the **Prosecution's Exhibit 3,** was produced to show that she was about 3-4 years old. In any event, the Appellant, in his defence conceded that the girl was about 4 years as at **23 June 2018** when he made his defence. She was clearly a child for purposes of **Section 20(1)** of the **Sexual Offences Act.**

[18] As to whether the offence was committed by the Appellant, there is proof that he had custody of the child at all material times; and therefore, that he had the opportunity to commit the offence. Indeed, his conviction was premised on circumstantial evidence that linked him with the crime. Hence, in **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** the Court of Appeal for Eastern Africa held thus in respect of circumstantial evidence:

> ***"In order to justify the inference of guilt, 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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."***

[19] It is significant that the Appellant conceded that the minor had been left under his charge at the material time; and that they were found to have the same strain of a sexually transmitted infection. Hence, the Learned Trial Magistrate held that:

> **"The circumstantial evidence points at the accused person, the children officer told this court that the minor said that his father the accused injected her in her private parts. By injection the child possibly meant that the father defiled her, having been taken to hospital, it was confirmed that the minor had some infections, she had some pus cells in her urine meaning that she had been infected. The accused was also tested and it was confirmed that he had some infection. They were both treated...I am convinced in my mind that the accused person committed the offence of incest..."**

In the premises, the trial court cannot be faulted for coming to the conclusion it did.

[20] On whether the Appellant's right to a fair trial was compromised by the fact that he was not accorded legal aid, it is true that the Appellant was unrepresented before the lower court. He was neither informed that he was entitled to legal representation nor provided with legal aid. **Article 50(2)(g) and (h)** of the Constitution does provide that:

> **"Every accused person has the right to a fair trial, which includes the right:-**
>
> **...**
>
> **(g) to choose and be represented by, an advocate, and to be informed of this right promptly;**
>
> **(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;**

[21] There can be no doubt that the Appellant raised a valid point; and that the Charge he was faced with was a fairly serious one that would otherwise necessitate legal advice and counsel. However, it is also appreciable that the State is, at the moment, incapable, due to paucity of resources, to provide legal aid to every accused person in cases where substantial injustice would otherwise result without legal representation. Hence in **David Njoroge *Macharia vs. Re*public [2011] eKLR** the Court of Appeal expressed the view that:

> ***"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result",***

persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."

[22] It is, hence understandable that presently, legal representation is only available at state expense, to those charged with capital offences. Accordingly, I find no merit in that ground as well. Regarding the Appellant's contention that his right to a fair trial under **Article 50(2)** of the Constitution was violated, he submitted that he was not given an opportunity to address the court before a ruling pursuant to **Section 210** of the **Criminal Procedure Code** was made. The record however shows, at page 27, that on **2 July 2018**, after the close of the Prosecution case, he was given an opportunity to address the court and he opted not to make any submissions at that point. Similarly, at the close of his defence he was called upon to address the court but expressed his wish not to make any final submissions; and this is evident at line 20 on page 29 of the Record of Appeal.

[23] In the same vein, the Appellant's defence was duly analysed by the lower court as can be seen on pages 32 and 33 of the Record of appeal. Accordingly, the Appellant's contention that the trial magistrate was biased or that his defence was disregarded cannot be true. To the contrary the trial magistrate's Judgment was in full accord with the provisions of **Section 169** of the **Criminal Procedure Code.**

[24] The Appellant faulted the sentence of life imprisonment that was imposed on him by the lower court, contending that it is inconsistent with the spirit of the Constitution, especially **Article 50(2)(p) and 25(c).** He may have had in mind decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**. Obviously, that is a misapprehension on the part of the Appellant granted that **Section 20(1)** of the **Sexual Offences Act** does provide for the penalty of life imprisonment. Indeed, the Supreme Court made it manifest that it was not, there, dealing with the constitutionality of the death penalty, but its mandatory nature. Hence, it held that:

> **[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.**
>
> **[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution**.

[25] Hence, the Supreme Court added, at paragraph 69 of its Judgment that

> **"...For the avoidance of doubt,** *this decision does not outlaw the death penalty***, which is still applicable as a discretionary maximum punishment."**

[26] The same arguments can be raised in respect of the penalty of life imprisonment. In so far as the sentence is in the applicable statutes, it is perfectly constitutional; it is therefore my understanding that it is the mandatory minimum that would require re-consideration. Indeed, in **Jared Koita Injiri vs. Republic [2019] eKLR,** the Court of Appeal grappled with this very issue and held that:

> **Arising from the decision in** *Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015* **where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by** *section 204* **of the** *Penal Code* **was unconstitutional. The Court took the view that;**
>
> *"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."*
>
> **In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by** *section 8 (1)* **of the** *Sexual Offences Act***, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."**

[27] The record however does not show that the trial court felt constrained to pass the sentence of life imprisonment because it was the prescribed minimum penalty for the offence. Granted the circumstances, I am satisfied that the sentence was warranted. Accordingly, I find no merit in his appeal, either on conviction or sentence and would dismiss the same.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF JUNE 2019

OLGA SEWE

JUDGE