REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO 14 OF 2019

OON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence in criminal case No. 1 of 2018 before

Hon. OKUCHE SRM delivered on 18th May 2018)

JUDGMENT

1. The appellant was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence were that on the 29th day of December, 2017 in Kajiado County, being a male person caused his penis to penetrate the vagina of NR a female person who was to his knowledge his daughter aged 14 years.

2. The appellant was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act (No. 3 of 2006. Particulars were that on the 29th December, 2017 in Kajiado County intentionally touched the vagina of NR a child aged 14 years with his penis.

3. The appellant denied both counts and after a full trial in which the prosecution called a total of 9 witnesses, the appellant was found guilty convicted on the main count and sentenced to life imprisonment.

4. Aggrieved by both the conviction and sentence, the appellant filed this appeal and raised the following grounds in his amended petition of appeal namely:

> ***1. The learned trial Magistrate erred in both law and fact when he conducted the trial with partiality denying the appellant an opportunity to call witnesses opposed (sic) to Section 211 Criminal Procedure Code and Article 50(2) of the constitution of Kenya 2010.***
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> ***2. That the learned trial Magistrate erred in both law and fact when he convicted the appellant yet he failed to find that the witnesses who testified against the appellant were hostile witnesses.***
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> ***3. That the learned trial Magistrate erred in law and fact when he conducted an irregular trial as the key witnesses did not positively identify the exhibits during the trial.***

5. The appellant prayed that appeal be allowed, conviction quashed and the sentence set aside.

6. During the hearing of the appeal, the appellant who was unrepresented, relied on his grounds of appeal filed on 11th March 2019 with his amended petition. He denied committing the offence and argued that although the record showed that section 211 of the Criminal Code had been complied with, it was not enough for the trial court to state so but was required to ensure that the section was fully complied with.

7. Secondly, the petitioner contended that the prosecution witness gave contradictory evidence that not only suggested conspiracy but also proved it. According to the appellant, PW1 claimed that she was defiled on 29th December 2017 at 3 p.m. yet her testimony shows that she told the court that on the material day and time she was in the kitchen cooking when the appellant came home after taking beer and defiled her; that PW2 had told the court that some people were telling her to lie to court and that PW3 told the court on 29th November, 2017 she was selling beads at Mashimoni when at about 11.a.m. PW1 and PW2 went and told her that that the appellant had defiled her (PW1). He

urged the court to invoke section 163(1) of the Evidence Act and find that the entire evidence is impeachable.

8. The appellant further submitted that key witnesses did not identify the exhibits and they were not therefore truthful. He contended that he should have been subjected to medical examination since it was alleged that he was arrested immediately and relied on ***Cauri Ndungu v Republic, (Cr. Appeal No. 132 of 2008).***

9. Mr. Njeru, learned prosecution counsel, submitted relying on their written submissions dated 6th May2019 that the prosecution proved its case to the required standard; that the appellant did not allege during trial that the charges were framed up; that the appellant did not state who framed him up and that the conviction was proper and sentence legal. He urged the court to dismiss the appeal.

Determination

10. I have considered the appeal; submissions by both sides and the authorities relied on. This being a first appeal, it is by way of a retrial and this court, as a first appellate court, has a duty to reconsider the evidence a fresh re-analyze and reassess it in order to come to its own conclusion. In doing so, it should bear in mind that it never saw witnesses testifying and therefore give due allowance for that.

11. In ***Kiilu & Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> ***"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 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 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."***

12. PW1 NR a minor aged 14 years, told the court that on 29th December, 2017, she was in the kitchen cooking when the appellant, her father, who had taken beer, grabbed her, removed her clothes, removed his trousers put her on the floor and then had sex with her. She testified that the appellant covered her mouth with his hand to prevent her from screaming. After he was done, PW1 ran out towards the gate and reported the matter to some women including her teacher who in turn informed the Chief. The chief called the police who came and arrested the appellant. She was taken to hospital for treatment.

13. PW2, PO also a minor and sister to PW1 told the court that on 29th December, 2017, the appellant came home undressed PW1 and had sex with her. She told the court that she was outside the compound when PW1 ran from the house naked and informed her had happened. When she (PW2) went to check, the appellant beat her up.

14. PW3 Lemali Ole Koole, nephew to the appellant, testified that on 29th December 2017, he was selling beads at Mashimoni gate at around 11,00 a.m. when PW1 and PW2 went to him crying. They told him that the appellant had defiled PW1 and beaten PW2. The witness sought help from a KWS officer and with the help of Chief the appellant was arrested while sleeping. He told the court that PW1's biker and pants were found on the appellants' bed.

15. Pw4 Mary Dennis, a business lady and neighbor to the appellant's family, testified that on 29th December, 2017 at about 11.00 a.m., she was at her house when PW1 and PW2 went and told her that PW1 had been defiled by the appellant. She met a group of people who also told her that PW1 had been defiled. KWS officers called for a vehicle which took PW1 to hospital and that she accompanied PW1 to Loitokitok Hospital.

16. According to PW5, George Lepunke, Senior Assistant Chief of Loreta Sub-location, on 29th December, 2017 at around 11.00 a.m. members of the public went to his office accompanied with a minor and told him that the minor had been defiled. He sought help from KWS officers and they arrested the appellant from his home.

17. PW6 SN the appellant's brother told the court that on 29th December 2017 PW1 and PW2 went to his home crying. PW1 said that the appellant had defiled her. They had the appellant arrested and taken to Loitokitok police station.

18. On his part, PW7 Samuel Mogesi, an officer from KWS attached to Amboseli National Park and based at Mashimoni, told the court that on 29th December, 2017, while at Mashimoni gate, PW5 alerted him that a minor had been defiled. He went and arrested the appellant and took him to the office. He called for a vehicle which took the appellant to Loitokitok Police Station. He testified that members of the public recovered the minor's biker and pants in the house and handed them over to the police station.

19. PW8 Dr. Abdi Yakub, a medical Doctor based at Loitokitok Hospital testified that on 17th January, 2018, he examined PW1, a minor aged 14 years who was taken to hospital for examination with a history of defilement; that the clothes the minor was wearing at the time of the alleged defilement did not have blood stains; that the minor's hymen was not intact but labia Majora and Manora were intact; that there was foul smell from her private parts although they were intact.

20. The witness estimated the age of injuries to be 20 hours and identified the weapon used as penis. He filled and signed the P3 Form on the same day. He told the court that the PRC form contained the same information and was the basis of the information he filled in the P3 Form. He produced the P3 and PRC as Pex 3 and 4 respectively while the age assessment form was produced as Pex 5. He further told the court that the appellant was not examined but was treated and he produced treatment notes as Pex 6. In cross examination, he told the court that there was evidence of defilement.

21. PW9 No. 107280 PC Ann Mary Wandera, a police officer based at Loitokitok Police station, testified that on 29th December, 2017 at about 11.00 am, she took PW1 to hospital on suspicion of sexual abuse; that PW1 was treated and a P3 and PRC forms filled. The age of PW1 was assessed to be 14 years old; that the P3 form was filled on 17th January, 2018; that PW1 took to her the cloths she was wearing at the material time, a biker and pants which she produced as Pex 1 and 2. She then charged the appellant with the offence. When the appellant was put on his defence, he gave unsworn statement and denied committing the offence claiming that he was framed up.

22. The learned trial Magistrate was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him to life imprisonment triggering this appeal. In doing so, the learned trial magistrate believed the testimony of the prosecution witnesses that the appellant was PW1's father, a fact the appellant did not dispute in his defence.

23. I have independently reviewed the evidence of the prosecution witnesses, on this issue, including that of PW1, PW2, PW3 and PW4 which points to the fact that the appellant is PW1's father. This fact is corroborated by the evidence of PW5 the appellant's brother and that of Area Assistant chief, PW6. For that reason and in the absence of evidence to the contrary, the fact that the appellant was PW1's father was proved and there would be no reason to fault the learned trial magistrate's finding of fact on this issue.

24. The trial court then addressed its mind on the issue of sexual involvement between the appellant and his daughter, PW1. The learned trial Magistrate considered the fact that when the incident occurred on 29th December, 2017, the matter was referred to Loitokitok Hospital where PW1 was examined by PW8 on 17th January, 2018 and it was confirmed that the hymen had been broken; that there was foul smell from PW1's private parts which was considered to be proof of penetration. According to the trial magistrate, this was supported by the P3 form and PRC, Pex 3 and 4. He concluded that there could have been no other cause of the broken hymen except sexual intercourse, a fact he found the appellant had not able to disprove.

25. As to whether the appellant was at the scene, the learned Magistrate believed the evidence of PW1 who told the court how the appellant defiled her; that she ran out and informed PW2, her sister what had happened and the evidence of PW2 who told the court that Pw1 came out naked and when she (PW2) went to check what had happened the appellant beat her. He also believed the evidence of PW3, PW4, PW5, PW6 and PW7 which placed the appellant at the scene as well as the fact that the appellant was found in the house sleeping. The trial Magistrate declined to accept the appellant's defence that he was framed up, saying the appellant had failed to show who had framed him and why.

26. In the prosecution's case, the only witnesses who were said to have been at the scene were PW1 and PW2, two minors who testified to the fact of the sexual contact between the appellant and PW1. PW1 gave sworn testimony and was cross examined while PW2 was found not to possess sufficient intelligence and was therefore allowed to give unsworn testimony and her testimony was not subjected to cross examination. That left the evidence of PW1 as the only evidence that was subjected to scrutiny through cross examination. The rest of the witnesses were only told by PW1 and PW2 that the appellant had sexually attacked PW1.This raises the issue of the probative value of the testimony of PW2 and whether the evidence of PW1 was sufficient to establish the appellant's guilt.

27. Section 124 of the Evidence Act, Cap 80, is to the effect that a person charged with a criminal offence should not be convicted on the basis of the victim's evidence alone without corroboration. However in sexual offences, a conviction is possible if the court believes that the victim is telling the truth. The section provides;

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

28. Was the court satisfied that PW1told the truth or that there was corroboration through evidence of other witnesses? As already mentioned elsewhere in this judgment, the trial magistrate believed that the evidence of the PW1 was corroborated by not only PW2 but also that of the other witnesses including medical evidence. This therefore requires a thorough review of the evidence on record to determine whether that is the case. This is so because the appellant complains that prosecution witnesses gave contradictory evidence.

29. From the record whereas PW1testified that the offence was committed at 3.00 pm, PW3, PW4, and PW5 stated that they were informed of the incident at 11.00 am on the same day a fact the learned trial magistrate did not address his mind to. Did the incidence take place at 3 pm or 11 am and what is the effect of these contradictory testimonies?

30. In one of his grounds of appeal, the appellant raised the issue of contradictory witness testimonies. He argued that whereas PW1 stated that she was defiled on 29th December, 2017 at 3.00 p.m. The other witnesses stated that they got the information at 11.00 a.m. I have indeed perused the record of the trial court. The charge sheet does not state the time the offence was committed on that material day. However, PW1 testified that it was at 3 p.m. PW3 told the court that PW1 and PW2 went to him at 11.00 a.m. and told him that the appellant had defiled PW1. The same is with regard to PW4, PW5.

31. These were the first people to receive information about the commission of the offence. The learned Magistrate did not address his mind to this contradiction at all. Further, PW2 stated that she was near the gate and that PW1 went out naked. She did not explain whether being naked meant PW1 had no cloths or that she had no under wear. No other witness mentioned the issue of nakedness and if so who gave PW1 cloths to wear.

32. There is also the issue of the date PW1 was examined. The offence was committed on 29th December 2017.Time would be of essence in determining the age of the injuries. PW8, the Doctor who examined PW1, testified that he examined her on 17th January, 2018. This is the same day he filled the P3form He concluded that the injuries were 20 hours old. PW4 told the court that she accompanied PW1 to hospital. Her evidence suggests that PW1 was taken to hospital the same day. This is the same with regard to the evidence of PW9 the police officer who took to hospital and later charged the appellant.

33. In his testimony, PW8 said he examined PW1 on 17th January and that he filled the P3form the same day and that the age of the injury was 20 days. The witness did not say that he had examined the victim earlier and that he only filled the P3form on 17th January or that another doctor examined PW1 and was giving evidence on behalf of that Doctor. These gaps leave a lot to be desired in the prosecution's case. The learned trial magistrate did not address his mind to these gaps and contradictions in his judgment at all.

34. It is a principle of criminal justice system that it is always the duty of the prosecution to prove its case against the accused beyond reasonable doubt and if there should be any doubt, the benefit should go to the accused. In ***Pius Arap Maina v Republic*** [2013] e KLR, the court observed that the prosecution must prove a criminal charge beyond reasonable doubt and as a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused.

35. For my part I am persuaded that there were contradictions in the prosecution evidence that were significant as to raise doubt to the appellant's guilt given the gravity of the punishment and that only the victim's evidence would have been vital because she is the only person who knows what had happened while all other witnesses relied on what she told them.

36. The appellant also argued that his trial was conducted with partiality and as a result he was denied an opportunity to call witnesses in violation of his right to a fair trial guaranteed under Article 50(2) of the Constitution. I have independently reviewed the record of the trial court. On 9th April 2018, the appellant informed the court that he would give unsworn testimony and call 3 witnesses. Defence hearing was set for 16th April 2017. On that day, the appellant testified and at the end of his testimony, the court reserved judgment for 18th May 2018. The record is silent on whether the appellant was given his wish to call his witnesses.

37. While analyzing evidence for both the prosecution and defence, the learned trial Magistrate referred to the appellant's denial of committing the offence but did not say whether or not the appellant had been given an opportunity to call witnesses. The appellant has therefore argued that his right to a fair trial was thus violated.

38. The Constitution guarantees every accused person the right to a fair trial including the right to challenge the prosecution's evidence and to call his own witnesses. Article 50 (2) provides that ***every accused person has the right to fair trial, which includes the right to (k) adduce and challenge evidence.*** The right to adduce and challenge evidence would include not only cross examining prosecution witnesses but also to give his own version or side of the story and call witnesses to support his case and thereby challenge that of the case of the prosecution.

39. The right to s fair trial is constitutionally guaranteed. It is an inviolable and non derogable right. Article 25 of the Constitution recognizes this right as one of the rights that cannot be limited. It is therefore the duty of the trial court, every trial court, to ensure that criminal trials conform to this constitutional standard. Failure to comply with this constitutional command would cause the trial court's decision to be impugned with the possibility of having it quashed on appeal.

40. The value of the right to a fair trial was emphasized by the Supreme Court of India in ***Zahira Habibullah Sheikh and others v State of Gujarat and others***(2006) 3 SCC 374 when the court observed;

> ***"[E]ach one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and to society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witness or the cause which is being tried, is eliminated."***

41. The trial court's record shows that the appellant who was unrepresented, informed the trial magistrate that he would call witnesses. It was the duty of the trial magistrate to ensure that this right was not infringed. Having indicated his willingness to call witnesses, the trial Magistrate should have asked the appellant whether he still intended to call witnesses and give him an opportunity to do so, including granting him an adjournment to call the witnesses if they were not present in court, unless he had made up his mind not to call witnesses and put it on record.

42. In the absence of reasons why the appellant's wish to call witnesses was not fulfilled, it is clear to me that the appellant's right a fair trial was violated. This is so because the test for determining whether the fundamental principles of justice were complied with or observed is to look in the manner the impugned proceedings were conducted. The proceedings must have to comply with the constitution and the law which was not the case in the proceedings before the trial court.

43. As ***Moseneke DCJ*** observed in the South African case of ***Masetlha v President of the Republic of South Africa*** [2008] ZACC 6; 2008 (5) SA 31 (CC);

> ***"Ordinarily…courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial"***

44. The above view would be true like in this appeal where the appellant's wish to call witnesses was to exercise his constitutional right to a

fair trial. The appellant had argued that he had been framed up. No one knows what those witnesses were going to say and whether their evidence would be favourable to the appellant or not. Only after receiving such evidence would the court determine its probative value. That having not happened, I agree with the appellant that his right to a fair trial was severely compromised and therefore affected the entire trial.

45. Having independently reviewed, reanalyzed and reconsidered the evidence on record, I am satisfied that the conviction was unsafe and the decision of the trial court should be interfered with. Consequently, this appeal is hereby allowed, the conviction quashed and the sentence set aside. The appellant shall be set free unless otherwise lawfully held.

Dated Signed and Delivered at Kajiado this 19th Day of July 2019.

E. C MWITA

JUDGE