REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 30 OF 2017

ZWO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the judgment and sentence of C. N. Sindani, SRM in Mumias PMC Sexual Offence No. 26 of 2016 delivered on 27/2/17)

JUDGEMENT

1. The appellant was convicted of the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 15 years imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal are in summary that:-

1. The learned trial magistrate erred in law and fact in convicting the appellant when the age of the victim was not established.

2. The court convicted the appellant without medical evidence to support the charge.

3. The learned trial magistrate convicted the appellant while there was insufficient evidence to prove the charge which evidence was otherwise inconsistent, discredited, fabricated and suspicious.

4. The learned trial magistrate erred in convicting the appellant in a trial that failed to meet the threshold set out in Article 50 (2) (c) (h) and (j) of the Constitution of Kenya 2010.

5. The learned trial magistrate erred in shifting the burden of proof to the appellant by rejecting his defence without proper evaluation.

2. The particulars of the charge against the appellant were that on the 20th July, 2016 at about 7.30 p.m. in Mumias Sub-county in Kakamega County intentionally caused his penis to penetrate the vagina of JN (herein referred to as the minor), a child aged 14 years who was to his knowledge his niece.

3. The state conceded to the appeal.

Case for the Prosecution -

4. The evidence for the prosecution was that the minor herein was in 2016 aged 14 years and was a pupil at [particulars withheld] Primary School in Standard 5. She was living with her mother PW2 at [particulars withheld] village. The appellant was a cousin to the minor's father. That on the evening of the material day the minor had been sent by her mother to fetch water at a local borehole. She met with the appellant who took her to a sugarcane plantation and defiled her. Meanwhile that when the minor failed to return in time her mother went in search of her. She met with the appellant and the minor coming from a sugarcane plantation. She questioned the minor as to what she was doing with the appellant in the sugarcane plantation. She told her that she had been at the home of a schoolmate called C. They went to the home of C but the girl said that the minor had not been at their home. The minor then disappeared. She was taken home at 11 p.m. by a person called O.

5. On the following day her mother took her to Matungu Sub-county hospital. She was examined by a clinical officer who found her with broken hymen but with no evidence that it was recently broken. On the following day they reported at Mumias police station. Cpl. Otieno PW5 received their report. He issued a P3 form to the minor. He escorted her to Matungu Sub-county Hospital. The P3 form was completed. The appellant was arrested by PC Owiti PW4 who took him to Mumias Police Station. He was received by Cpl. Otieno PW5. He was charged with the offence. During the hearing the minor's mother said that the minor was born on 7/7/2002. She produced her health clinic card as exhibit, P.Ex.3. It showed the date of birth. A clinical officer PW3 produced the treatment notes and the P3 form as exhibits, P.Ex.1 and 2 respectively. The investigating officer produced a letter from the minor's school as exhibit, P.Ex.4. It indicated that she was in

class 5.

Defence Case –

6. When placed to his defence the appellant gave a sworn statement in which he stated that he was arrested by administration policemen on allegations that he had quarreled with his brother, the father to the minor. He was taken to the AP Camp. His brother did not turn up at the camp. On the following day he was taken to Mumias Police station. He stayed there for 3 days. He was then charged with defiling the minor. He said that he had a land dispute with the father of the minor. That on the 20/7/16 he was working at a construction site at a place called [particulars withheld]. He denied that he defiled the minor on that day.

Findings of the Trial Court –

7. The trial magistrate found that the minor identified the appellant as the person who defiled her. That the minor's mother PW2 found the appellant and the minor coming from a sugarcane plantation. That medical evidence confirmed penetration on the minor. That the defence evidence of a dispute between the appellant and the minor's father was neither supported nor corroborated. That the appellant and the minor were related which fact the appellant did not deny. The magistrate found the evidence sufficient and convicted the appellant of the offence of incest.

Analysis and Determination -

8. This is a first appeal. It is the duty of a first appellate court to analyze and re-consider the evidence and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – see **Okero –Vs- Republic (1972) EA 32**.

9. The appellant contended that the age of the minor was not established. The minor and her mother said that the minor was born on 7/7/2002.

10. The age of a person can be proved in various ways as was held by the Court of Appeal in **Edwin Nyabaso Onsongo –Vs- Republic (2016) eKLR** (cited in the case of **Mwolongo Chichoro Mwanyembe –Vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR)** where it was held that:-

> ***"..the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "... we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."***

The clinic card that was produced in proof of the minor's date of birth indicates that the minor was being attended to in hospital in August and September, 2001. The date of birth can only have been in July, 2001 and not in July, 2002. That would mean that the minor was aged 15 years at the time of the commission of the offence and not 14 years. That means that the minor was under the age of 18 years. She therefore came within the meaning of a "*child*" for the purposes of Sexual Offences Act. It was therefore proved that the girl was under the age of 18 years and more particularly 15 years.

11. The appellant contended that there was no medical evidence adduced to support the charge of incest. That there was no evidence to prove penetration. That absence of hymen alone could not prove penetration. That he was not examined to support the charge.

12. The position of the law in respect to medical evidence in proof of defilement is that defilement can be proved without medical evidence in support thereof. In **Geoffrey Kioji Vs Republic, Nyeri Criminal Appeal No. 270 of 2010 (**cited in **Dennis Osoro Obiri Vs Republic (2014) eKLR)** the Court of Appeal held that:-

> ***"Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person …under proviso to section 124 of the Evidence Act Cap 80 Laws, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim, if the court believes the victim and records the reasons for the belief."***

13. In **AML Vs Republic 201 eKLR. The** Court of Appeal stated that:

> ***"the fact of rape or defilement is not proved by a DNA (read medical) test but by way of evidence."***

14. The court upheld the same **in Kassim Ali Vs Republic in Mombasa Criminal Appeal No. 84 of 2005** where it stated that:

> ***"(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence."***

15. The fact that there was no evidence that the hymen was not recently broken did not mean that there was no defilement as defilement could be proved by oral evidence and circumstantial evidence.

16. The appellant submitted that there were contradictions in the prosecution evidence. That the victim alleged in her evidence that after the ordeal the appellant left her at the scene and told her to leave later after he had gone. However that her mother stated that she saw the two of them walking from the sugar cane plantation. That the prosecution did not call C and O to testify in the case. That the investigating officer PW5 alleged that he was armed with a panga at the time of the incident but none of the other witnesses mentioned this.

17. The way to treat contradictions in a case was stated by the Court of Appeal in **Jackson Mwanzia Musembi Vs Republic (2017) eKLR** where the court cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda , Cr. Appeal No. 139 of 2001(2003) UG CA,6** where the court held the following in regard to contradictions in a case:-

> ***" with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

18. Whereas the minor stated that the appellant told her to wait for him to leave the scene first, she at the same time said that her mother found them coming from the sugarcane plantation. The evidence of both witnesses was that the minor's mother saw them coming from the sugarcane plantation. There was thereby no contradiction in respect to that evidence.

19. C and O were not called as witnesses in the case. The question was whether the prosecution evidence was sufficient even without the evidence of the two witnesses.

20. The trial court dismissed the appellant's defence because it was neither supported nor corroborated. The appellant alleged that there was a land dispute between him and the minor's father. The appellant did not question the minor and her mother about the land dispute. It is only the investigating officer PW5 whom he questioned on the land dispute. PW5 said that he did not establish the presence of any land dispute between the family of the minor and that of the appellant. The appellant does not seem to have raised the issue with PW5 after arrest so that PW5 could investigate it.

21. The appellant raised an alibi defence that he was working away from home on the material day. There was no evidence that he raised the defence early enough to the arresting officer PW4 and the investigating officer PW5 for the said defence to be investigated. He did not question the two witnesses on his defence. The defence was raised at the tail end of the case when it could not be investigated. In **Stephen Nguli Mulili –Vs- Repbulic (2014) eKLR** the Court of Appeal held that the defence of alibi ought to be raised at the earliest opportunity possible while in **Victor Mwendwa Mulinge –Vs- Republic (2004) eKLR** the same court held that an alibi defence should be raised early enough during investigations so that it can be investigated to avoid any suggestion that it is an afterthought.

22. Article 50 (2) of the Constitution provides that:-

> ***"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;***
>
> ***(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;***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."***

23. Section 43 (1) of the Legal Aid Act states as follows:-

> ***"A court before which an unrepresented accused person is presented shall:***
>
> ***(a) Promptly inform the accused of his or her right to legal representation;***
>
> ***(b) If substantial injustice is likely to result, promptly, inform the accused of the right to have an advocate assigned to him or her; and***
>
> ***(c) Inform the service to provide legal aid to the accused person."***

24. When the plea was taken on 25/7/2016 the plea magistrate Hon. C. S. Nambafu, SRM, ordered that the appellant be given copies of the charge sheet, witness statements and documents to be used at the trial. On the 18/8/16, the trial magistrate Hon. F.M. Nyakundi ordered for the appellant to be furnished with a copy of the P3 form. The trial commenced on 3/10/2016 and ended on 20/12/2016. This means that the trial took close to 5 months. At no time during the trial did the appellant raise any issue that he was not ready to proceed with the case or that he had not been issued with copies of the above stated documents as ordered by the court. The conclusion was that the documents had been furnished to him as ordered by the court. The appellant was therefore informed in advance of the evidence the prosecution intended to rely on in the case and he was given adequate time and facilities to prepare for the case.

25. An accused person is entitled to legal representation at state expense if substantial injustice would otherwise result by failure to do so. In **Meshack Juma Wafula –Vs- Republic (2019) eKLR** the court held that:-

"The question of legal representation was discussed by the court of Appeal in the case of Macharia v Republic HCCA.12/2012 (eKLR 2014) where the court said "Article 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 interest 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 court 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."

The court in Karisa Chengo and 2 others v Republic Cr.No.44, 45 & 76 of 2016, the court also observed that the right to legal representation is essential to the realization of a fair trial more so in capital offences.

From a reading of the above authorities, it is clear that the right to legal representation is not absolute and there are situations it can be limited. It must be established that the accused will suffer substantial injustice if one is not accorded legal representation and that is why the courts have said that the gravity of the offence, the nature of the reality or severity of the sentence must be taken into account; whether accused is a minor or illiterate and not able to understand the court proceedings is also a factor to be considered."

26. In **Republic –Vs- Karisa Chengo & 2 Others (2017) eKLR** the Supreme Court held that:-

"It is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:-

(i) the seriousness of the offence;

(ii) the severity of the sentence;

(iii) the ability of the accused person to pay for his own legal representation;

(iv) whether the accused is a minor;

(v) the literacy of the accused;

(vi) the complexity of the charge against the accused;"

27. In **Joseph Kiema Philip –Vs- Republic (2019) eKLR** where the appellant was convicted of the offence of defilement and sentenced to 20 years imprisonment but was not informed of his right to legal representation and neither was he accorded legal representation during the hearing, Nyakundi J held that there was substantial injustice for the appellant not having been accorded legal representation as he was charged with an offence which carried a severe sentence of life imprisonment. Again in the case of **Vincent Muchera Isalano –Vs- Republic (2019) eKLR** where the appellant was charged with defilement whose penalty if found guilty was 20 years imprisonment, was not informed of his right to legal representation and had difficulties in representing himself in the case Ngenye - Macharia J. held that the trial court did not accord the appellant a fair hearing as the offence the appellant was facing was serious, the sentence severe and the charge was complex in nature.

28. In the case under consideration the appellant alleged in his defence that he had a land dispute with the father to the complainant. He did not put such question to the complainant PW1 and her mother PW2 during cross-examination. He did not question prosecution witnesses on his alibi defence. These are manifestations of difficulties in representing himself in the case. As the appellant was facing a serious charge that attracted a maximum sentence of life imprisonment he was entitled to legal representation. Failure to provide him with the same caused him substantial injustice. He was thereby not accorded a fair trial as required by the constitution.

29. The appellant was charged with incest contrary to Section20 (1) of the Sexual Offences Act which provides that:-

"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."

30. The minor's mother PW2 stated that the appellant was a cousin to the minor's father. In that case the minor was not a niece to the appellant as stated in the charge sheet. Cousins are not among the prohibited sexual relationships under the Act. There was thereby no offence of incest committed in the case of the appellant. The trial court erred by convicting the appellant of the offence of incest.

31. In the foregoing the appellant was not accorded a fair trial and was wrongly convicted of the offence of incest. The appeal is therefore upheld. The conviction is thereby quashed and the sentence set aside. The appellant is set at liberty forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 3rd day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Juma for State

Appellant - present

Court Assistant - George

14 days right of appeal.