REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 33 OF 2019

TMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence delivered by J.A. Agonda (S. R.M)*

in the Senior Principal Magistrates Court at Mavoko in Criminal Case S.O. 13 of 2015

delivered on 10.11.2017)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

TMM.....ACCUSED

JUDGEMENT

1. This is an appeal from the judgment, conviction and sentence of Hon. J.A. Agonda, Senior Resident Magistrate in **Criminal Case S.O. No. 13 of 2015** on 10.11.2017. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. When the matter came up for trial, a plea of not guilty was entered and the prosecution presented five witnesses in support of their case against the appellant. Pw1 was JM. A voir dire was conducted upon her and she testified that she was a nine year old student in class three at [Particulars Withheld] Primary School and when the court was satisfied that she was competent to testify on oath, she was put on the witness stand. She testified that she is aged nine years and is a class three pupil. It was her testimony that the appellant was her father and that on 19.3.2015 at about 5.00 am she was asleep when the appellant removed her stoking, dress and panty and put his penis in her vagina and she screamed and her mother put on the lights and found them in the act and who called Pw1's uncle and they went to Mlolongo Police Station where they recorded a statement and were referred to Nairobi Women's Hospital Kitengela where she was admitted. She told the court that she knew it was her father because she heard him cough and that she felt pain and told the court that he had previously raped her when her mother was at work but that the appellant had threatened to kill her if she reported and thus she did not tell her mother about it. There was no cross-examination. The matter started de novo before a new magistrate and she reiterated her evidence an added that when the lights were switched on by her mother she saw her father who had no clothes on and that her uncle by the name A attempted to arrest the appellant at the toilet but however the appellant took off and escaped. She added that the appellant had raped her three times and this was the third time. On cross-examination, she testified that the incident happened in the morning of 19th March, 2015 and she was admitted to Kitengela Women's Hospital on the same day and that her screams woke up her mother who switched on the lights. On re-examination, she testified that her mother did not coach her on how to testify.

3. Pw2 was KM who testified that Pw1 is her daughter who was born on 22.9.2005 as per the birth certificate she produced in court. She told the court that they live in a single room and on 19th March, 2015 she heard her child scream and she rushed to switch the light and saw her husband who is the appellant on top of Pw1 and had no clothes on whereas Pw1 was naked on the lower part. Pw1 informed her that the appellant did "tabia mbaya" and it was then that the appellant threatened to kill her or go and commit suicide in Mlolongo. She agreed to forgive him. She told the court that the appellant sought to go to the toilet and she got a chance to call her cousin W who came and she

briefed him on what had happened and the attempts to arrest the appellant failed because he fled from the compound. She went to Mlolongo Police Station and was referred to Nairobi Women Hospital and then to Kitengela Women Hospital where she gave the OB reference and on the way to hospital the child was crying in pain. On arrival, the child was examined and admitted from 20th to 24th March, 2015 and whilst in hospital and when discharged the appellant kept sending threatening messages. She told the court that some NGO persons in July, 2015 asked for the description of her husband and they took him to Mlolongo Hospital where she identified him. She told the court that she was only aware of what the appellant did to Pw1 when she caught him red-handed. She went on to add that her daughter was uncomfortable being left at home alone with the appellant who had bad friends. On cross-examination, she told the court that the incident happened on 19th March, 2015 at 5.00 am and that the child's performance in school started declining in 2016 and on re-examination, she stated that she reported the incident on 20th March, 2015. The appellant's counsel ceased from acting for him and the court declined an application by the appellant for the trial to start afresh and directed that the trial proceed.

4. Pw3 was Ruth Lengete, a clinical officer at Nairobi Women Kitengela who testified on 2.11.2016 on behalf of Christine Kitesho with regard to an examination that was carried out on the victim on 20.3.2015 who had a history of defilement. The matter was stood down on the application of the appellant who indicated that he had filed an application in the high court and the trial dragged on till 29.3.2017 when the court in the absence of stay orders from the high court as alleged by the appellant directed that Pw3 to give her testimony. She testified on the examination that was carried out on Pw1 on 20th March, 2015 and the same revealed bruises on the private parts, injuries on the vaginal wall, lacerations on the lips of the vagina and a partly broken vagina. She told the court that Pw1 was in pain and was admitted for five days. She produced the PRC form and the discharge summary as per the application by the prosecution to admit the same under Section 33 as read with Section 77 of the Evidence Act. On cross-examination, the appellant told the court that he wanted the matter to start afresh and indicated that he would not ask any question and the court noted the behavior of the appellant.

5. Pw4 was AWM who testified that on 19th March, 2015 at 5.30 am he received a call from Pw2 and went to her house where he received a narration of the incident that happened and managed to convince the appellant that they go to the police over the matter but the appellant later escaped when he (Pw4) went to pick his phone. He told the court that he went to the police station to record a statement. He added that the appellant had lost his job and that he and his wife quarreled frequently over finances. The court noted that the appellant refused to cross-examine the witness because the appellant claimed that there was a pending application for the court to disqualify itself.

6. Pw5 was No. 93179 Pc Veronica Nthugo who testified that on 17th June, 2015 she was assigned duties to investigate a report of a defilement in the OB and she received statements from Pc Wangechi who recorded witness statements and visited the scene of crime. She told the court that Pw1 was taken to Nairobi Women Hospital Kitengela and admitted for four days and that the medical treatment notes confirmed defilement. She stated that the appellant went into hiding and was spotted at Transami Muthaiga and arrested and brought to Mlolongo. She verified the child's age vide the birth certificate and produced the same. On cross examination, the appellant told the court that he would not cross-examine the said witness and the learned trial magistrate noted that the appellant continuously refused to cross-examine the prosecution witnesses. The court found that a prima facie case had been established and put the appellant on his defence. The appellant told the court that he would not give any evidence and when directed to file submissions he refused to do so.

7. The trial court found that there was medical evidence to prove penetration, an eye-witness and victim account of the defilement as well as a birth certificate. The learned magistrate found that the appellant gave no defence and opted to keep quiet and that the prosecution had proved their case and proceeded to convict the appellant of the main charge and sentenced him to life imprisonment.

8. The appeal was canvassed vide written submissions. It is the appellant's case that the trial court went into error in failing to find that the charge sheet was defective as he was charged with defilement yet the evidence on record show commission of the offence of incest. Further he submitted that the PRC form was not produced by the maker; that the charge sheet indicated that the child was aged 14 years and the age ought to be determined with credible evidence and there was no evidence to prove that the child was 11 years old. He submitted that there is no evidence of penetration and therefore the prosecution did not prove its case. He argued that a clinical officer was not a medical officer and hence the evidence of Pw3 was unsatisfactory. He cited the case of **Mutua Kivaya Nthege v R, HC Cr App 183 of 2009**. He questioned why the NGO persons did not testify and he urged the court to allow his appeal, quash the conviction and set aside the sentence.

9. The state (incorrectly)submitted that appellant was sentenced to 20 years imprisonment and that his constitutional rights were infringed because it failed to indicate the language that was used during the hearing of the prosecution witness' evidence and therefore the appellant did not understand the evidence that was used against him. He cited the case of **Jason Akhonya Makokha v R (2014) eKLR** where the court found that the plea was not taken in a language that the appellant understood and therefore the plea of guilty was not unequivocal and the court of appeal could not grant an order for retrial and thus set the appellant at liberty. Mr. Machogu for the respondent submitted that the appellant's right to a fair trial was violated as the trial court refused to listen to his plea that he had filed an application before the high court seeking intervention as the trial court was biased. Learned counsel further submitted that the trial court failed to avail the records to the high court and that led to the appellant's application being overtaken by events and he was thus prejudiced and therefore the trial and conviction should not be allowed to stand and an order for retrial be made.

10. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except bearing in mind that it did not have the advantage of hearing or seeing the witnesses.

11. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal and the amended grounds may be collapsed into two grounds:

> ***1. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;***
>
> ***2. That the trial magistrate erred in convicting the Appellant yet the charge sheet was defective;***
>
> ***3. That the trial magistrate erred by failing to indicate the language used by the witnesses***

4. That the trial court breached the appellant's rights to a fair trial.

12. In cases of defilement the following ingredients are to be proven:

a). ***The age of the child.***

b). The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and

c). That the perpetrator is the Appellant.

13. Having considered this appeal and the rival submissions, the issues for determination are whether the prosecution proved its case; whether the charge sheet was defective and whether the charge should be substituted; whether the trial court breached the right of the appellant to a fair trial by refusing to allow the case to be heard de novo. From the evidence on record it is undisputed that the complainant was a person below 18 years as she was aged 11 years. There is a birth certificate on record that is conclusive evidence of age and the appellant did not challenge its production. What is in contention is the issue of penetration as well as identification of the appellant as the perpetrator.

14. The evidence on record points towards penetration and this was indicated on the P3 form, the PRC form and the account of the victim.

15. P3 form was filled by Christine Kitesho; the PRC form was filled in by Dr. Makau and the discharge summary from Nairobi Women Hospital was filled in by Dr. Kitesho. Pw3 testified on the physical examination carried out on the victim and testified on the contents of the document that were filled in by her colleague. The Appellant did not object to its production that was made by the prosecution under Section 33 and 77 of the Evidence Act. The medical evidence tendered concluded that the victim was defiled and the P3 form and PRC form were produced as exhibits.

16. The P3 form indicates that, *"the hymen was absent.* To convict the appellant, there ought to have been no doubt in the mind of the court that the appellant was responsible as well as rule out other causes or explanations to the condition of the body of the complainant. **Maraga and Rawal, JJA**, as they then were), in **P. K.W v Republic [2012] eKLR** took this view.

17. The trial court took into account the medical evidence in totality and not in isolation of other factors surrounding the case.

18. The victim testified that the appellant was a person known to her and thus she recognized him. Pw2 testified that she saw the appellant and the complainant in flagrant delicto. The evidence of Pw1 and Pw2 placed the appellant at the scene of the crime and his failure to cross-examine the witnesses meant that the evidence was unchallenged.

19. The appellant gave no explanation to the charges facing him and from the evidence on record there is no plausible explanation or defence or evidence to controvert the evidence that has been presented against him. Failure to cross-examine leads to the inference that the evidence is accepted as being true. As stated by their Lordships of the Supreme Court of Uganda in **James Sawoabiri & Another v Uganda S.C. Criminal Appeal No. 5 of 1990.**

"An omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue."

20. In the instant appeal, the learned trial magistrate before convicting the appellant on the prosecution evidence warned herself and found that there was corroborative evidence and she went ahead and convicted the appellant. She was satisfied that the witnesses were truthful and their evidence was reliable though she did not warn herself of acting on uncorroborated testimony because the evidence of the victim was not the only evidence of the defilement. I am unable to fault the trial magistrate on the finding of culpability of the appellant for the offence that he was charged with. As was stated in **Chila v R (1967) EA 722** thus:

"The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."

21. From the foregoing, I did not have the benefit of seeing the witnesses testify, however from the proceedings and the court record it seems the trial court was satisfied that the charge against the appellant had been proved.

22. The Appellant has raised the issue of failure to call the NGO officials. However the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available hence this ground has no merit. Indeed the said NGO persons only assisted in tracing the appellant who was arrested and further the key witnesses did not have a problem identifying him and hence there was no question of mistaken identity. The evidence of the NGO officials could not have added much to the evidence already received.

23. The Appellant has raised the issue of a defective charge sheet. The criminal procedure code provides that a charge sheet must contain a statement of the specific offence with which the accused is charged together with such particulars as may be necessary to give reasonable information as to the nature of the offence charged. Regarding time, the law requires that it must be expressed in ordinary language as to

indicate with reasonable clarity the time when the offence was committed. See **Section 137 of the Criminal Procedure Code.** I am of the considered view that the particulars of the offence in the charge sheet clearly indicated the offence, the particulars and the time the offence was committed. The appellant had, therefore, reasonable information as to the nature of the charge and the time he was alleged to have committed the offence was indicated to him with reasonable clarity.

24. The appellant was convicted on a charge of defilement yet the evidence on record supports an offence of incest. Because the penalty for the offence of defilement is the same as incest, and the element of consanguinity was proven, the court ought to consider whether to substitute the charge.

25. From the evidence on record, I find that the same establishes an offence of incest as it transpired that the complainant was a biological daughter of the appellant. The issue of consanguinity between them was established.

26. The facts and the evidence adduced herein are found to sufficiently prove the offence of Incest by male person which is an indecent act to a person who to his knowledge is his daughter contrary to Section 20(1) of the Sexual Offences Act. Alternatively the evidence establishes an offence of Sexual Assault contrary to Section 5(1) and (2) of the Sexual Offences Act. The authorized sentence for Incest under proviso to Section 20 of the Sexual Offences Act which provides that where the minor is less than eighteen (18) years the sentence shall be life imprisonment; whereas Section 5(2) of the Act provides for a less severe sentence as it carries a minimum sentence of ten (10) years that may be enhanced to life imprisonment.

27. From the evidence on record, the conviction of the appellant on the main charge was therefore erroneous and the same ought to be quashed and likewise the sentence set aside.

28. The Appellant has raise the issue of breach of his constitutional rights and during trial he raised the issue of the failure of the trial court to allow the trial to start de novo and I thought it prudent to give my mind to the same. The trial magistrate observed that the matter had started afresh on three occasions and that two witnesses had already testified and therefore concluded that starting the trial *de novo* would be denied. The case of ***Ndegwa v Republic (1981) KLR 543*** held that a succeeding magistrate needs to make a determination on whether to start a case afresh when demanded by the Accused Person in accordance with the particular circumstances of the case. The Court of Appeal observed that section 200 of the CPC should be used sparingly and "only in cases where the exigencies of the circumstances are not likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor."

29. I see no error in the decision of the trial magistrate on the question of when it will be appropriate to order a trial to start afresh. While section 200(3) makes it mandatory for the succeeding magistrate (or judge) to inform the Accused Person of his or her rights to request for a *de novo* trial, the succeeding magistrate or judge is not bound by the position taken by the accused person on whether to request for a *de novo* trial or not. Some considerations that a Court considering the issue should have in mind include:

a. ***Whether it is convenient to commence the trial de novo, that is, the difficulty in mounting a new trial;***

b. How far the trial had proceeded;

c. The availability of witnesses who had already testified;

d. Possible loss of memory by the witnesses given the passage of time;

e. The time that has lapsed since the commencement of the trial taking into consideration the constitutional requirement that criminal trials should commence and be concluded without undue delay;

f. The prejudice likely to be suffered by either the Prosecution or the Accused if a new trial is ordered; and

g. The interests of the victims of the crime and witnesses – including the impact a new trial will have on them balanced against the benefits of a new trial.

30. In looking at these factors, the circumstances of this case and the reasoning of the learned trial magistrate in her ruling I find that she correctly considered that the case had come very far along with the minor witness and one other witness had testified. I add that the case had already been in the court system from 29.8.2015. The magistrate was also correct in assessing that the matter had started afresh thrice and I opine that the appellant had been represented by counsel throughout testimony of the two witnesses who testified and therefore their evidence was tested by the said counsel during cross-examination and to start afresh would have been to his detriment now that he was acting in person. To this I add that the key witnesses had testified and one of them was a school- going child and might no longer be available to testify. I therefore conclude that the decision by the learned trial magistrate to adopt the proceedings and evidence of the two eye witnesses as cross-examined by counsel was correct and was not erroneous in the circumstances.

31. Despite the above observations I find the appellant's conviction was not safe as he has raised a germane issue namely that he had filed an application before the high court being Machakos Misc. Application number 9 of 2107 wherein he had sought the court's intervention as he wasn't getting help before the trial court. This court sought for the lower court records to no avail until the matter was overtaken by events when the trial court convicted and sentenced the appellant to life imprisonment. The record of the trial court clearly reveal that upon the appellant's counsel ceasing to act for him, he was left without any representation and hence he kept on reminding the trial court of the existence of the pending application before the high court. Indeed one of the correspondence between the trial magistrate and the Deputy registrar confirms that the trial court was in fact aware of the high court application but nevertheless went ahead with the trial instead of forwarding the file. I find in the circumstances the appellant was prejudiced as he was denied a chance to ventilate his application. The appellant was unrepresented and in custody and could not have control over the issue of proceedings. Under Article 50 of the Constitution

the accused was entitled to a fair trial. I find the appellant was not accorded such a right in the circumstances. From the proceedings of the lower court it emerged that the appellant was a lone ranger and did not participate in the proceedings after his Advocate withdrew from acting for him. The appellant did not cross examine the rest of the witnesses as he had hoped that his application before the high court would be addressed but that did not happen as the trial court proceeded with the trial. I find the conviction reached by the trial court was not safe in view of the protest raised by the appellant on each day of the proceedings. It would be unjust and unfair not to give the appellant a chance to have his case decided on merits. This then calls for a retrial. The circumstances of this case warrants an order for a retrial. The witnesses for the prosecution are available and on the other hand the appellant has only served a fraction of the sentence. There will be no prejudice caused to both parties herein if an order for a retrial is made in the matter.

32. In the result it is my finding that the appeal has merit. The conviction by the trial court is hereby quashed and the sentence is set aside. The appellant is ordered to be released from prison custody and be placed at Mlolongo Police Station and to be produced before the Senior Principal Magistrate Mavoko Law Courts on 20th September 2019 for the purpose of a retrial.

It is so ordered.

Dated and delivered at Machakos this 19th day of September, 2019.

D.K. Kemei

Judge