REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 101 OF 2016

BETWEEN

ESJ…….APPELLANT

AND

REPUBLIC…….RESPONDENT

(Being an appeal from original conviction and sentence by Hon. E. W. Muleka, Senior Resident Magistrate in Hamisi SRMC. Cr. (S.O.) Case No. 586 of 2016 dated 3/10/2016)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein ESJ was charged with the offence of ***incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2016.*** The particulars of the offence are that on the 10th May, 2016 at [particulars withheld] location, Vihiga County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of B.I. a female who is his daughter and a minor aged 12 years.

2. In the alternative to the main count, the appellant faced the charge of committing an **indecent act with a child** contrary to **Section 11 (1) of the Sexual Offences Act, No. 3 of 2006**, the particulars thereof being that on the 10th May, 2016 at [particulars withheld] location, Vihiga County, the appellant intentionally and unlawfully touched the anus of B.I. a female minor aged 12 years with his penis.

3. The appellant denied all the charges, and during the ensuing trial, the prosecution called seven witnesses to support its case. When put on his defence, the appellant gave unsworn evidence in which he denied committing the alleged offence. He did not call any witnesses.

Judgment of the Trial Court

4. upon analyzing the evidence on record, the Learned Trial Magistrate found the appellant guilty of the offence of incest with his niece contrary to ***section 20 (1) of the Sexual Offences Act No. 3 of 2006.*** He was sentenced to serve life imprisonment.

The Appeal

5. The appellant, being dissatisfied with the entire judgment of the Trial Court, brought this appeal which is premised on ten home made grounds which can be summarized as follows:-

> ***1. That the Learned Trial Magistrate erred in law and in fact in carrying out a defective Trial that prejudiced the appellant's rights.***
>
> ***2. That crucial witnesses were not called to clear lingering doubt in the prosecution case.***
>
> ***3. That voire dire examination was not done to ascertain or out of caution to form an opinion whether the child understood the nature of oath or not hence occasioning a miscarriage of justice.***
>
> ***4. The DNA test was not done hence the Trial Court fell short of the standards of Section 36 (1) of the Sexual Offences Act.***

5. That the Learned Trial Magistrate erred in law and in fact in meting an improper and harsh life sentence to the appellant that did not satisfy the laid down legal provision and standards.

6. That the Learned Trial Magistrate gravely and grossly misdirected himself in not making a finding that this case was framed and fabricated to implicate the appellant by PW1 so as to achieve her own ill-gotten gains.

7. That the Learned Trial Magistrate erred in law and in fact in not making a finding that the age verification of the complainant was not genuinely established.

8. That the Learned Trial Magistrate erred in law and in fact in receiving a single evidence of minor, unsworn and uncorroborated without necessary cautions, circumspection and skepticism as required in the Evidence Act Section 124.

9. That the investigation was shoddy and did not hold probative value to incriminate in a criminal liability.

10. That conviction was based on beliefs, anticipation and [far] fetched evidence.

6. It is the appellant's prayer that his appeal be allowed, conviction quashed and sentence set aside.

7. As this is a first appeal this court is required to carry out a fresh and exhaustive examination of all the evidence on record before reaching its own conclusions in the matter, only remembering that it has no opportunity of seeing and hearing the witnesses who gave evidence at the trial and to make an allowance for the same. See ***Okeno -vs- Republic [1972] EA 32*** *and* ***Kiilu & Another -vs- Republic [2005] 1 KLR 174***.

The Prosecution Case

8. From the records, the appellant is the father to the complainant. That on the 10th May, 2016 between 6-7 p.m., while in the appellant's house the appellant grabbed the complainant, threw her on the bed, removed her pant and inserted his penis in her anus four times. The complainant narrated how the appellant held her by the mouth when she tried to scream and how painful the experience was when the appellant thrust his penis into her anus four times before he let her go.

9. Evidence was also tendered that after the ordeal, the complainant went and reported the same to her grandmother, her aunt and her teacher who later took her to Mbale Hospital and Serem Police Station respectively for necessary interventions.

10. PW6 Sammy Chelule, a clinical officer at Mbale hospital confirmed that the complainant was examined at the hospital and that the P3 form was also filled there. He stated that upon examination, he established that the complainant's anus was red with tears and bruises and was painful. He stated that the minor was also discharging blood with stool. He produced both the P3 form and Post Rape Care form as Pexhibit 1 (a) and 1 (b) respectively.

11. Number 58298 PC Shem Saya, the investigating officer attached at Serem police station testified as PW7. He stated that on 11/5/2016 a report was made by PW1 that a person known to her had defiled his daughter. He stated that upon inquiry he established that the minor was already admitted at Mbale hospital where he proceeded to and interrogated her. It was upon her account of events that the appellant was arrested and charged. PW7 also applied for an age assessment which confirmed that the complainant was 13 years old. The same was produced in evidence as Pexhibit 3.

12. In cross examination PW7 confirmed that the appellant was the complainant's father and that he had separated from her mother.

Defence Case

13. The appellant gave unsworn testimony. He denied committing the offence. He insisted that he had been framed by PW1 because he had denied her land use after the death of his brother.

Submissions

14. In his submissions, the appellant challenged the fact that the complainant's grandmother did not testify yet he perceived her as a crucial witness in the case. He also submitted that the Trial Court's failure to conduct *voire dire* examination on the minor complainant was fatal to the prosecution case.

15. The appellant also contended that he was not supplied with the necessary statements before trial which was a violation of his rights as envisaged under ***Article 50 (2) (i).***

16. The appellant further submitted that no medical examination was carried out on him after the alleged offence and that the age of the complainant was not well established. He also challenged the evidence of the complainant stating that it was not corroborated and that the court did not caution itself on the same.

17. He submitted further that the sentence was harsh and improper.

18. The state on its part opposed the Appeal. In his oral submission, Mr. Juma, prosecution counsel

emphasized that all the elements of the offence of incest had been proved and that the Trial Court's findings were proper. He prayed that the Appeal be dismissed.

Issues, Analysis and Determination

19. The issue for determination is whether the case against the appellant was proved beyond reasonable doubt. In other words, whether the ingredients of the offence of incest were proved.

20. The offence of incest is defined in ***section 20 (1) of the Sexual Offences Act*** 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 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."***

21. The ingredients for the offence of incest are therefore:-

> ***a. Knowledge that the person is a relative.***
>
> ***b. Penetration.***
>
> ***c. Age of the complainant.***

a. Knowledge that the person is a relative

22. In the instant suit, the complainant testified that the appellant was her father. The same was confirmed by PW1, PW2, PW3 and PW5. The appellant himself in his testimony confirmed that the complaint was his daughter. This is, in my considered view, satisfactory proof of the existence of the father-daughter relationship between the complainant and the appellant.

b. ***Penetration***

23. It was the complainant's evidence that the appellant threw her onto the bed, removed her pant and inserted his penis in her anus four times. She stated that she felt pain. PW6 a clinical officer testified that upon examination of the minor, he established that the complainant's anus was red and had a tear. It was also his evidence that the anus was painful on being touched and that it had bruises. He also noted that the complainant was discharging blood in her stool. The information was recorded in the P3 form and the PRC form both of which were produced in evidence.

24. ***Section 2 of the Sexual Offences Act*** provides that;-

> ***"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

The section further defines genital organs as follows;-

> ***"genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus."***

25. In ***Hassan Wami Saidi -vs- Republic [2017] eKLR*** the court held that;-

> ***".....PW2's evidence was corroborated by PW4, the doctor who examined the victim. He found tears and laceration on his anus which established penile penetration of the anus. This court is satisfied that the prosecution proved that indeed the victim was penetrated."***

26. In ***Wycliffe Okoyo Ongongo -vs- Republic [2018] eKLR,*** the Court held***,*** *inter alia,*

> ***".....with regards to penetration the complainant's evidence was that after the appellant dragged him into the house he undressed him and proceeded to defile him. His evidence was corroborated by the medical evidence produced by Dr. Maundu and Ndolo which indicated that there was a laceration and tear of the anus. The Post Rape Care report that was filled the same date of the incident indicated that blood stains were found on the rectum. The evidence proved penetration of the child's anus and that the penetration was perpetrated within a short period of the examination."***

27. The complainant in the instant case testified that he appellant inserted his penis into her anus four times and that it was painful. The medical reports indicated that the complainant's anus had tears and bruises thereon. From the above, this Court is satisfied that penetration was proved via the evidence of the complainant, and which evidence was corroborated by the medical reports which showed that there were tears and bruises on the complainant's anus.

c. Age of the complainant

28. It is the prosecution's case that the minor was aged 13 years old. The charge sheet indicates that the minor was aged 12 years. The appellant thus contends that the complainant's age was not proved as no documents were produced to establish the same. PW7 testified that he took the minor for age assessment. He produced the age assessment report in evidence as Pexhibit No. 3.

29. In the case of ***Kaingu Elias Kasomo -vs- Republic, Malindi Cr. App. No. 504 of 2010*** the Court of Appeal, *inter alia*, that:-

> ***"The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.....Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of a defilement victim is carried out by dentists. The said assessment while useful in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial Court heard the minor's evidence and saw her. The court was convinced that she spoke the truth."***

30. In ***Musyoki Mwakavi -vs- Republic High Court Criminal Appeal No. 172 of 2012***, the court was of the view that:-

> ***"....apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense....."***

31. In the instant case, the medical assessment report, the P3 form and the PRC form all indicate that the complainant was 13 years old at the time of the alleged incident. The age assessment was done by a dentist as prescribed by law and the appellant did not object to the age assessment report being produced in court. It is thus my considered view that the age of the minor was proved to be 13 years old. The fact that the charge sheet speaks of 12 years did not in any way prejudice the appellant, since the complainant was below the age of eighteen years.

32. It should also be noted that proof of the age of the minor is basically for sentencing purposes. In ***Hilary Nyongesa -vs- Republic, Eldoret Criminal Appeal No. 123 of 2009,*** the court stated that:

> ***"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.....And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."***

The Sentence

33. The appellant herein having been convicted of the offence of incest was sentenced to life imprisonment. The section provides that so long as the complainant is below eighteen years, the offence will attract a life sentence. In this case evidence on record establishes that the complainant was below eighteen years and thus no prejudice was occasioned to the appellant in terms of sentencing. The appellant abused the trust placed on him as a parent in committing this offence.

Other Pertinent Issues raised by the Appellant

34. The appellant submitted that he was not subjected to medical examination and DNA testing to establish that he was the assailant. In ***Evans Wamalwa Simiyu -vs- Republic [2016] eKLR t***he Court of Appeal had occasion to consider a similar argument and was of the following view:

> ***".....section 36 of the Sexual Offences Act that gives the trial court powers to order an accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The Trial Magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her....."***

35. From the above cited authority, it is clear that subjecting the appellant to a medical examination was a matter of discretion on the part of the trial court. The trial court herein was satisfied and I am equally satisfied that the evidence that was adduced by the prosecution was sufficient to nail the appellant to the commission of the offence. There was no doubt as to the identity of the appellant since he was well known to the complainant. The evidence is sufficient and did not warrant the DNA medical examination of the appellant and thus the said ground of appeal cannot stand.

36. With regard to the prosecution's failure to call crucial witnesses the court in ***Benjamin Mbugua Gitau -vs- Republic [2011] eKLR*** held that:-

> ***"This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see Section 143 of the Evidence Act Cap 80 Laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."***

37. Also see ***AGM -vs- Republic [2014] eKLR***, in which case, the Court of Appeal stated, inter alia after referring to the case of ***Bukenya & Others -vs- Uganda [1972] EA 549***, that:-

"The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall be court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see Keter -vs- Republic [2007] 1 EA 135). In this case, the testimony and evidence adduced by the five prosecution witnesses was sufficient to prove that the complainant had been defiled by the appellant. As such, the situation hardly called for the drawing of an adverse inference with regard to the 'missing' witnesses."

38. As highlighted in the aforesaid authorities, the prosecution reserves a right to decide which witness to call. The appellant has not right to elect which witnesses he deems as crucial or not to the prosecution's case. In this case, The trial Magistrate when faced with the evidence placed before him made a conclusive determination of the case. From the proceedings I am satisfied that the prosecution proved its case to the required standards as supported by the evidence of PW1, PW2, PW3, PW6 and PW7.

39. The appellant herein also challenged the fact the Trial Magistrate did not conduct a *voire dire* examination on the complainant before deciding whether she could give sworn or unsworn evidence. Indeed there is no evidence of any *voire dire* examination having been conducted on the complainant.

40. ***Section 19 (1) of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya*** stipulates that:-

"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 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."

41. The question that arises in the present case is whether the complainant was a child of tender years. In ***Patrick Kathurima -vs- Republic Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014 [2015] eKLR***, the Court of Appeal held that:-

"Whereas the question of whether a child is of tender years remains a matter for the good sense of the court as was stated by this court in MOHAMMED -VS- REPUBLIC [2008] IKLR (G&F) 1175, we see no reason for departing from the observation made in KIBANGENY -VS- REPUBLIC (Supra) that the expression "child of tender years" for the purpose of Section 19 of the (Act) means, "in the absence of special circumstances, any child of any age,or apparent age, of under fourteen years." That indicative age has been followed by courts ever since, see, for instance, JOHNSON MUIRUI -VS- REPUBLIC [1983] KLR 445, where this Court,in respect of a 131/2 year old child approved the step taken by the trial court;

"The Learned Judge substantially followed the correct procedure before allowing her to be sworn by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth."

We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. ….....We are aware that Section 2 of the Children Act defines a child of tender years to be one under the age of ten years. That definition is preceeded by the words "In this Act, unless the context otherwise requires....." That definition has not been applied to the Oaths and Statutory Declarations Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes." Also see Samuel Warui Karimi -vs- Republic [2016] eKLR.

42. From the above authorities, and for purposes of Section 19 of the Oaths and Statutory Declarations Act, it is now settled that a child of tender years is a child under the age of 14 years.

43. The complainant herein was 13 years old and thus regarded as a child of tender years and ought to have been taken through *voir dire* examination.

44. Was this omission fatal to the Prosecution case? The Court of Appeal in the case of ***Maripett Loonkomok -vs- Republic [2016] eKLR*** observed that:-

"It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;

"In appropriate cases where voir dire is not conducted, but there is sufficient independent evidence to support the charge.....the court may still be able to uphold the conviction."

see Athumani Ali Mwinyi -vs- Republic Cr. Appeal No. 11 of 2015"

On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voir dire examination. The complainant's evidence was cogent; she was cross-examined and medical evidence

confirmed penetration. But of utmost significance is the admitted fact hat the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement."

45. In the more recent case of ***Philip Ochieng Mweresa -VS- Republic [2019] eKLR*** the Court of Appeal held that:-

The respondent conceded that voire dire examination on the complainant was not conducted. What therefore is the effect of the failure by the trial court to conduct a voire dire examination upon the complainant? In the case of Maripett Loonkomok -vs- Republic [2016] eKLR, this court stated as follows:-

> ***"It is firmly settled that it is not in all cases that voire dire is not administered or is not administered properly that the entire trial would be vitiated. This court sitting at Nyeri has recently reiterated what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case.***

See James Mwangi Muriithi -vs- Republic, Criminal Appeal No. 10 of 2014."

The court went on to state as follows:-

> ***"In appropriate cases where voir dire is not conducted, but there is sufficient independent evidence to support the charge.....the court may still be able to uphold the conviction."***

46. On the peculiar facts and circumstances of the present case, it is my humble view that the appellant's trial was not vitiated by the trial court's failure to conduct a *voir dire* examination. I am satisfied with the complainant's evidence which was cogent. The record shows that the complainant was cross examined by the appellant and she bravely withstood the test. The medical evidence also shows that there was penetration. The complainant's evidence was further corroborated by that of PW3, PW6 and PW7.

47. I have also carefully considered the appellant's other complaint's such as his allegation in the submission that he was not supplied with witness statements in time. I have also considered relevant authorities such as ***Evans Kibet Sulo versus Republic [2019] eKLR*** and note from the ***Julius Rotich Case*** (above) that the Court of Appeal was of the view that "***in spite of the provisions of Article 50 of the Constitution, the court was not 'to be understood' to be setting up a general principle or precedent that every breach of Article 50 of the Constitution 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair trial depend on all the surrounding circumstances of a case."***

48. In light of the circumstances of this case, I am not inclined to agree that the apparent breach of ***Article 50 of the Constitution of Kenya 2010*** in terms of the prosecution's failure to supply statements in advance vitiated the trial. I accordingly reject that ground of appeal.

49. The last pertinent issue that calls for this court's consideration is whether as contended by the appellant the sentence imposed upon the appellant was harsh and excessive in the circumstances. The recent jurisprudential developments, starting with the Supreme Court decision in ***Francis Karioko Muruatetu & Another versus Republic [2017]eKLR*** are to the effect that the requirement upon courts to impose mandatory minimum sentences deprives courts of their statutory discretionary power to impose sentences that are consistent with the circumstances of each case.

50. The appellant in this case was sentenced to life imprisonment pursuant to the proviso to ***section 20(1) of the Sexual Offences Act.*** The trial magistrate at the time had his hands tied at the back. I also note from the record that the appellant did not express any remorse for what he had done, and only spoke about his own welfare. The trial court still considered the mitigation but noted that the prescribed sentence for the offence was life imprisonment.

51. Considering the recent developments in the law, I find it necessary to interfere with the sentence of life imprisonment and reduce the same to forty (40) years imprisonment from 3.10.2016.

Conclusion

52. From the above analysis, I now make the following final orders:-

1. The appellant's appeal on vocation be and is hereby dismissed.

2. The appellant's appeal on sentence be and is hereby allowed to the extent that the sentence of life imprisonment is set aside and in lieu thereof, I sentence the appellant to fourty (40) years imprisonment.

3. Right of appeal within 14 days from the date of the judgment.

53. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 9th day of October, 2019.

WILLIAM M. MUSYOKA

JUDGE