REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 107 OF 2016

BETWEEN

CO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence by Hon. I. B. Shimenga, RM dated 14.10.2016 in Butere SPMC Cr. Case (SO) no. 483 of 2015)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein was charged with the offences of ***defilement contrary to Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006,*** the particulars being that on diverse dates between the 31st day of April 2014 and 11th September 2015 Butere Sub County, within Kakamega County, he intentionally caused his penis to penetrate the vagina of L.S.N , a child aged 17 years.

2. The appellant also faced 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***. It was alleged that on diverse dates between the 31st day of April 2014 and 11th September 2015 Butere sub County within Kakamega County, the Appellant unlawfully and intentionally committed an indecent act by causing his penis to come in contact with the vagina of L.S.N , a child aged 17 years.

3. The Trial Magistrate convicted the Appellant of the offence of ***defilement contrary to Section 8 (1) (4) of the Sexual Offences Act*** and sentenced him to 15 years imprisonment.

The Appeal

4. Being dissatisfied with the conviction and sentence, the Appellant lodged this appeal in which he raised four grounds of appeal as follows:-

> **1. That the appellant pleaded not guilty to the charge of defilement that was alleged.**
>
> **2. That the learned trial magistrate erred in both facts and law when she did not consider that PW1 testified that there was no incident of sexual intercourse that occurred as indicated in the first statement to the police.**
>
> **3. That the learned trial magistrate didn't take into consideration that PW1 and the Appellant underwent medical examination and both results for STI and Sex were negative.**
>
> **4. That the magistrate did not take any step when PW1 and the Appellant complained that the Administration police forced them to strip, kiss and have oral sex.**

Duty of this Court

5. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See **Okeno Vs Republic [1972] EA 32.** In a later decision in ***Kiilu & Another Vs. Republic [2005]1 KLR 174,*** the Court of Appeal stated thus:

> ***"1. 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.***
>
> ***2. 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."***

The Prosecution Case

6. The Prosecution called 6 witnesses. PW1, who was the complainant, testified that the Appellant was her boyfriend despite the fact that he was also her uncle. She stated that the Appellant had invited her to his home in September 2014 and that they had sexual intercourse. She stated that they had had sex at least four times before the arrest.

7. Evidence was also led that on the 11th of September 2015 while the complainant was in bed with the Appellant at the Appellant's home, they were ambushed by the area chief, two Administration police officers and her grandfather and they were both apprehended and taken to the police station. The two had been found naked with the complainant sitting on the bed while the appellant was hiding under a sofa set in the house.

8. In cross examination, the complainant confirmed that she was with the appellant in his house and that they were found naked in bed with the appellant who later hid under a sofa. PW1 also testified that her mother had warned the appellant to leave the complainant alone.

9. PW3, Caleb Okoti, the area assistant chief, testified that on the 11th September 2015 he was alerted that the complainant was in the Appellant's house. He stated that he and two policemen together with the complainant's grandfather stormed into the Appellant's house and found both him and the complainant naked with the complainant sitting on the bed and the appellant under a sofa.

10. PW4, Emily Nasimiyu, a clinical officer, testified that upon examination of the complainant on the 12th September 2015, she established that though her hymen was missing, it was not freshly broken and that there was a presence of epithelial cells in her vagina which indicated that she had had sex within 5 days prior to the examination. The treatment notes and P3 form were produced in evidence as Pexhibit 2 and 3 respectively.

11. PW2, LK produced the complainant's birth certificate which showed that the complainant was born on 27.9.1997, and that at the time of the incident the complainant was a form 3 student. PW2 also recalled receiving information on 11.9.2015 at about 8.30pm that the complainant had gone to the appellant's house. She initiated the process of making a follow-up and on the following day when she returned to her matrimonial home, she took the complainant to hospital at Butere. The appellant was subsequently charged with the offences.

The Defence case

12. By a ruling dated 22nd March 2015 the accused was found to have a case to answer and accordingly put on his defence. He testified that on the 11th September 2015 he was accosted by the assistant chief in his house and that he and the complainant were arrested. He stated further that the Police inquired if he had bhang and claimed he was supplying bhang in the area.

13. In cross examination he stated that the complainant was his niece and that she was with him on the night in question. He added that the complainant's evidence was true.

Submissions

14. The Appeal proceeded by way of both oral and written submissions. In his submissions, the Appellant challenged the manner in which the Trial was conducted stating that his rights as envisaged under ***Article 50(2),(b),(g),(h) and (m)*** had been violated. He stated that owing to the gravity of the offence, he was entitled to a state funded advocate and that the proceedings were conducted in English, a language he did not understand.

15. He further contended that the alleged sexual activity between the complainant and himself was consensual as she had attained the majority age of 18 and that she willingly accepted to be his girlfriend.

16. The State through Mr Juma opposed the appeal stating that the same had no merit. He submitted that the Appellant had not substantiated his claims with regard to constitutional violation and that the State does not guarantee legal representation in all cases.

17. He further submitted that the prosecution had sufficiently proved their case against the appellant and that there was no contradiction in the evidence. He prayed that the Appeal be dismissed in its entirety.

Issues, Analysis and Determination

18. The issue for determination is whether the case against the appellant was proved beyond reasonable doubt. In other words, whether the Appellant's rights as envisaged under ***Article 50(2),(b),(g),(h) and (m)*** of the Constitution were violated and the recourse thereto and whether the ingredients of the offence of defilement were proved.

a) **whether the Appellant's rights as envisaged under Article 50(2),(b),(g),(h) and (m) of the Constitution were violated and the recourse thereto.**

19. The Appellant submitted that his rights were infringed as the language the used in court was not properly indicated and that he did not understand English and needed an interpreter.

20. A perusal of the record shows that on the date the Appellant took plea the proceedings were interpreted from English to Kiswahili. The trial thereafter proceeded in Kiswahili and the Appellant had an opportunity to cross examine the witnesses. It is therefore not true that he did not understand the language in which the proceedings were conducted.

21. With regard to the issue of legal representation, the Court of Appeal stated in ***Karisa Chengo & 2 Others Versus Republic, CRA numbers 44, 45 & 76 of 2014,*** that:-

> ***"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result, and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another. Only then would the state obligation to provide legal representation arise."***

22. The Supreme Court in ***Republic Vs. Karisa Chengo and 2 Others (2017) eKLR*** stated as follows:-

> ***"In the above context, 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 specifically. Inevitably, there will be instances in which legal representation at the 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;***
>
> ***[95] In concluding on the above issue, it is our finding that in addition to the specific guarantee of legal representation afforded to an accused person by Article 50(2) (h) of the Constitution, there is now in operation an elaborate legal aid scheme that is in the process of implementation following the enactment of the Legal Aid Act no. 6 of 2016."***

23. In the case of ***Nicholas Tambula V Republic [2018] eKLR*** the court observed that one of the rights under ***Article 50 of the Constitution*** is the right to choose and be represented by an advocate and to be informed of this right promptly, and went on to hold that such a right was not an open ended right and that it only becomes available "**if substantial injustice would otherwise result."**

24. The Appellant herein was aged 22 years during trial. When the matter was slated for hearing he indicated that he was ready to proceed and as a matter of fact he proceeded with the case quite well and was able to cross examine the witnesses.

25. At no point during trial does the Appellant seem to struggle with following the proceedings, neither is there any intimation that he is illiterate and was unable to understand the proceedings. I am therefore satisfied that despite the fact the Appellant was not informed of his right to legal representation and was not availed a state funded advocate the failure to do so did not in any way cause substantial injustice to the Appellant.

b) whether the ingredients of the offence of defilement were proved by the prosecution .

26. The Appellant herein was charged with the offence of ***defilement contrary to Section 8 (1) (4) of the Sexual Offences Act*** and an

alternative charge of committing an ***indecent Act with a Child contrary to Section 11(1) of the Sexual Offences Act.***

27. ***Section 8(1) & (4) of The Sexual Offences Act*** provides that:-

> ***"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***8(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

28. ***Section 8(1)*** cited above provides the key elements of the offence of defilement. These are "**Penetration**, "**Child**" and identification of the culprit. The Act defines "**penetration**" as partial or complete insertion of the genital organs of a person into the genital organs of another person while **"child**" has the meaning assigned thereto in the Children's Act."

29. The above elements were reiterated in the case of ***Dominic Mwilaria V Republic [2018] eKLR*** where the court held that:'-

> ***"[7] It is now beyond peradventure that, in cases of defilement, the prosecution must prove:***
>
> ***1. The age of the child. This is important because defilement relates to children who are persons below the age of 18 years. Secondly, the age of the victim determines the sentence to be imposed.***
>
> ***2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and***
>
> ***3. That the perpetrator is the Appellant.***

30. Also the case of ***Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013*** it was held that:-

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

31. The case of ***Dominic Kibet Mwareng V Republic [2013] eKLR)*** is also relevant regarding the elements of the offence of defilement.

Age of the complainant

32. The Prosecution adduced evidence to the effect that the complainant was aged 17 years eleven months old at the time of the incident and arrest. According to her birth certificate, the complainant was born on the 27th September 1997. She was just 16 days shy of being 18 years. The bottom line is that she was under 18 years of age.

33. The Appellant stated that the relationship between himself and the complainant was consensual considering she was almost 18 years old and was well aware of the relationship and had sexual intercourse with him at her will without being forced. He insisted that he knew the complainant was 18 years old at the time of the incident.

34. ***Section 8(5) and 8(6) of the Sexual Offences Act*** provides that:-

> ***8(5) It is a defence to a charge under this section if-***
>
> ***(a) it is proved that such child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***8(6) the belief referred to in subsection 8(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***

35. ***Section 43 (4) of the Sexual Offences Act*** on the other hand states as follows:-

"43(4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act.

> ***(a) Asleep***
>
> ***(b) Unconscious***
>
> ***(c) In an altered state of consciousness***

(d) Under the influence of medicine, drug alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected.

(e) Mentally impaired, or

(f) A child

36. In the case of ***K K M v Republic [2017] eKLR*** Chitembwe J observed that:-

"There are other cases where even if the above ingredients are established, still the offence of defilement may not have been committed. These circumstances fall under the provisions of section 8(5) of the Sexual Offences Act. If the child makes the accused to believe that she is over 18 years old, that can be a good defence for the accused. By a good defence, the accused need not testify that he believed the complainant was over 18 years or that it was the complainant who told him that she was over 18 years old. Article 59(i) of the Constitution gives an accused person the right to remain silent during the proceedings. The right to remain silent is also a defence. The burden of proof as usual is upon the prosecution. Apart from proving that the complainant was below the age of 18 years old, the prosecution is also supposed to prove that the victim did not behave in a manner likely to suggest that she was over 18 years old."

37. Chitembwe J went on to state as follows:-

My view on the issue of the ingredients of the offence of defilement are that apart from proof of age, penetration and identification, the following also need to be considered:-

1. Was the complainant forcefully defiled

2. Was the complainant threatened

3. Did the accused take advantage of the complainant's young age and lured her into sex.

4. Were the two in a sexual relationship. How long did that relationship last.

5. What was the complainant's behavior."

38. Also see Kemei J in ***Wambua Munywoki v Republic [2018] eKLR*** in which the learned Judge observed that :-

"As regards the second issue, it is noted that the Appellant has really pitched tent under Section 8 (5) of the Sexual Offences Act No.3 of 2006 on the ground that the complainant had agreed to be his girlfriend and that they had had sexual intercourse in the past and further that the complainant had enjoyed the relationship and behaved in a manner likely to suggest that she was an adult."

39. The learned judge set out the provisions of ***section 8(5) of the sexual offences Act*** which he found to be a good defence to the appellant in the case on grounds that the complainant who was just about to turn 18 years acted in a manner to suggest that she saw the appellant as a prospective husband and never reported to her parents about her previous escapades with the appellant and further that if the complainant's mother had not stumbled upon the pair, the matter would not have gone beyond the lovebirds.

40. The evidence by the complainant in this case is very clear, and the tone in which the same was given tells a lot about the relationship between the complainant and the Appellant, who by blood were niece and uncle as the appellant is a brother to the complainant's father.

41. The complainant boldly told the court that the Appellant approached her and that she accepted to be his girlfriend. She stated that she had severally deceived her parents and had gone to the Appellant's house to have sex with him.

42. She testified that she was aware of the fact that she was having sex and that she was even willing to lie so that she could visit the Appellant. A lot can be read from her testimony, her arrogance and the fact that she actually voluntarily went to spend the night with the Appellant. She actually stated that she was never forced to have sex with the Appellant.

43. It should also be noted that the complainant's mother PW2, was aware that the complainant was in a relationship with the Appellant and that she had warned her against the relationship. What is alarming though, is PW2's testimony that she had heard of the relationship in 2014 and August 2015 and that the same had been settled at home.

44. From the evidence, the complainant had by all means carried out herself as one who was an adult and old enough to indulge in unlimited sexual activity with the appellant, considering the fact that she started indulging in sex when she was 16 years old. In the circumstances, it is my humble view that if the complainant was just any other girl, the Appellant's defence under ***section 8(5) of the Sexual Offences Act*** qualified as a good defence in his favour and would have completely exonerated the appellant. But the complainant was not just any girl. She was the appellant's niece. She was his brother's daughter.

45. Having established that the complainant is a niece to the Appellant, being the Appellant's late brother's child, their filial relationship was not in dispute. In fact the complainant stated that she willingly accepted the relationship despite her knowledge that the Appellant was her

uncle.

46. ***Section 20 (1) of the Sexual Offences Act*** provides that:-

> ***(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.***

47. ***Section 179 of the Criminal Procedure Code*** provides that:-

> ***(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

48. Applying the provisions of ***Section 179 of the Criminal Procedure Code***, the court in the case of ***David Mwangi Njoroge v Republic [2015] eKLR*** stated that:-

> ***"This was not done which means that from the outset there was a defect in the trial. The defect could only have been cured by the application of Section 179 of the Criminal Procedure Code. But again, Section 179 applies when the evidence on record establishes a minor offence than the one the accused person was charged with. On the other hand, Section 191 outlines the directions for application of section 179 to 190 of the Criminal Procedure Code. The same provides as follows:-***
>
> ***"The provisions of Sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of Sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of Section 179."***
>
> ***This Section properly applied means that where the offence in question is not provided for in the specific provisions, nothing prohibits the court from invoking the provisions of Sections 179 being the general provision."***

49. As stated above, ***section 179 of the Criminal Procedure Code*** only applies when the evidence on record establishes a minor offence than the one the accused person was charged with.

50. The evidence adduced in the present case proves the ingredients of the offence of incest as prescribed under s***ection 20 (1) of the Sexual Offences Act,*** which calls for proof of penetration and the relationship between the victim and the offender.

51. The only sticky issue here is whether the offence of incest is cognate to the one that the Appellant was charged with namely defilement. In my considered view, the answer is yes.

52. The offence as prescribed in the charge sheet attracts a sentence of not less than 15 years while the offence of incest as prescribed under ***section 20(1)*** attracts a sentence of not less than ten years. Incest is thus a minor cognate offence as compared to the offence of ***defilement under section 8(1)*** as read.

53. In the circumstances, I would set aside the conviction and sentence for the offence of defilement as charged and substitute the charge with one of i***ncest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006.*** The ingredients of the said cognate offence having been proved, I convict the appellant of the same and sentence the appellant to ten (10) years imprisonment with effect from 14.10.2016.

Conclusion

54. In the end, I make the following final orders on this appeal:-

1. The conviction for the charge of defilement is quashed and the sentence of 15 years imprisonment set aside.

2. I convict the appellant of the cognate offence of ***incest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006*** and sentence him to ten (10) years imprisonment from 14.10.2016.

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

55. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 15th day of November, 2019

WILLIAM MUSYOKA

JUDGMENT

In the presence of:-

Collins Omachi – Appellant in person

Ms. Omondi for Respondent

Eric - Court Assistant