REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 67 OF 2016

K N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*An appeal against the original conviction and sentence of Hon L.K Gatheru RM,**

delivered on 20th June 2016 in Criminal Case No. 219 of 2016

in the Senior Principal Magistrate's Court at Mariakani)

JUDGMENT

The Appeal

1. The Appellant was charged with two counts in the trial Court namely, defilement of a child contrary to Section 8(1) as read together with Section 8(3) of the Sexual Offences Act No. 3 of 2006, and incest by male contrary to section 20 (1) of the same Act. In the alternative to the first count, he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006.

2. The particulars of count one were that the Appellant on 14th March, 2016 in [particulars withheld] Village, Kasemeni location within Kwale County, intentionally caused his penis to penetrate the vagina of M.N. a child aged 12 years. The particulars of the alternative charge to that count being that the Appellant on 14th March, 2016 at [particulars withheld] Village, Kasemeni location within Kwale County intentionally and willfully caused his penis to touch the vagina of M. N. a child aged 12 years.

3. The particulars of count two were that the Appellant on 14th March, 2016 at [particulars withheld] village, Kasemeni location within Kwale County, being a male person, intentionally caused his penis to penetrate the vagina of M. N. a child aged 12 years who was to his knowledge his daughter.

4. The Appellant pleaded not guilty to all the counts, and was after full trial, convicted on the first count of defilement and sentenced to 20 years imprisonment . He was also convicted of the second count and sentenced to serve 15 years imprisonment. Both sentences were to run concurrently.

5. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal and Amended Grounds of Appeal that he filed in Court are as follows:

a) That the learned trial magistrate erred in law and fact in convicting the Appellant on the present charge without considering that the burden of proof was not established beyond any reasonable doubt to warrant the conviction thus contravening section 107 as red with 109 of the Evidence Act.

b) That the learned trial magistrate erred in law and fact in convicting the Appellant while relying on the evidence that had massive invariance and contradictions which did not corroborate with other evidence to warrant the conviction thus contravening section 153 as read with section 154 of the Criminal Procedure Code.

c) That the learned trial magistrate erred in law and fact in convicting the Appellant while not considering that the credible witnesses who were mentioned in the committal proceedings were never compelled to appear in court to clear the doubt upon the prosecution evidence thus contravening section 144 and 150 of the Criminal Procedure Code.

d) That the learned trial magistrate erred in law and fact in convicting the Appellant without giving due weight to the alibi defence advanced by the appellant which was substantial enough to vindicate him thus contravening section 212 as read with section 235 of the Criminal Procedure Code that there was grudge between PW1's mother and the appellant over the custody of M.N.

6. The appeal proceeded for hearing on 20th July, 2017, and the Appellant submitted that he would wholly rely on written submissions that he had availed to the Court. The Prosecution counsel made oral submissions.

7. The Appellant argued that burden of proof lay with the prosecution by virtue of Section 109 of the Evidence Act, but that it did not prove its case beyond reasonable doubt. It was contended in this respect that the evidence by PW3 did not support the charge since it emerged therefrom that while M.N. was HIV positive, the Appellant was not. Further, that the DNA test did not ascertain that he was M.N's father, thereby the offence of incest was not proved. He stated that the combined paternity index was 48273952.7 instead of 99.99%.

8. The Appellant contended that the trial magistrate relied upon PW2 and PW3's evidence in arriving at the conviction, yet the said evidence was full of variance and contradictions. He submitted that while PW2 stated that she used to have sex with the Appellant regularly, PW3's evidence that the Appellant was HIV negative and that M.N. used to go for clinics for the said condition did not corroborate each other. That there was no way the two could have been having regular sex for a period of three years and one happens to be infected while the other is not.

9. To support his argument on contradictions, the Appellant cited the decisions in **Augustino Njoroge v. Republic Nairobi Criminal Appeal No. 99 of 1986** , **Chemangong v. Republic (1984) KLR 611**, **Republic v. Ramadhan Bin Mirandu (1934) EACA 109** and **Okethi Okale v. R (1965) EA 555**. He further submitted that it was inadvisable for a trial court to put forward a theory not canvassed in evidence.

10. The Appellant took issue with the prosecution's failure to bring on board all the witnesses that were mentioned in the committal proceedings. He submitted that the said failure was in contravention of section 144 as read together with section 150 of the Criminal Procedure Code. In particular, the Appellant submitted that although M.N. stated that she stayed with her grandmother, the said grandmother was not summoned as a witness.

11. He further submitted that the others who were mentioned were a chief and a witchdoctor but were not summoned. That the failure to summon witnesses who have vital evidence is prejudicial as it left the court at limbo as to the truth of the matter before the court. The Appellant cited **Bukenya v. Republic (1975) EA 57** where the court was of the opinion that the prosecution was under duty to avail all witnesses necessary to establish the truth even if their evidence may be inconsistent to its case.

12. Lastly, the Appellant submitted that he raised the defence of alibi which was sufficient to vindicate him but which the trial court did not consider. That he also raised the issue of the existence of a grudge between the PW1's family and him, but which the trial court failed to seek rebuttal on as prescribed under section 2 (2) as read with section 235 of the Criminal Procedure Code.

13. Mr. Fundi, the learned prosecution counsel, conceded that there was duplicity in the charges. He however urged the court to consider the evidence and convict the Appellant on the grounds named by the appellant. He further urged this court to uphold the conviction and sentence in regard to the 2nd count which he submitted connects to the charge.

14. My duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

The Evidence

15. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called four witnesses. PW1 was A D who is the complainant's (M.N's) mother, and she testified that the complainant told her that the Appellant was defiling her. She then reported the matter to Mariakani Police Station where she was issued with a P3 form with which she took the complainant to hospital. She also produced the complainant's Child Health Card as an exhibit, which showed that the complainant's date of birth was 16th February 2004.

16. It emerged from PW1's evidence that she was previously married to the Appellant, who was the complainant's father, but they later separated and the complainant was left in the custody of the Appellant. She stated that M.N. was born on 27th January, 2004 and produced her clinic card as P. Exhibit 2. On cross examination, PW1 denied there being any grudge between her and the Appellant.

17. The complainant (M.N) testified as PW2, and she recounted that on 14th March 2016, the Appellant told her to accompany him to a quarry at Kokotoni, and when they arrived at the quarry, he told her to go to the nearby forest. He followed her shortly thereafter, undressed her and told her to hold his penis first before he inserted it into her private part. PW2 further testified that the Appellant afterwards told her to go home and told her not to reveal to anyone what had happened. He then followed her home later.

18. It was PW2's testimony that on 16th March, 2016 her mother (PW1) visited her in school and inquired why PW2 looked gloomy. PW2 then revealed to her that the Appellant was defiling her and had told her not to tell.

19. Mwangolo Chigulu who is a Clinical Officer at Mariakani testified as PW3, and he stated that he examined the complainant on 23rd March, 2016, who had a history of defilement for a period of 3 years. Further, that the examination showed that PW2 had an inner left laceration in the vagina and had no hymen.

20. Further, that she was HIV positive due to defilement but was not pregnant. PW3 also testifies that he also examined the Appellant who was 26 years of age and found that he had no STI's or HIV. He produced the P3 form as P. Exhibit 3. On cross examination, PW3 in explained that it is possible for one person to be a carrier of HIV where two persons who have had sex and one is HIV positive and another HIV negative.

21. The last witness (PW4) was Corporal Peter Nyaga of Taru Police Station who testified that a report of the defilement was made on 23rd March 2016, and he took PW1 and PW2's statements. Further, that he then took the Appellant and complainant to Mariakani sub county hospital where a P3 form was filled. In addition, that DNA samples were taken from the Appellant and the complainant, and tests on paternity done. He produced the exhibit memo B18/2016 and report from Government Chemist therefrom as Exhibit 4 and 5 respectively. He stated that the test revealed that there were 99.99% chances that the Appellant is the complainant's father.

22. The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in this respect. The Appellant gave an unsworn testimony without calling any witnesses. He testified that he chased PW1 away when he caught her with another man. He was not aware that she was pregnant at the time, and that the complainant was then returned to the Appellant after PW1 remarried.

23,. That on 14th March, 2016, he got a call from the village elder who went to his home with two police officers. He was then taken to the Administration Police camp and was told of the allegation of defilement. He stated the complaint was instigated by PW1's family which is bitter about him and want to punish him.

The Determination

24. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there are two issues for determination in this appeal. These are whether the Appellant was convicted for the offences of defilement and incest on the basis of a defective charge, and if so whether the defect was fatal. The second issue is if the charges were not defective or fatal, whether his conviction was on the basis of sufficient and satisfactory evidence.

25. On the first issue, the Prosecution counsel did concede that the charge sheet was defective and this Court also noted the defect in the charges brought against the Appellant. The issue of when a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which provides as follows:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

26. In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

27. However, I note that the defect in the charge sheet is not one of duplicity as conceded by the prosecution counsel, but one of multiplicity of charges, as the Appellant was charged with the offences of defilement and incest based on the same set of facts. Multiplicity in a charge sheet arises from the charging of a single criminal act or offence as multiple separate counts, and raises the risk of violating the double jeopardy principle against receiving multiple sentences for a single offence that is enshrined in Article 50 (2) (o) of the Constitution.

28. Multiplicity therefore occurs when two counts or charges allege the same offence, and is different from duplicity which occurs when more than one offence is alleged in the same charge. Multiplicity can be corrected by amendment of the charge without necessarily dismissing the case. The error or mistake in the charge is also one that can be cured on appeal under section 382 of the Criminal Procedure Code, where it is shown that no prejudice has been occasioned by the multiplicity of charges.

29. Therefore, in order to determine the effect of the multiplicity, I will need to first address the second issue as to whether the prosecution proved that the Appellant committed the offence of defilement and/or incest beyond reasonable doubt. Defilement is defined in section 8(1) of the Sexual Offences Act as follows:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"."**

Section 2 of the Sexual Offences Act provides that penetration entails the partial or complete insertion of the genital organs of a person into the genital organs of another person.

30. The ingredients of defilement were further highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

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

31. The offence of incest on the other hand as provided under section 20(1) of the Sexual Offences Act is as follows:

"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."

32. In order to prove incest under section 20(1) of the Sexual Offences Act, it is not necessary to prove penetration. The prosecution may prove either penetration or an indecent act to obtain a conviction. An indecent act is defined in section 2 of the said Act as an unlawful intentional act which causes—

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will;

33. The relevant evidence adduced in the trial Court as to defilement and incest was that of the complainant, who was PW2, who testified that the Appellant, who was her father, took her to a forest on 14th March 2016, and put his private parts in her private parts. Further, that he first removed his penis out and told her to hold it before he inserted it. The medical evidence by PW3 corroborated the fact of penetration as the complainant had no hymen and was also HIV positive. The testimony by PW2 was consistent upon cross-examination, and there is no reason for this Court to doubt her credibility.

34. PW2 was also clear in her testimony that the Appellant was her father, and known to her as she was living with him. In addition, PW1 testified that PW2, who was born on 16th February 2004, was her daughter with the Appellant. The Appellant also admitted having lived with the complainant after she was brought back to him on account of being her father.

35. The DNA report produced by PW4 As exhibit 5 was clear that the findings therein were that there was a 99.99% chance that the Appellant was the biological father of the complainant. The combined paternity index of 48273952.7 relied upon by the Appellant is what was used to come up with this finding, and did not disprove the fact of paternity. It was thus proved beyond reasonable doubt that the Appellant was the complainant's father.

36. On the issue raised by the Appellant that he was HIV negative while the complainant was found to be HIV positive, the HIV status of a person is not an ingredient of the offence of defilement or incest, and is not proof or otherwise of penetration which is the key ingredient of the offences of defilement and incest. In addition, it is also not proof or other wise of an indecent act as shown in the definitions of the offences provided in the foregoing. Therefore, the fact that the Appellant was HIV negative and the complainant was HIV positive was immaterial, and as explained by PW3 in his testimony, is possible.

37. Lastly, I also note that the Appellant in his testimony did not provide any evidence as to his whereabouts on 14th March 2016 when the offences are alleged to have been committed, nor indicate that he was in another location other than the one indicated by PW2. The defence of alibi therefore did not arise.

38. The evidence adduced in the trial Court therefore pointed to the appropriate offence being that of incest, and not defilement, as the consanguine relationship between the Appellant and complainant was proved, in addition to the element of penetration. Therefore, even though the charge sheet is found to be defective on account of multiplicity of charges, the same is curable under the provisions of section 382 of the Criminal Procedure Code by allowing the correct charge which is that of incest to stand, and dismissing the additional charges.

39. Lastly, on the sentence, the minimum sentence for the offence of incest is 10 years imprisonment, while the maximum sentence is life imprisonment where the victim is aged below eighteen years. The exhibit 2 produced by PW1 showed that complainant was born on 16th February 2004, and was therefore aged 12 years, and the maximum sentence of life imprisonment therefore applied in the circumstances. The sentence of 15 years imprisonment for the conviction of incest was therefore lawful.

40. I accordingly uphold the conviction of the Appellant by the trial Court for the offence of incest contrary to Section 20(1) of the Sexual Offences Act. I also affirm the sentence imposed upon him of 15 years imprisonment for this conviction.

41. I however quash the conviction of the Appellant for the offence of defilement, contrary to section 8 (1) as read together with section 8 (3) of the Sexual Offences Act, and set aside the sentence of twenty years imprisonment imposed upon the Appellant for this conviction.

42. It is so ordered.

DATED AND SIGNED THIS 16TH DAY OF APRIL 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS 5TH DAY OF JUNE 2018

D. O. CHEPKWONY

JUDGE