REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 94 OF 2012

J K S.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. J K S (the appellant was convicted on a charge of incest by a male person Contrary to Section 20(1) of the Sexual Offences Act and sentenced to serve 35 years imprisonment. The charge against him was that on 26th November 2011 at [particulars withheld] village within **NANDI** county he willfully and intentionally caused his penis to penetrate the vagina of **CC*** a child aged 11 years who to his knowledge was his niece. He denied the charge.

2. CC (PW1) lived with her aunt **A C** in [particulars withheld] area. On 26.11.11 at around 7.00 pm the appellant passed by the home and asked her mother what she was lacking and was told it was paraffin. **CC's** mother gave her a bottle and instructed her to accompany the appellant so as to purchase paraffin.

3. On the way the appellant covered her mouth with a sweater and took her into a tea plantation where he did what she described as "bad manners to her.

She stated:-

> ***"He laid on me. He did some other things to me. He did bad things to me here (pointing at her vagina)… He used his thing for urinating to do bad things to me here (pointing at vagina). He did that many times. I felt pain. I cried. I became unconscious."***

4. The appellant then left and she returned home and told her mother what had happened. She told the trial court that the appellant was her uncle. PW1 was taken to hospital and a report about the incident was made to police.

5. L C (PW2) , the minor's mother told the trial court that the appellant who was her brother passed by her home at about 6.00pm and asked her what needs she had – she said she needed paraffin and indeed sent her daughter **CC** to accompany the appellant for purposes of purchasing the paraffin. By 8.00 pm, **CC** had not returned home, and PW2 got worried and decided to follow them. When she got to the shops, she failed to locate the pair and returned to her house. At about 10.00pm **CC** returned home and asked her mother thus: *"**Mum, why did you send me to die?"*** – that is when CC described to her the ordeal she had undergone. She checked **CC's** genitalia and noticed that she was bleeding from the vagina. **CC** told her, the uncle had inserted his penis into her vagina and that is why she was bleeding. PW2 then rushed her to hospital for treatment and also made a report to the chief.

6. She confirmed to the trial court that **CC** was born in the year 2000 and produced the immunization card which showed the year of birth as 20.04.2000. PW3 (**CPL LINDA JUMA**) of **NANDI HILLS** Police Station received the report about the incident from **CC** and her mother. She also obtained the immunization card which sowed **CC's** date of birth. PW3 issued the minor with a P3 form.

7. BARASA TUM JUMA (PW4) was the Clinical Officer who examined **CC** on 22.12.2010 and noted that she had tenderness at the abdomen, the hymen was perforated and both labias were inflamed with marked tenderness.

She stated:-

> "***There was strong evidence of penile penetration***"

8. In his unworn defence the appellant narrated how while at home carrying out his own chores, he was summoned by the chief. Upon getting there, he was arrested and placed in cells. When he was brought to court, he almost fainted when the charges were read to him.

9. The trial magistrate in her judgment pointed out that the appellant did not dispute that he was PW2's blood brother, or that he did not know that PW1 was her daughter, and therefore his niece. She also noted that he appellant did not dispute that he was known to PW1. Further the opportunity available for the appellant to be alone with PW1 was confirmed by the evidence of PW2 that they left together to go and buy paraffin.

10. The trial magistrate ruled out the possibility of mistaken identity saying CC and the appellant were familiar with each other, they left together and PW1 said there was adequate lighting. They spent considerable time together which enabled her to see and recognize the appellant. The trial magistrate described PW1 as truthful and honest, and that her evidence was "reliable and leaves no reason for any doubt that she may have been mistaken about her recognition of the accused. In any event at no point did they part company. The trial magistrate was also satisfied with the description given by PW1 regarding what took place which resulted in the appellant penetrating the minor, and this was confirmed by her mother who upon immediate inspection of her genitalia noted that the young girl was bleeding. This was fortified by the medical evidence of PW4 which confirmed that there was penile penetration. The trial magistrate held that witnesses were consistent in their evidence which corroborated each other and qualified them to be regarded as credible witnesses.

11. The appellant's defence was considered and rejected as evasive because instead of talking about events of the date the offence took place, he decided to dwell on events around the day he was arrested.

12. In meting out sentence the trial magistrate pointed out that the appellant had abused the trust bestowed upon him by society and the trust by the family who expected him to protect his niece instead of preying on her.

13. In the amended grounds of appeal the findings of the trial magistrate are contested that;

a) the evidence by the prosecution witnesses was uncorroborated

b) The appellant was not examined to prove the allegation and the medical evidence did not prove the offence against the appellant

c) The trial magistrate failed to appreciate the appellant was not represented during trial and may not have had the capacity to understand the magnitude of the charge

d) The sentence was manifestly excessive.

14. At the hearing of the appeal **Mr Kibii** appeared for the appellant and filed written submissions, which he highlighted orally, saying the evidence of prosecution witnesses was uncorroborated. He submitted that PW4's evidence was doubtful and the trial magistrate shouldn't have relied on it as the medical examination was conducted a month after the alleged act of incest.

Counsel also argued that the Clinical Officer failed to indicate whether he was the one who examined and treated the complainant immediately after the incident or whether he relied on previous medical records. That in any case the previous medical records, though marked for identification were not produced as exhibit.

15. The appellant's counsel also poked holes at PW4's credibility saying, he did not qualify to give expert opinion. On this limb counsel cited the case of **FRANCIS MUGAMBI N'CHUKE VR [2009) eKLR** where **emukule (J)** held that;

> ***"… the competency or …… of PW1 were not established prior to his evidence being admitted … the competency of all expert witnesses should, in all cased be shown before his evidence, is properly admissible is still good law. There was no evidence that PW1 was either a medical Officer of Health or a Medical Practioner. The P3 form could not be properly admitted. The evidence of PW1 was therefore inadmissible…***

16. It was further argued that in the event that the court finds that the medical evidence was lawfully tendered, then it still failed to link the appellant to the offence. That in any event the complainant's evidence was uncorroborated since PW2 was not an eye witness to the offence.

It was contended that it is a miscarriage of justice to rely on uncorroborated evidence, and counsel sought to draw from the case of **BENJAMIN MUGO MWANGI and ANOR VR [1984] eKLR** which stated that the relevant law in Kenya is …… set out in **CHILA V R [1967) EA 722 at pg 723**, that;

> **"The law of East Africa on corroboration in Sexual cases is as follows, the judge should warn the assessors and himself of the dangers 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 such warning is given, then the conviction will merely be set aside unless the appellate court is satisfied that there has been no failure of Justice."**

17. Counsel pointed out that there was no eye witnesses to the offence and the complainant's evidence remained uncorroborated, and the trial court failed to give reason for reliance on such evidence, to convict the appellant as contemplated by the provisions of Section 124 of the Evidence act, and thus amounted to a miscarriage of justice.

18. It also alleged that the trial magistrate failed to record all the evidence which was presented at the trial during cross examination of the prosecution witnesses. In that neither the questions nor the answers were recorded, thereby violating the appellant's right to a fair trial under Section 50 of the Constitution of Kenya.

19. Counsel further argued that, the trial magistrate ought to have taken into consideration that he appellant was not represented by legal

counsel during the hearing and this caused him great prejudice. He drew from the decision in **JOSEPH NDUNGU KAGIRI V R [2016] eKLR** where the court noted that;

> ***"In criminal trials, it makes a lot of difference if an accused person is represented or not, this is because of the complexities in the adversarial system that an accused person denied of the requisite legal status may find difficult to comprehend."***

20. It was also submitted that the trial court failed to indicate the language used during the proceedings and the appellant did not understand the language the trial court adopted. The sentence meted out was described as manifestly excessive and the appellants argued that given the nature of the offence the trial court ought to have encouraged reconciliation since the victim and the offender were family members. He urged the court to be guided by the principle set out in Section 26 of the Penal Code which authorizes a court to sentence an offender to a shorter term than maximum provided by any written law.

Citing Section 26(3) of the Penal Code which provides that;

> "26(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment."

21. In opposing the appeal, **Ms Kegehi** on behalf of the State submitted that the evidence tendered by the four(4) prosecution witnesses was consistent, credible and well corroborated. She pointed out that the Sexual Offences Acts provides the ingredients of incest as;

a) **Relationship** – which was demonstrated clearly as the appellant was the uncle of PW1 (a minor). This was corroborated by PW2 (the minor's mother) who said the appellant was her brother and appellant did not deny that relationship.

b) **<u>Penetration</u>** – Mrs Kegehi pointed out that PW1 testified how the appellant lured her to accompany him under the pretext that he was going to bring for them paraffin, but on the way turned on her and had sexual intercourse with her. She submitted that PW2's evidence corroborated that of PW1, to the extent that PW1 accompanied the appellant, and when PW1 returned home after a long wait, her found question to her mother was;

> ***"why did you send me to die."***

22. The minor related her ordeal which Mrs Kegehi submits was confirmed by the medical findings that the hymen was perforated and both labia were swollen – there was a strong suggestion of penile penetration.

23. It was also contended that the appellant was well known to PW1 as he was her uncle, whom she had accompanied to go and purchase paraffin, on his own request.

When he got to there house at 7.00pm and offered to purchase paraffin for her then PW1 could clearly see his appearance. Further the evidence proved the minor was 11 years old as per the health card.

24. The appellant's defence was described as evasive, and only gave an account of how he was arrested. The sentence was described as lenient since under Section 21 of the Sexual Offences Act if the victim is below 18 years then the sentence ought to be life imprisonment.

The main issues revolve around;

a) Corroboration of the evidence of prosecution witnesses and lack of an eye witness

b) Admissibility of the medical evidence and its credibility

c) Right to a fair trial

(i) Right to a legal representative

(ii) Language

d) Sentence

<u>Corroboration</u>

It is the defence counsel's contention that there was lack of corroboration and the court erred in finding that prosecution evidence was corroborated.

The provisions to Section 124 of the Evidence Act provides;

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of a child of tender years is admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

25. I think this provision exists in recognition of the fact that in Sexual Offences, it is very rare that one gets to have a third party witnessing the act – simply because, such offenders take advantage of the absence of "prying eyes" to carry out the misdeed. Yet I am persuaded that PW2's evidence corroborated PW1's evidence and demonstrated her credibility in so far there was consistency in;

a) her leaving their home in the company of the appellant,

b) the purpose for which she accompanied the appellant,

c) that she took an inordinately long time before returning home,

d) Her evidence that the appellant "did bad things" to her (which in the Kenya social decent/acceptable/ moral parlance means having sexual intercourse, was corroborated by;

a) PW2 evidence that upon inspecting CC's genitalia she noticed that she was bleeding,

b) The medical evidence confirmed what both CC and PW2 stated.

I therefore cannot fault the trial magistrate's finding that prosecution witnesses corroborated each other and indeed there was no need to invoke the provisions to Section 124 of the Evidence Act and warn herself.

2) **Admissibility of medical evidence.**

This has a multi-pronged grievance

a) Who examined the complainant immediately after the incident,

b) PW4 – a Clinical Officer lacked the capacity to produce the P3 form for want of professional qualifications,

c) Again the counsel for the state did not address this limb.

I am not aware of any legal provision requiring that the Doctor who examines the victim must be the same one who initially treated the victim. I think this latitude is given so that the court must respect the administrative structure within the health Institution where the Doctor at casualty may not necessarily be on the duty roster for filing of medical forms.

26. It is however true that it was not established at the trial what PW4's qualification were, so as to render him qualified to testify. Was this fatal to prosecution case? I take note that Emukule 'J' in the case of **FRANCIS MUGAMBI 'NCHOKE v R [2009] eKLR** pointed out that the competency and credentials established before a P3 form can be properly admitted.

27. It is true that in the present matter it was not established what PW4's professional qualifications were, and since the examination was being done almost a month later, where did he get the information from- was it just what PW1 told him or was it from previous treatment notes? I think counsel is stretching it too far and going extraneously at a tangent because the witness stated he examined PW1 – as follows;

"… at the time of examination, she had lower abdominal tenderness on deep palpation. On vaginal examination the hymen was perforated, she had inflamed both labias and marked tenderness.

… There was strong evidence of penile penetration.

28. These were the observations of PW1, there was nothing on record to suggest that these observations were based on another source other than the physical examination which was conducted. The failure to establish the witnessed professional credentials in my view does not negate what PW1 stated, and which was confirmed by examination done by PW2 and fortified by PW4, in my view that failure to establish the academic credentials of PW4 did not dial a fatal blow to the prosecution case.

Right to fair trial

Under Article 50 (2) g provides that; "Every accused person has the right to a fair trial, which includes the right;

(g) to choose, and be represented by an advocate, and be informed of the right promptly.

(m) to have the assistance of an interpreter … if the accused person cannot understand the language used at the trial.

The duty to be informed of the right to legal counsel is such a pertinent issue which I feel ought to have been extensively addressed because it raises a constitutional issue. I am persuaded that such a matter which would have a significant effect on many cases country wide ought to be thoroughly addressed in a Constitutional Petition. As to the right to an interpreter and the issue of language when plea was taken on 29.11.11 the language of the court or the language used to read the charge to the appellant was not recorded. However mercifully he pleaded not guilty. The record disclosed that PW1 spoke in Kiswahili as did PW2. PW3 spoke in English, the language of the court was not recorded, but it is significant that her evidence was basically based on the report – made by complainant, the production of the immunization

card and his arrest. I note that the appellant asked no questions, the same is repeated in the evidence of PW4, the clinical officer whose evidence was certainly critical, and from the record the accused seems to have only asked two questions – a suggestion that he may not have fully understood what the witnesses who spoke in English said. In the absence of a clear indication of the language being used in interpretation, thus the logical conclusion is that the appellant's right to a fair trial was violated, and he may not have satisfactorily understood what the two witnesses who spoke in English said in court. This was a fatal omission which unfortunately the D.P.P failed to respond to when arguing the appeal. I am satisfied that this greatly affected the appellant's constitutional rights and must be declared a mistrial.

29. Where lies the remedy? A retrial would have been ideal, but without an input from the prosecution on this aspect, then the court is left in the dark regarding availability or otherwise of prosecution witnesses. It means ordering for a retrial may end up being a not-starter and a travesty of the justice system. It is as a result of this and being keenly aware that the appellant has already served $^{1}/_{5}$ (a fifth of the sentence) i.e 7 years imprisonment that he must now benefit from this loophole and I allow the appeal by quashing the conviction and setting aside the sentence.

30. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at ELDORET this 20th day of July 2018.

H. A. OMONDI

HIGH COURT JUDGE