



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 20 OF 2017

J O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate

Honourable C. Obulutsain Eldoret CMCC No. 6134 of 2015,

dated 6th February, 2017)

JUDGMENT

J O O, the appellant herein, was charged in the main count with one offence of incest contrary to *Section 20(1)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 25th day of October 2015 at [particulars withheld], Simat location, Wareng Sub-County within Uasin-Gishu County, the appellant willfully and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of *M W N*, a child aged 12 years who is to his knowledge his niece.

In the alternative he is charged with the offence of committing Indecent Act with a child, contrary to *Section 11(1)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars hereof are that on the 25th day of October, 2015, at [particulars withheld], Simat location, Wareng Sub-County within Uasin-Gishu County, the appellant willfully and unlawfully caused his genital organ to get into contact with the genital organ of *M W N*, a child aged 12 years who to his knowledge is his niece.

The prosecution case is that the complainant in this case, who gave evidence as PW-1, was in the year 2015 aged 12 years. She was living at [particulars withheld] Estate, in Eldoret and was schooling at [particulars withheld] Academy. She was living with her father, the PW-2 in this case. The accused is a brother to PW-2 and therefore an uncle to the complainant.

On 25th October, 2015 at about 7 a.m the complainant was at home. Her brother called *J* sent her to the house of the appellant to get a thread for repairing shoes. She went and found the appellant in his house. The appellant was living alone as his wife and children were living in Kisii. The appellant locked the door after the complainant got inside and ordered her to lie down on a mattress, on the floor. She did as ordered to. The appellant wore a condom on his private parts and did bad things between her legs. He then threatened to cut her with a panga if she tells anyone. She was thereafter given a thread of which she took to *J*. She did not tell *J* or her father of what had been done to her. The day was on a Sunday.

In mid October, 2015 the complainant had told PW-3, her teacher at [particulars withheld] Academy, that her uncle had defiled her. On 27th October, 2015 she made a similar report. PW-3 called her father to the school but he did not attend. She called him again the following day but in vain. On 29th October, 2015 she reported the matter to the village elder known as *Llemenda*. *Llemenda* reported the matter to the area assistant chief, *David Kiptoo Ruto*, the PW-4 in this case. He called the police who arrested the appellant. The P3 form was filled on 2nd November, 2015 by *Dr. Yatich*. It shows that the complainant had Erythematous labia minora and posterior fourchette abrasions. There was no discharge, HIV test was negative, no pus cells seen and spermatozoa. No opinion was made as to whether there was penetration or not.

On 10th December, 2015 her age was assessed. Radiology was done and the age was assessed between 12 and 15 years old. The appellant

was also examined on 2nd November, 2015. Urinalysis test revealed no spermatozoa and no pus cells. HIV test was also negative.

The case was investigated by PW-6. He visited the appellant's house and saw a mattress on the floor where allegedly the complainant was defiled. After completion of the investigations the appellant was charged.

The appellant gave unsworn testimony in his defence and called no witness. In his brief defence he said he deals in charcoal. He denied commission of the offence saying that the complainant is his daughter and it's only that he differed with her mother. The mother wanted the girl to go to Kisumu. She framed him.

The trial court evaluated the evidence, found the offence in the main count proved by the prosecution beyond reasonable doubt; convicted the appellant and sentenced him to serve life imprisonment. The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

- (1) There is no evidence that the appellant had intercourse with the complainant.
- (2) Incest was not proved by the prosecution.
- (3) Appellant was not informed of charges and supplied with statements.
- (4) The decision was not based on the law.
- (5) Prosecution case was full of contradictions.
- (6) Prosecution case was not established beyond reasonable doubt.
- (7) The age of the victim was not ascertained.
- (8) The trial was of defilement and not incest.
- (9) Defence evidence was not properly weighed as well as the mitigation.

During the hearing of the appeal it was argued by *Mr. Mathai*, for the appellant, that the P-3 form produced on behalf of the victim was not backed by treatment sheets. He urged the court not to rely on it in showing that there was penetration. He further submitted that the complainant's evidence was not corroborated. Key witnesses namely *J*, the brother to the victim and *W* who followed on the issue at school were not called as witnesses.

On 5th November, 2015 the appellant asked for witness statements and charge sheet. They were not supplied and on 19th November, 2015 he reiterated his application and they were not supplied. On 24th November, 2015 the trial commenced. Four witnesses were heard. On 9th December, 2015 the appellant applied for statements and that is when they were supplied. *Article 50* of the *Constitution*, which is on fair trial, states that an accused person should be accorded adequate time and facilities to prepare his defence. He need be informed of the evidence the prosecution intends to call and to have reasonable access to that evidence. *Mr. Mathai* averred that failure to accord the appellant the said facilities violated his right to a fair trial, which is a right that cannot be limited. He relied on *Criminal case No. 69 of 2012, of Joseph Ndun'gu Kagiri -vs- Republic*, where *Justice Mativo* sitting in the High Court at Nyeri, observed that:-

“failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2) (j) violated their constitutional right to a fair trial and vitiated the entire trial...” Eventually he ruled that the entire trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial and declared the entire proceedings a nullity. I was urged to equally find so in this appeal and not to order a retrial which would enable the prosecution take advantage and fills the gaps in its evidence, thereby prejudicing the appellant. On this the case of *Erick Ochieng -vs- Republic, Criminal Appeal No. 56 of 2016* was relied on.

The state opposed the appeal. They averred that the appellant chose to proceed without statements when the 4 witnesses were called. He fully cross examined them. When he later on 9th December, 2015 applied for statements it was just an afterthought.

The state further submitted that the ingredients of incest were established beyond reasonable doubt. There is evidence by PW-1 and PW-2 that the appellant is an uncle to the victim. He did not dispute that relationship in his defence. The evidence that the victim was defiled is corroborated by the evidence of PW-3 and PW-5 who produced the P-3 form. The appellant was well known to the victim and it was during the day. She could not have made a mistake of him.

They further submitted that the sentence was as provided under *Section 20(1)* of the *Sexual Offences Act*.

I have evaluated the entire evidence in the file, considered the judgment passed, grounds of the appeal and submissions by both parties. One issue which is not disputed by either side and which is of paramount importance in this appeal is that on two occasions prior to the hearing on 24th November, 2015, the appellant had on 5th November 2015 and 19th November, 2015 requested for charge sheet and witness statements and were not supplied to him. On 24th November, 2015 four prosecution witnesses were heard.

It's only thereafter, on 9th December, 2015 that the statements were supplied to him. It is therefore correct to say that four crucial

prosecution witnesses were heard when the appellant was ill prepared.

Article 50(2) (b) reads that every accused person has the right to a fair trial, which includes the right (b) – to be informed of the charge, with sufficient details to answer it;

(c) – to have adequate time and facilities to prepare a defence.

(j) – to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

The appellant in this case had indicated his need to court to have a copy of the charge sheet and witness statements before trial. It was wrong for the court and the prosecution to have commenced calling of the evidence on 24th November, 2015 before according the appellant his constitutional right to a fair hearing. He was definitely highly prejudiced when the case proceeded while he was ill prepared. As was rightly observed by my colleague, *Justice Mativo* in ***Criminal Appeal No. 69 of 2012 of Joseph Ndung'u Kagiri -vs- Republic***, such a trial is a nullity. I declare so in this appeal and quash the entire proceedings, conviction and sentence arising therefrom. The appellant should be set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 12th day of July, 2018

In the presence of:

1. Mr. Mathai Advocate for the accused
2. Ms Kegehi- State prosecutor
3. Mr. Mwelem - Court clerk