REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 59 OF 2017

J K G.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Hon.V.O. Chianda (Senior Resident Magistrate, Mukuruweini) delivered on 31st August, 2017 in PMCriminal Case No. 225 of 2016)

JUDGMENT

1. The Appellant, **J K G,** was charged with the offence of defilement contrary to **Section 8 (1)(2)** of the **Sexual Offences Act.** The particulars of the charge were that on diverse dates between the 15th July, 2016 and 29th July, 2016 within Nyeri County the appellant intentionally caused his member to penetrate that of **GWK** a child aged eight (8) years;

2. The appellant also had an alternate charge of Committing an Indecent Act contrary to **Section 11(1)** of the **Sexual Offences Act No.3 of 2006;** and the particulars are on the same dates and at the same place the appellant intentionally touched the private parts of **GKW** a child aged eight (8) years;

3. After the trial, the Appellant was found guilty and was convicted on the main count and he was sentenced to life imprisonment;

4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and Grounds of Appeal which grounds are summarized as follows;

(i) The trial court erred in invoking the proviso to Section 124 of the Evidence Act as a basis for convicting the appellant;

(ii) The head teacher's evidence contradicted that of the complainant; the sub-chief's evidence was hearsay;

(iii) The trial court rejected his defence and failed to take into consideration that this was a case where the relationship of a husband and wife had gone sour;

APPELLANTS SUBMISSIONS

5. The appellant submitted as follows;

(i) The prosecution failed to prove the charges beyond reasonable doubt as required in law; penetration was not proved nor was age of the complainant proved;

(ii) The complainant being of tender age was stood down and an intermediary was to testify on the complainant's behalf; the trial court concluded the case without the complainant being cross-examined or the intermediary being called to testify on her behalf; which was a serious miscarriage of justice;

(iii) The use of the words **"tabia mbaya"** by the complainant did not prove penetration as defined in Section 2 of the Act; that Section 8(1)(2) with the omission of the words ***"as read with"*** is a non-existent section in the Sexual Offences Act; the appellant was charged with an offence which he did not understand the consequences of;

(iv) **PW2** who was a Standard 8 student was just sworn and proceeded to give evidence without a ***'voire dire'*** examination being conducted; the evidence of **PW2**, **PW3** and **PW4** was hearsay evidence; a crucial witness like the complainant's aunt was not called to testify;

(v) The trial court denied the appellant the chance to cross-examine the complainant thereby denying him a fair trial as guaranteed under Article 50(2) of the current Constitution 2010;

(vi) That if **PW2** and the other witnesses testified that the appellant who was the father of the complainant had defiled his said daughter; then it was for the prosecution to have amended the Charge Sheet to the offence of Incest as prescribed by Section 20(1) of the Sexual Offences Act; that at this stage it was not curable under Section 382 of the Criminal Procedure Code;

(vii) The appellant gave a sworn statement and called no witnesses; the trial court failed to consider that the charge was driven by malice or ill motive due to a break down in his marriage and an assault case where he was convicted for six (6) months imprisonment; it rejected the appellants defence and passed sentence without even considering the many doubts and gaps in the prosecution's case; which doubts should have been resolved in his favour;

(viii) He urged this court to analyze the whole evidence and to arrive at a different conclusion; and to allow the appeal in its totality;

RESPONDENTS SUBMISSIONS

6. In response prosecuting counsel for the State submitted as follows;

(i) The trial court conducted a ***'voire dire'*** examination on **PW1**; but failed to indicate whether she gave a sworn or unsworn testimony; that she was stood down twice; when recalled the minor stated in her evidence that the person in the dock was her father and that he had done bad manners to her; upon being stood down a second time the record does not reflect whether the issue of the intermediary was re-visited; nor is it indicated whether the appellant was allowed to cross-examine **PW1**;

(ii) Counsel conceded that there were gaps in the evidence of **PW1**; but this notwithstanding there was concrete evidence on record to support a conviction; that the witnesses were related and could be availed; and prayed this court considers that the matter goes for retrial for the lower court to interrogate the issue of Incest as well as the standing charges;

REJOINDER

7. The appellant pointed out that he had been in prison for a period of two (2) years and felt prejudiced; but was not opposed to a retrial.

ISSUES FOR DETERMINATION;

8. After taking into consideration the submissions of both the Appellant and Respondent this court finds only one issue for determination which is whether this is a suitable case to make an order for a retrial;

ANALYSIS

9. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion; refer to the case of **Okeno vs Republic (1972) EA 32.**

10. The complainant being of tender age was stood down and an intermediary was to testify on the complainant's behalf; it is noted from the record that the intermediary was never called; the minor was re-called and again stood down a second time; the trial court concluded the case without the complainant being recalled for cross-examination or the intermediary being called to testify on her behalf;

11. In the light of the omission by the trial court in its failure to invite the appellant to cross-examine the complainant it is for this court to consider whether this is a suitable case for this court to order for a retrial so that the appellant can be accorded a full and fair trial;

12. The principles for which a retrial are set out in the Court of Appeal decision of **Elirema and Another vs Republic [2003] KLR 537**; in which it held that where there is a gap in the evidence or other defect occasioned by the prosecution the appellate court will not order for a re-trial; but where it is found like in this instance that the gaps, irregularities and defects were occasioned by the trial court and it is to blame a retrial may be ordered provided these other factors are also taken into consideration; which factors are as set down hereunder;

(i) There is admissible evidence that can lead to a conviction;

(ii) Where it is required in the interest of justice; provided it is unlikely to cause injustice to the appellants;

(iii) The availability of the witnesses;

13. This court is satisfied that the irregularity was indeed occasioned by the trial court; and there is sufficient evidence that can lead to a conviction; that it is also in the interest of justice that the assailant of the minor be brought to book; the state submitted that this was a suitable case for a retrial but made no submissions on the prejudice that may be occasioned on the appellant; whereas the appellant in his rejoinder did not oppose the retrial of his case but pointed out that he may be prejudiced as he had been incarcerated for a period of two (2) years; this court notes that the appellant was arrested on the 29/07/2016 and was convicted on the 5/09/2017; the appeal was heard in 2018 which translates to a period of two (2) years; this period is not lengthy compared to the period set out in the case of **Muiruri vs Republic [2003] KLR 552** where 15 years had lapsed from the date of arrest to the hearing of the appeal which the court deemed to be lengthy; the period herein of two (2) this court reiterates is not lengthy and is satisfied that there shall be no prejudiced occasioned to the appellant; as for the witnesses there were mainly locals from the village of the complainant and the doctor who examined the minor; and the state has satisfied

this court on the availability of these prosecution witnesses;

14. In the light of the omission by the trial court in its failure to invite the appellant to cross-examine the complainant, this court is satisfied that this is a suitable case for this court to order for a retrial so that the appellant can be accorded a full and fair trial;

FINDINGS & DETERMINATION

15. For the forgoing reasons this court makes the following findings;

(i) *T*his a suitable case for this court to make an order for retrial;

(ii) The conviction is hereby quashed and the sentence set aside;

(iii) The appellant shall be released into police custody and shall be produced before the Chief Magistrate Nyeri on the 17th day of September, 2018 for the purposes of directions on the retrial before a subordinate court with competent jurisdiction;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 12th day of September, 2018.

HON. A. MSHILA

JUDGE