REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 8 OF 2016

J M C.....APPLLCANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant J M C was charged with the offence of incest contrary to Section 20(1) of the Sexual offences Act No. 3 of 2006 before the Principal Magistrate's Court Wang'uru in Criminal Case No. 534/2015. After a full trial he was convicted and sentenced to life imprisonment. He was aggrieved and was dissatisfied with the conviction and sentence and filed this appeal claiming that the learned trial Magistrate erred in law and fact by:-

a) Did not indicate the language in which proceedings were conducted.

b) Violation of Article 50 (2) (c), (g), (j), and (k) of the Constitution.

c) Admitting a doubt ridden evidence of intermediary.

d) Failed to consider the co-existing grudge.

e) Failed to appreciate the prosecution failed to prove its case beyond reasonable doubt.

The brief facts of the case are that the complainant in this case AWM is young female who at the time of the incident was aged 2 ½ years. The appellant is her biological father. The complainant was living with the appellant after her mother disappeared from home. The child used to sleep on the same bed with the appellant during the night. The appellant used to remove his genital organ during the night and put it in the complainant's vagina. The complainant would cry but the appellant would tell her not to cry.

The appellant used to leave the complainant with PW-2- when going to work. PW-2- noticed that the complainant was feeling pain when passing urine and she would make painful sounds. PW-2- enquired and the child told her that the appellant used to remove something under his trouser at night and touch her vagina. That the appellant would tell her to lie down when doing that and when she cried he would tell her to keep quiet. PW-2- reported to the Assistant Chief who in turn informed a Nyumba Kumi Official, S W M PW-3-. She checked the child's genital organ and realized it was not normal and it had some blisters. The matter was then reported to the police. The child was treated at Kimbimbi Hospital and a P.3 form was filled by PW-7- Doctor Kenneth Munyi. On examining the complainant he found that –

- Heat rush of labia majora
- Grazes on the perineal area.
- The hymen was broken but there is no bruising – not a fresh injury.
- No spermatozoa seen
- Presence of yeast cells 0.3 Hpf which was very high.
- Urinalysis normal.
- VDRL not avaible.
- H.I.V none reactive.

PW-7- had a birth certificate showing that the complainant was born on 12/5/2013. PW 8 Cpl Magdalene Mbula of Wanguru Police Station conducted investigation and found that the complainant was able to narrate what was done to her by the appellant. She then charged him with this offence.

When this appeal came up for directions, the appellant opted to proceed by way of written submissions which he filed on 4/7/2017 in support of the grounds of the appeal.

For the state submissions were filed by E.P.O Omooria Assistant Director of Public Prosecutions. He opposed the appeal and prayed that it be dismissed.

The appellant submits that the learned trial Magistrate erred in law and fact by nor recording in which language in which the proceedings were conducted. He submits that PW4 & 5 testified in Kiswahili while PW6, 7 & 8 testified in Kiswahili. He submits that it is impossible to establish whether the trial was conducted in a language that the appellant understood. That the conviction was not safe. He cited **Section 198(1) of the Criminal Procedure Code** which provides:-

> ***"(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands".***

He also submits that **Article 50(2)(m) of the Constitution** was violated. The article provides:-

> ***"(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;"***

The appellant submits that he understands kikuyu language and there was no indication that there was any interpretation.

For the State it is submitted that the appellant had indicated during plea taking that he understands kikuyu and the charge was read in kikuyu. PWI, 2 & 3 testified in kikuyu and he cross examined them. PW4 & 5testified in Kiswahili and he was able to cross-examine them. PW6, 7 & 8 testified in English and translation was in Kiswahili. The appellant did cross examine the witnesses. He gave his defence in kikuyu. He submits that the appellant was able to understand the proceedings as he was able to cross-examine all the witnesses. That his rights were not breached.

The appellant has a right to a fair trial which includes the right to have the assistance of an interpreter without payment if he cannot understand the language used at the trial. The right to fair trial is one of the rights which is inalienable as provided under ***Article 25 (c) of the Constitution***. As such when an accused alleges a violation of right to fair trial the court must do a thorough enquiry to determine whether indeed the right has been violated.

> **As per the proceedings, on 15/10/2015 the language was indicated as English/Kiswahili whereby the appellant requested the charges be read in Kikuyu. On 28/10/2015, 10/11/2015, 12/11/2015, 26/01/2016 it's indicated as English/Kiswahili. On 18/11/2015, 18/12/2015, 28/12/2015, 22/01/2016 it's indicated as English/Kiswahili/Kikuyu but on 20/11/2015 and 04/12/2015 the language is not indicated.**
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> **However, the appellant was able to cross examine all the witnesses and even gave unsworn statement on 26/01/2016 therefore he understood the language used.**

The Court of Appeal in the recent decision of ***George Mbugua Thiongo –vs- Republic in Criminal Appeal 302 of 2007*** when it stated that:-

> ***"22. For the Court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial Magistrate to record the language occasioned a miscarriage of justice."***

The appellant was able to cross-examine the witnesses and to give his defence. Though it was a mistake for the trial court to fail to indicate the language used the proceedings show that the appellant participated fully in the trial. He cross-examined witnesses and finally gave his defence which was in answer to the prosecution case. He never raised the issue before the trial Magistrate that he could not understand the language. Instead, he did cross-examine witnesses, when he was put on his defence he opted to give unsworn defence. This does not portray a person who could not understand the proceeding. I find that the appellant understood the language used and his rights under ***Section 198(1) of the C.P.C and Article 50(2)(m) of the Constitution*** were not violated. In any case in all the sitting of the trial court there was a Court Clerk by name Kariuki and at times Ann who was expected to interpret the proceedings in a language which appellant understood. The ground must fail.

The appellant submits that his rights under ***Article 50(2)(c)(g)(j) and (k) of the Constitution*** were violated. He submits that he was not informed of his right to legal representation, he was not supplied with statements, and therefore denying him the right to adequate time and facility to prepare his defence.

The appellant applied for statements and the Court ordered that he be supplied. He never informed the court that he was not supplied it is presumed that the order was complied with and that is why the appellant proceeded when the matter came up next for hearing after he indicated that he was ready to proceeded. He never raised the issue after that.

The States submits that the rights of the appellant were not violated.

In **Fredrick Oyoo Odhiambo v Republic [2017] eKLR**

In a case where the statement was requested but not supplied, the court held;

> ***He did not raise the issue of not having been supplied with witnesses statements. The same proceeded to hearing and prosecution called PW1 who the appellant cross-examined without any difficulties. That on 14th October 2015 when PW2 gave evidence, the appellant was ready and also cross-examined PW2 without any complaint that he did not have witnesses statements. The position was repeated when PW3 gave evidence and PW2 was recalled. I therefore find that Article 50(2)(j) of the Constitution of Kenya 2010 was not violated as the appellant had witnesses statements as he was able to cross-examine prosecution witnesses without difficulties hence I find he was not prejudiced in any way and his constitutional rights to fair hearing was not violated and/or breached in any way.***

In this case as per the proceedings of 28/10/2015 and 10/11/2015, the court ordered that the appellants be supplied with witness statements. However, this issue was never revisited. The matter proceeded on 12/11/2015 when the appellant indicated he was ready to proceed with the hearing but there was no mention that the statements were yet to be supplied to him. It is presumed that the statements were supplied.

This ground is without merits. His rights were not violated.

It is not borne out from the record that the appellant chose to be represented by an Advocate. **Article 50(g) of the Constitution** states:-

> ***"to chose and be represented by an Advocate and to be informed of this right promptly".***

Legal representation has financial implications and that is why the sub-article is worded the way it is. The accused must first choose to be represented by an Advocate. This would show that he has the requisite financial means to hire an Advocate. If he brings this to the attention of the Court, it informs him promptly of his right to have legal representation **Article 50(g) of the Constitution** does not require that every accused person be represented by counsel. It gives an accused person the right to choose to be represented by legal counsel. Whether or not to be represented therefore depends on the choice by the accused. The duty of the court is to inform him that he indeed has the right to be represented by an Advocate of his own choice once he has opted to have a legal representation.

In this case the appellant never indicated that he wished to be represented by an Advocate. The fact that the trial court did not inform him of the right did not in any way amount to a violation of his rights.

The appellant faults the evidence of the intermediary.

> **The appellant claims that the intermediary did not attain the required threshold, she did not inform court of her training and qualifications or prove with any documentary evidence that she worked at Joy Rescue Centre.**

For the State it was submitted that the intermediary Purity Wairimu Gichovi was properly evaluated and she indicated that she works at Joy Rescue Centre as matron and lives in the said centre where she had worked for four months. She indicated that she had known the complainant and had created a rapport with her and had no personal interests in the matter.

The complainant was a child aged about three years. She was therefore a vulnerable witness as provided under ***Section 31(1) (a) (b) (c) (2) (a) - (k) of the Sexual Offences Act*** which provides:-

> ***"(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -***
>
> ***(a) the alleged victim in the proceedings pending before the court;***
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> ***(b) a child; or***
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> ***(c) a person with mental disabilities.***
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> ***(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -***
>
> ***(a) age;***
>
> ***(b) intellectual, psychological or physical impairment;***
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> ***(c) trauma;***
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> ***(d) cultural differences;***
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> ***(e) the possibility of intimidation;***
>
> ***(f) race;***

(g) religion;

(h) language;

(i) the relationship of the witness to any party to the proceedings;

(j) the nature of the subject matter of the evidence; or

(k) any other factor the court considers relevant."

An intermediary is supposed to assist a vulnerable witness and the court to communicate. ***Section 31(7)(a)(b) & (c) of the Act*** provides:

"If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -

(a) convey the general purport of any question to the relevant witness;

(b) inform the court at any time that the witness is fatigued or stressed; and

(c) request the court for a recess."

Having found that the witness was a vulnerable witness the trial Magistrate was right to appoint an intermediary.

The Court of appeal stated the following in considering the role of intermediary;

It is clear from what we have said so far that the procedure of appointing an intermediary preceeds the testimony of the intended vulnerable witness even where the court does so suo moto. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness.

The intermediary herein worked as a matron at Joy Rescue Centre where she got to interact with PW 1 when she was brought to the centre a month before since her mother was not available and had developed a rapport with PW 1.

This ground must therefore fail.

The appellant submits that the trial court failed to consider that there was an existing grudge. The appellant when cross examining PW-2- put it to her that she was framing him to take his land. This was a mere allegation which PW-2- promptly denied. The appellant did not show how PW-2 was driven by grudge and yet the complainant was his own child who was able to tell the court and the witnesses and not only PW-2- that his father defiled her. Medical evidence corroborated the fact of defilement. The appellant was not implicated by PW-2- or any other witness but by his own child. The child stated what happened and the appellant does not state why the child would have implicated him. The ground is a red herring and without merits.

Whether the prosecution proved its case beyond reasonable doubt

Looking at the whole evidence adduced, I find the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 1 in the manner described. Though there was no eye witness, the evidence of PW 1 was very clear on what the appellant used to do to her at night and this was confirmed by medical evidence. PW 7 who was the medical officer produced her P3 form and treatment notes which indicated that she had heat rush on labia manjora, grazes on perennial area, the hymen was broken and yeasts cell was seen. The appellant did not challenge the evidence of PW-1- and PW-7- the Doctor. Their evidence is therefore credible.

In N. K v Republic [2011] eKLR where in dismissing the appeal, the Court of Appeal stated;

We think for ourselves that the case rested on the credibility of the child E whose evidence the appellant did not challenge. The trial court had the advantage of seeing and hearing her in the witness box and was therefore a better judge on credibility. We have no reasonable basis for interfering with that assessment. Medical evidence further confirmed her complaint that there had been penetration in her private parts which was a finding of fact. The law does not require any number of witnesses to be called for proof of corroboration of the facts stated by the complainant and therefore the first ground of appeal has no legal basis.

The age of the minor was proved with the production of the birth certificate No. [Particulars Withheld] which showed that the complainant A W M was born on 12/5/13 and the appellant is her father. The appellant did not dispute that he was the father of the complainant. The child was barely three years old. She was clear on what happened and the perpetrator was her own father. He had continuously defiled the child. There was no doubt on the issue of defilement and who the perpetrator was. The appellant gave a defence which was a mere denial. The evidence tendered by the prosecution was sufficient, well corroborated, cogent and overwhelming. It proved the charge against the appellant beyond any reasonable doubts. I find that the appeal is without merits and so I dismiss it. The State gave notice to the appellant that it would seek enhancement of the sentence. The appellant was informed of the notice and he confirmed that he understood the notice of enhancement of the sentence but nevertheless opted to proceed with the appeal on both conviction and sentence.

Section 354(3) (ii) of the Criminal Procedure Code provides:-

> ***"(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -***
>
> ***(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence;"***

The appellant was charged under ***Section 20(1) of the Sexual Offences Act*** which provides:-

> ***"(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.***
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> ***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."***

In sentencing, the court consider the law under which the person is charged and the sentence provided, mitigation and aggravating factors and circumstances of the case. The sentence provided was life imprisonment in view of the age of the victim. The court observed that the appellant was not remorseful. The complainant will live with the trauma for the rest of her life. The maximum sentence was meted was deserved. There is no room for enhancement. The sentence is upheld. The appeal is without merits and is dismissed.

Dated at Kerugoya this 19th day of November 2018.

L. W. GITARI

JUDGE