REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 25 OF 2017

SCG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENTS

(*Being an appeal against conviction and sentence of the appellant in Cr. Case No. 40 of 2016*

in the PM'S Court presided over by Hon. Kasera in a judgement delivered on 31st January, 2017)

JUDGEMENT

This is a first appeal by the appellant SCG herein after referred to as the appellant, who after conviction and sentence for the offence of attempted incest contrary to Section 210(2) of the Sexual Offences Act No. 3 of 2006 has lodged an appeal in the entire judgement.

The particulars of the offence in the court below were that on the 12th October, 2016 at Kitengela township within Kajiado County, the appellant intentionally attempted to touch the vagina of LWC who was to his knowledge his daughter.

The alternative charge was that of committing an indecent act with a child contrary to Section 11(1) of the same Act. The appellant before the trial court pleaded not guilty to the charges. The provisions under Section 207(1) of the Evidence Act in their quest to discharge the burden of proof summoned (4) witnesses. At the close of the prosecution case the appellant was placed on his defence where he gave a sworn statement of defence. The learned trial Magistrate in her judgement convicted the appellant and sentenced him to twenty (20) years imprisonment.

Being aggrieved with the orders he appealed to this court as stated in his memorandum of appeal dated 8th May, 2017 as herein under:

> **1. That the learned trial Magistrate erred in both law and facts by convicting on the evidence which was full of material contradictions and inconsistencies without making any reference to the same.**
>
> **2. That the learned trial Magistrate erred in both law and facts by failing to make an independent opinion on the burden of prove as required in law.**
>
> **3. That the learned Trial Magistrate erred in both law and facts by failing to comply by the provisions of Section 169(1) in relation to my defence statement.**
>
> **4. That the learned trial Magistrate erred in both law and facts by failing to weigh the entire evidence adduced as in the light of my defence evidence as the demands.**
>
> **5. That the learned trial Magistrate erred in both Law and facts by failing to observe that the evidence brought forward by the prosecution feel too short of the standard needed in law hence my conviction was manifestly unsafe.**
>
> **6. That I apply for a copy of Court proceedings to enable me raise more important grounds.**

The appellant prayed that the conviction and sentence be quashed and set aside.

Prosecution case at the trial

Pw1 is a clinician at Nairobi Women's Hospital Kitengela Branch, the clinician produced the P3 form. During cross examination Pw1 narrated that the child was examined on 12th October 2016 both back and front. Her vagina was smeared with jelly.

On examination of the P3 form it states that the complainant was 6 years old, vagina was normal, hymen intact and there was jelly in her private part. Post rape care form indicates that the hymen was intact, anus intact and there was attempted penile penetration according to the victim' account.

Pw2 is the complainant, a voir doire was conducted, she proceeded to give unsworn statement, she was of a tender age, and could not understand the meaning of an oath. On 12th October 2016 the appellant bought for her doughnut and ice cream in the club, she changed into home clothes. The appellant removed her clothes and put her on the bed. He told her if she told her mother he would kill her, he applied oil on her private parts and also on his pubic areas. He then inserted his penis between her thighs. Pw2 described his penis as a thing the appellant uses for urinating. Pw2 lay on the bed and the appellant was on top of her. The complainant told her mother what happened when the appellant went to buy credit. Pw3 who is the complainant's mother checked her, she proceeded to make a report to the police and took the complainant to hospital. Pw2 testified that the appellant had defiled her twice before, she forgot to tell her mother.

On cross examination Pw2 identified the appellant as her dad, she saw her naked, she saw her thing and he did "tabia mbaya" in the bedroom, he carried her with his hands, he removed her clothes after she removed her uniform and inserted his thing.

Pw3 is the complainant's mother, on 12th October 2016 she reached home and found the appellant and complainant locked in the house. She knocked the door for a while and it was not opened. The appellant opened the door bare chested. He was zipping his trousers. She asked the appellant if he slept without clothes. The appellant smelled of alcohol, Pw3 saw Valon on the bed. He hit it on the floor. Pw2 told her that they went to the club after school. The appellant bought her soda and ice cream. They went to the house and the complainant removed her uniform, he took her to the bed. He told her to open his legs and applied oil in her vagina and he applied on his penis. He then put his penis between her thighs as she closed her vagina by putting her legs together. He told the child not to tell anyone as he would kill her. Pw3 made a police report at Kitengela and took the child to Nairobi Women's Hospital.

Pw4 is a police corporal working at Kitengela Police Station. On 12th October 2016, he received a report of defilement by a father of a 6 year old child. I directed the mother to take the child to Nairobi Women's Hospital in Kitengela. I gave her a P3 form which the doctor filled. I wrote statements for the child and mother. I compiled the file. I charged him with the offence of attempted incest. On cross examination she testified that the child was injured on her thighs where you placed your penis.

Appellant defence case

In his defence the appellant told the court that he was being framed by Pw3, the mother of the complainant. It was his evidence that on 12 th october2 016, the appellant went to get pw2 at 1 p.m. he applied kerosene on her back because of flees. The appellant slept on the couch. He heard pw3 knock the door and told him that he will not see those who sell to him alcohol. He was arrested and at the police station he was told he defiled his child.

Judgement was delivered on 31st January 2017, the appellant was convicted of the offence of attempted incest in pursuant to section 215 of the criminal procedure code and, he was sentenced on the same date to twenty years imprisonment.

The appeal was disposed off by way of written submissions. The state was represented by Mr. Meroka, the Principal Prosecution Counsel while the appellant was in person.

The appellant's submissions

The appellant advanced his argument via his undated written submissions. On ground 1, he submitted that the trial magistrate is said to have convicted and entered a harsh and excessive sentence. The Sexual Offences Act No 3 of 2006 provides that, any person who attempts to defile a child shall be sentenced to 10 years. There is no provision for enhancement of the sentence. The appellant being awarded 20 years imprisonment was contrary to the provision of section 20(2) of the Sexual Offences Act No3 of 2006 which provides for a sentence of 10 years for the offence if it is proved beyond a reasonable doubt.

On ground 2, the appellant submits that there were no proper investigations conducted in the present case. Investigations were shoddy and revealed no truth. The incident occurred on 12/10/2016 and it was not reported nor booked in the occurrence book and no reference number is indicated.

The appellant states that there was no voir doire conducted on Pw2. Pw3 lied to the court as she had coached the minor to claim he had attempted to defile her. Pw3 could have applied the oil to lure or mislead the medical practitioners and investigators to believe that he was the person who had applied the oil.Pw1 evidence is inconclusive, all systems were normal. There was no evidence of penetration, medical practitioners did not make any commentary on colour of the hymen, bruises or inflammation. Oil smeared in her private parts had nothing to do with an attempted defilement.

The appellant further submits that this is not the first time the incident had occurred raises doubt. Proof could have been provided that either the vagina tract of the complainant had widened which is abnormal for children her age. This was a move by pw3 to fix him using pw2.

On ground 3, the appellant submits that the evidence was adduced by outright hostile witnesses; documentary exhibits presented in court were not authentic. Investigating officer was misleading and influenced the witnesses to adduce adverse evidence against an innocent father. Appellant was not arrested immediately proves that no report of attempted defilement was reported against him on 12th October 2016, the case was planned to frame him. P3 form is not genuine and not authenticated; it does not bear a rubber stamp or seal by the police and from

which police station.

P3 form has no medical reference numbers; it was fraudulently acquired and produced in evidence. The appellant's wife vowed to separate him from those he used to drink with.

On ground 5 the appellant submits that he was not granted a fair trial and the trial magistrate breached article 50(2) (j) and 25(c) of the constitution. The trial magistrate made no effort to inform the appellant of his rights to a fair trial.

In conclusion, the appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

The respondent's submissions

The respondent's made written submissions dated 19th October 2018 and filed on 22nd October 2018, therein they submitted that the prosecution's duty under the main charge was to ascertain the nature of the relationship between the victim and the accused herein the appellant. Pw3 explained that she was married to the appellant, out of the marriage an issue Pw2 arose.Pw1 referred to the appellant as dad, it is this entrusting that allowed her to be picked by the appellant to go home on 12th October 2016. Pw4 corroborated that there existed a family set up between the appellant and Pw2.

Evidence was submitted of the attempted incest. Victim stated that the father lubricated her with jelly and his genitals. The appellant brushed his penis between the thighs on the minor while he was on top her, as the minor was sleeping flat on the bed.Pw3 found the appellant zipping his trouser, on proceeding to the bedroom he found her wearing her inner clothing wrongly presumably because of being in a hurry. Pw3 found jelly on the bed.

Nature of the offence under section 124 of the Evidence Act Cap 80 Laws of Kenya does not require corroboration. In this circumstance there was corroboration, examination by clinician, Pw1, affirmed to traces of jelly on the minor private parts. It was the respondent's submissions that the appellant's testimony did not displace the prosecution case. Conviction was sound and the sentence lawful.

Consideration of the appeal

The duty of the first appellate court is clearly stated in the case of ***Okeno v. Republic (1972) EA 32***

> ***"The duty of the appellate court in this appeal is to submit the evidence adduced in the trial to fresh analysis in order to reach its own independent conclusion. In doing so, the court must bear in mind that unlike the trial court, it has not heard the opportunity of seeing and hearing the witness testify. By this principles this court is enjoined to carefully examine and weigh the record of the trial court and subsequent judgment in order to come up with its own decision"***

I shall now proceed to appraise the evidence and the grounds of appeal tiled by the appellant.

Ground one

Whether the offence of attempted incest was proved beyond reasonable doubt.

The first issue of consideration was whether the appellant attempted incest contrary to section 20(2) of the sexual offences Act, the section states as follows:

> ***"If any male person attempts to commit the offence specified in subsection 1 he is guilty of an offence of attempted incest and is liable upon conviction of a term of imprisonment of not less than 10 years."***

Section 20(1) is read together with the above section, it provides as follows;

> ***"Any male person who commits an indecent act or an act which causes the penetration with a female person who is to his knowledge his daughter,....., is liable to imprisonment for a term not less than 10 years....."***

An indecent act under section 2(1) of the Sexual Offences Act is defined as unlawful intentional act which causes; ***"(a) any contact which between any part of the body of a person with genital organs, breasts or buttocks of another but does not include an act that causes penetration."***

Genital organs are defined in section 2 of the Sexual Offences Act No. 3 of 2006 as, "Include ***the whole or part of female or male genital organs and for purposes of this act includes the anus***."

Section 124 of the Evidence Act states the following;

> ***"Provided that where in criminal cases involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

Pw2 was a minor and the trial magistrate conducted a voir dire to establish whether the minor understood the importance of telling the truth, according to the court proceedings, she proceeded to give unsworn testimony against the appellant because of her tender age she could not understand the meaning of an oath. She testified as follows;

> ***"On 12th October 2016 the appellant bought for her doughnut and ice cream in the club, she changed into home clothes. The appellant removed her clothes and put her on the bed. He told her if she told her mother he would kill her, he applied oil on her private parts and also on his pubic areas. He then inserted his penis between her thighs. Pw2 described his penis as a thing the appellant uses for urinating.Pw2 laid on the bed and the appellant was on top of her. The complainant told her mother what happened when the appellant went to buy credit. Pw3 who is the complainant's mother checked her; she proceeded to make a report to the police and took the complainant to hospital. Pw2 stated that the appellant had defiled her twice before, she forgot to tell her mother.***

On cross examination Pw2 narrated, ***"that you are my dad, I saw you naked, I saw your thing and you did "tabia mbaya" in the bedroom, he carried me with his hands, he removed his clothes after I removed my uniform and inserted his thing."***

"Tabia mbaya" is a common expression which courts need to take judicial notice in sexual offences concerning minors, and more particularly in children of tender age who have no experience and are not expected to know or understand at that age, matters of sex, but have a general understanding that male adults or adolescents are not supposed to touch them in their private parts and if they do so, they are guilty of "tabia mbaya", behaving badly or "having bad manners." See ***GMK vs. Republic Criminal Appeal 26 of 2010 (2012) EKLR.***

Pw2 evidence was corroborated by Pw1, the clinician, where she stated that; "I have Worked as a clinician at Nairobi Women's Hospital Kitengela branch, 3 years, i am in court on behalf of Mr. Patrick Museuhi, her colleague for 2 years, he is currently on leave." the clinician produced the P3 form according to section 77 of the Evidence Act. During cross examination Pw1 narrated that the child was examined on 12th October 2016 both back and front. Her vagina was smeared with jelly.

On evaluation of the P3 form it states that the complainant was 6 years old, vagina was normal, hymen intact and there was jelly in her private part. Post rape care form indicates that the hymen was intact, anus intact and according to the child's account there was attempted penile penetration.

Pw3 was the complainant's mother she testified as follows; On 12th October 2016 she reached home and found the appellant and complainant locked in the house. She knocked the door for a while and it was not opened. The appellant opened the door bare chested. He was zipping his trousers. She asked the appellant if he slept without clothes. The appellant smelled of alcohol, pw3 saw valon on the bed. He hit it on the floor. Pw2 told her that they went to the club after school. The appellant bought her soda and ice cream. They went to the house and the complainant removed her uniform, he took her to the bed. He told her to open his legs and applied oil in her vagina and he applied on his penis. He then put his penis between her thighs as she closed her vagina by putting her legs together. He told the child not to tell anyone as he would kill her. Pw3 made a police report at Kitengela and took the child to Nairobi Women's Hospital.

During cross examination she narrated that- I slept in that house the previous night. You were drank that night, my first born was taken care of by my mother. She joined us in form one. You were taking her to school in a motor car.

The point of contention was whether there was attempted penile penetration or an indecent act. In the appellant's sworn statement he testified that, Pw3 hates alcohol, which she told me, i will not see those who sell to her alcohol. In the appellant's grounds of appeal he states that the magistrate ignored any plausible defence, this was advanced in his submissions where he said that Pw3 coached the minor and she was the one who smeared oil on Pw1 vagina. He states that Pw3 framed her and instigated this suit.

In this instant case the prosecution was required to prove either attempted penetration or an indecent act. The additional element of the relationship between the appellant and the child is what makes the offence incest. The matter in contention is whether there was attempted incest; the relationship between the appellant and the complainant is already established as father and daughter hence undisputed.

Evidence of the complainant disclosed that the appellant applied oil on her private parts and also on his pubic areas, he inserted his penis between her thighs, she said it was a thing the appellant uses for urinating. The medical evidence indicated that there was jelly in her vagina, there was no penetration, no spermatozoa and the hymen was intact. The accused challenged the evidence of Pw2 and Pw3 during cross examination and they held the same stance.

In my view, the prosecution proved the important element of attempted incest and that there was an indecent act between the appellant and complainant. Indecent act is described as unlawful intentional act which causes any act 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.

Ground two

Failure to conduct proper investigations

The appellant contends in his ground of appeal, specifically ground 2, where he states that no proper investigations were done in the present case. He advanced his argument in his written submissions; That the charge sheet does not have an occurrence book number; he was not arrested immediately proves that no report of attempted defilement was reported against him and the case was to frame him and the P3 form is not genuine.

I looked at the charge sheet and it is factual that the occurrence book number was not written. Did this omission in any way prejudice the appellant? In my view, there was no prejudice occasioned to the appellant by the omission of the OB No. This case was reported by Pw3

who is the mother to the complainant, if there was a discrepancy between the date the offence was committed and the said date written in the occurrence book. The discrepancy would only be tested during trial, had the appellant raised his concern during trial, the prosecution would have had the opportunity of producing the occurrence book in court for clarification of any information the appellant required.

In the appellant's written submissions, he attacks the authenticity of the P3 form. He submits that the P3 form did not bear the rubber stamp or seal from the police station, it did not have medical officer's reference numbers. He concludes that the p3 form was fraudulently acquired and produced in evidence.

The P3 form is a medical examination report to be filled in by the witness in order to enable the police to decide whether to prosecute and upon what basis. Patrick Museuhi is a clinician who was competent to fill and sign the P3 form. At the time of the hearing he was on leave and Ruth Lengete took over his place. Ruth Lengete (Pw1) and Patrick Museuhi were colleagues for 2 years and she was conversant with his signature hence the court allowed her to produce the P3 form.

In the case of ***Seif Juma Mohammed vs. Republic Criminal Appeal 61 of 2005***; the court held, that a clinical officer's evidence performs two functions; one as an independent witness not involved in the offence and to confirm whether there was an injury. Two, as an expert witness to assess the damage of harm.

Section 33 of the Evidence Act Cap 80 Laws of Kenya provides:

> **"*statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible ……..*"**
>
> **(b) *when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty …….*"**

Section 77 of the Evidence Act Cap 80 Laws of Kenya provides:

> **"(1) *In criminal proceedings any document purporting to be a report under the hand of a government analyst or of any geologist employed in the public service upon any matter or thing submitted to him for examination or analysis may be used in evidence."***

In my opinion Pw1 was competent in producing the medical examination report on behalf of her colleague in accordance with section 33 and 77 of the Evidence Act. On examination of the P3 form dated 15th October 2016, it bears the stamp of the Nairobi women's hospital Kitengela outpatient and a signature of the medical officer/ practitioner, therefore the P3 form produced was authentic and admissible in evidence.

Ground three

Hostile witness

Ground 3 of the appellant's ground of appeal; he contends that the trial magistrate erred in convicting him by relying on evidence adduced by a hostile witness. He buttressed this claim by stating in his written submissions that the case was falsely instigated by Pw3 for reason to be given in his defence. The evidence adduced was by an outright hostile witness.

Hostile witness is defined in the ***Black's law dictionary 2nd edition*** *as* ***a party that the court feels is hostile against the party they are supposed to testify for. They can be cross examined if they are called. They can be impeached by their own credibility*.**

A hostile witness is defined in ***Merriam Webster dictionary*** as, ***"A witness in a legal case who supports the opposing side."***

The evidence Act in section 161 and 163 (1) gives the court discretion to allow cross examination of own witness and impeachment of the credit of the witness. The procedure laid out in those sections ought to be followed in order to ensure that apparent inconsistencies are not explicable by the witness before he is declared hostile.

Section 161 of the Evidence Act cap 80 laws of Kenya provides that: "***The court may in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross examination by the adverse party."***

It is such a witness who is being sought to be cross examined by the party calling him that is termed in legal parlance as a hostile witness. In other words , he is hostile to the position favourable to the person calling him contrary to the position which he had made the party calling him to believe was the position. In the case of ***Republic versus Kiilu Wambua Criminal Case No. 89 of 2010 (2018 EKLR***), the court observed that a hostile witness is not just a person whose evidence is unfavourable to the party calling him, but a witness who appears to be biased or unwilling to tell the truth. In such cases the court has the discretion to permit the party calling the witness to put any questions to him which might be put in cross examination by the adverse party.

It was held by ***Sir J.P. Wilde in Cole vs. Cole (1866) L.R. IP. D. 70,71***: " A hostile witness is the one who from the manner in which he gives evidence shows that he is not desirous to telling the truth to the court."

In ***Alowo vs. Republic (1972) EA page 324 EACA*** the court said-"***The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible."***

In ***Batala vs. Uganda (1974) EA 402*** the said court in page 405 said- "the giving of leave to treat a witness as hostile is equivalent to finding that the witness is unreliable. It enables the party calling the witness to cross examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be give a little, if any weight."

In this instant case, Pw3 was the prosecution's third witness and the mother of the complainant. There were no contradictions to the questions put to her in examination in chief and the statement made to the police. In my view Pw3 and the other 3 prosecution witnesses were not hostile witnesses for all intent and purposes. The evidence adduced by all prosecution witness were relied on by the prosecution, the party who called them, and the evidence favoured the prosecution's case. If Pw3 or any other prosecution witness were hostile witnesses, the state would have applied for them to be treated as such.

Ground four

5. Contravention of Article 50(2) (j) of the Constitution of Kenya, 2010

Article 50 provides for the right to a fair trial which is a non- limited right and one of the cornerstones of a just society as it was observed in the supreme court of India decision of ***Rattiram vs. State of M.P. 2012 4SCC 516,*** wherein the 3 judge bench ruled thus, ***"fundamentally a fair trial and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism."***

Specifically, Article 50 (2) (j) provides for the right of the accused person to be informed in advance of the evidence, the prosecution intends to rely on, and to have reasonable access to that evidence while sub article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence. Right to a fair trial is amongst the fundamental right and freedom that may not be limited according to Article 25(c) of the constitution.

The right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence was discussed in the case of ***Thomas Patrick Cholmondeley vs. Republic 2008 EKLR*** the Court of Appeal stated that-

> ***"We think that it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under..... our constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statement of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."***

The accused cannot prepare for his defence if he has not been supplied with the evidence the prosecution intends to rely on ahead of the trial. In the case of ***Republic vs. Ward 1993 2 ALLER557*** the Court of Appeal stated that the duty of disclosure by the prosecution is a continuing one throughout the trial, It was held that:

> ***" the prosecution duty at common law is disclosure to the defence all relevant material, that is evidence which tends to either weaken either the prosecution's case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to defence or allow them to inspect the statements and make copies unless there were good reasons for not doing so, furthermore, the prosecution were under a duty which continued during the pre-trial period and throughout the trial to disclose all defence all relevant scientific materials, whether it strengthened or weakened the prosecution's case or assisted the defence case and whether or not the defence made a specific request for disclosure pursuant to that duty, the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses."***

The duty imposed on the trial court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. The prosecution ought to disclose all the evidential material and witnesses to the defence during the pre-trial stage and throughout trial. Thereafter, the accused is granted adequate time and facilities to prepare for his defence.

The court notes that since the promulgation of the constitution there has been an upsurge of litigation under Article 50(2) (5) of the constitution. This court recalls that generally speaking there is no standard operating procedure all things being equal how witness statements are to be confirmed as having been issued to an accused person. Accordingly this court relied on the record of appeal for purpose of determining the issue on witness statements. The constitution and the criminal procedure code remains silent as to the correct statutory scheme to determine without the prosecution case docket information was supplied in advance to the hearing date.

In this regard any lacuna in the record has occasioned an avalanche of applications on appeal that the right to a fair trial was infringed or violated in absence of witness statements supplied to the appellants.

The purpose of Article 50(2) (j) of the constitution on a right to a fair hearing is to protect rights of an accused person throughout the trial till the outcome of the case by way of a decision or termination of proceedings by the state under Article 157 of the constitution.

The various rights embodied in Article 50 explicitly proclaim what constitutes a right to a fair trial but fails short to define what is not a fair trial.

The right to a fair trial is also enshrined in the numerous international conventions and treaties. One such instrument is the universal declaration of Human Rights which in Article 10 states that:

> "***Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"***

This same provision is similar with our Article 50(1) of the constitution 2010. The right to a fair trial is also protected in Article 14 and 16 of the international covenant on civil and political rights.

The bone of contention in this appeal is on non-disclosure of evidence in advance to the appellant thus occasioning prejudice and injustice in the entire process. The question I ask myself is that whether despite clear statement on record with regard to supply of the witness statements in advance this court should take the position of the appellant as true reflection of what transpired before the trial court.

In answer to this question I have perused the record and it reveals that the appellant was charged before court on 23rd October, 2016 when he pleaded not guilty to the offence. His trial commenced in earnest on 25th November, 2016 when the first witness Pw1 took the witness stand to testify on the matter.

The case was heard by a trial Magistrate as an impartial umpire as envisage under Article 50(1) of the constitution. The trial was conducted in the open as there is no evidence that the proceedings were held in camera.

There is no dispute that the appellant was accorded services of an interpreter in a language which he preferred at the commencement of the trial. He was able to cross-examine the witness called by the state to prove the charge against him as stated in the charge sheet.

It is also sufficient to note that the appellant was informed of the accusations on 23rd October, 2016 when he denied the offence of attempted incest.

Despite being there no clear record on the issue of whether witness statements were supplied, the appellant was informed the reasons for his arrest and the charges against him when he was arraigned before court on 23rd October, 2016. It is also evident that the issues arising out of cross examination do not seem to me to come from a person who was not aware of his indictment. The submission therefore by the appellant on the specific right constituting being informed of the evidence in advance means that both parties right to be in equal position during the time and course of the trial. The inequality of arms has not been sufficiently established by the appellant. To me the right to a fair hearing under article 50 must be interpreted as a whole. With regard to the scope of this minimum guarantee a judge or magistrate sitting as a trial court has the constitutional duty to identify in advance any acts of omission that could constitute a violation of this right. Looking at the matter closely the record is sufficiently clear that there was prompt notice of the nature and the complainant of the charge of defilement which the appellant was facing at the time.

However this is not to water down the value and protection to be attached on the right to promptly supply the appellant with the evidence being relied upon by the state. In the broad sense the mere fact that the trial Magistrate on account of any act of omission or commission failed to set forth in the record that witness statements have been supplied to the appellant does not render the trial unfair.

It is my view that there should be iron clad rules and directions as to how the right attributable to Article 50(j) of the constitution to be informed of the evidence in advance and reasonable access should be carried out and monitored. Taking into consideration of all these provisions and submissions by the appellant, I do not find that the learned trial Magistrate compromised the right to a fair trial or did anything to affect the integrity and probity of the proceedings. As a result in this appeal there is no evidence that the state infringed this right in Article 50(j) of the constitution.

I am therefore satisfied that the appellant's conviction was ascertained beyond reasonable doubt by the trial court. In the premises the appeal on conviction and sentence lacks merit and the entire appeal stands dismissed with no order to costs.

Dated, signed and delivered in open court at Kajiado this 17th day of December, 2018

.....

R. NYAKUNDI

JUDGE

In the present of:

Mr. Mutunga for Hassan for the appellant

Mr. Meroka for DPP

Appellant in person