REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 4 OF 2016

K K K ……..……. APPELLANT

VERSUS

REPUBLIC ……..……..……. RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 99 of 2013 of the Senior Principal Magistrate's Court at Kilifi – L.N. Wasige, SRM)

JUDGEMENT

The appellant was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act Number 3 of 2006. The particulars of the offence were that the appellant, on the 8.8.2012 at 3.00 pm at [particulars withheld] Village, in Ganze District within Kilifi County intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of B.Z. a child aged 6 years who was to his knowledge his niece.

The trial court substituted the charge of incest with that of defilement contrary to section 8 (1) (2) of the Sexual Offences Act. The appellant was convicted and sentenced to life in prison. He has now approached this court with his grounds of appeal being that: -

i. The trial court erred in law by amending the charge sheet without considering that the same was bad in law.

ii. The trial was not fair as the trial court allowed the amendment of the dates on the charge sheet.

iii. The appellant's arrest had no connection with the criminal case.

iv. The case was a made up one and the sentence is unsafe.

v. The age assessment report was not produced by an expert.

vi. The case was poorly investigated and was not proved.

vii. The trial court did not consider the appellant's reliable defence.

The petitioner submit that the trial court amended the charge sheet in its judgement. That was not the charge sheet he had pleaded. Under section 207 of the Criminal Procedure Act, the appellant was to be called upon to take a fresh plea. Further, section 214 (1) of the same Act calls upon an accused to take a

fresh plea should the charge sheet be amended. This made the trial not to be fair as required under Article 50 of the Constitution.

It is further submitted that courts have held that if the life of an individual is at stake, then the prosecution should be extremely careful as the consequences of conviction are serious. Care should be taken when drafting charges. The case of **NGOME PATRICK AND NGOME NYALE High Court Miscellaneous Applications Numbers 192/193 of 2004** has been cited. It is submitted that the appellant was not called upon to cross-examine the witnesses who had testified after the charge sheet was amended.

The appellant submit that the manner in which he was arrested is unclear. PW2 testified that she reported to the village elder who referred them to hospital. The village elder did not testify. PW2 does not know how the appellant was arrested. Further, the mother of the child testified that she saw semen on the victim's legs. The semen was not taken for testing to determine if they belonged to the appellant. The complainant's mother was the appellant's girlfriend. The appellant stopped the relationship and that is why the appellant was charged. The appellant got another lover of his age and the complainant's mother was older than the appellant.

It is contended that the age assessment report was produced by a police officer who could not answer any question regarding the assessment. The maker of the report ought to have testified as the police officer was unsuitable to answer medical questions. The police officer was not an expert. The Evidence Act provides that any report or document prepared by an expert might be used as evidence in criminal cases. The police officer was not an expert.

It is also submitted that the investigating officer testified that he did not do any investigations. The case was not proved beyond reasonable doubt.

The State opposed the appeal. It is submitted that section 214 of the Criminal Procedure Act allows amendment of the charge sheet any time before the close of the prosecution case. Reliance is also placed on the provisions of section 179 of the Criminal Procedure Act.

On the issue of the production of the age assessment report, the prosecution relies on the case of **HIRAM MWANGI GATHONJIA V REPUBLIC, Nakuru High Court Criminal Appeal Number 44 of 2013**. In that case, the court stated as follows: -

> **"I entirely agree with the appellant's contention that P3 form was produced by PW3, the investigating officer. PW3 also produced the age assessment report showing the child to have been about or 4 years of age together PRC (Post Rape Care Form) all admitted without objection by the appellant. ... Again it is clear to me unless the court deems it necessary (although it is always good practice to do so), failure to call and examine such medical practitioner as to his report is not fatal to the prosecution's case …"**

This is a first appeal and the court is duty bound to re-evaluate the evidence and make its own findings. PW1 was the complainant. She gave unsworn evidence. She testified that she was eight years old and a class one pupil. On 8.8.2012 at about 3.00 pm she arrived home from school. The appellant who is known to her went there and asked for a match box to light his cigarette. PW1's mother was not at home. She gave the appellant the match box. The appellant asked her to follow him. She refused but the appellant insisted. They walked together and the appellant gave her Kshs.10/= but she refused. The appellant also told her to remove her clothes but she refused. He started to undress her and also undressed himself. He then defiled her. She started screaming but the appellant told her to keep quiet. The appellant saw a cow approaching and ran away. The owner of the cow did not see them. She went home while crying and found her mother. She told her mother what had happened. The incident was reported to the village elder and then at the Kilifi police station. She was referred to Kilifi hospital where she was treated.

PW2 E Z is PW1's mother. She testified that PW1 was born on 7.7.2005. She was six years old when the incident occurred. On 8.8.2012 at about 3.00 pm she left her farm. She met her co-wife's child by the

name I, who informed her that PW1 had left with their uncle K K (the appellant). She followed the route which the two had taken but did not find them. She followed the other route but still did not find them. She then saw PW1 crying. She informed her that the appellant had defiled her. She checked PW1's vaginal and saw blood and semen on her thighs. She reported to the village elder who referred her to Dida dispensary. The matter was later reported to the police and the appellant was arrested. It is her evidence that the appellant is an uncle to PW1. He is related to her mother- in-law. She denied that the appellant was his boyfriend. It is her evidence that the appellant used to comment that she had beautiful children and she could have married one of them if he was young.

PW3 DR. SUCHIRA UDUGAMASOORIYA was based at the Kilifi County hospital. He produced the P3 form that was filled by Dr. Kalu who had left for further studies. He worked with Dr. Kalu for one and half years. The PW3 was filled on 13.8.2012. PW1's hymen was missing. The outer part of genital was normal. The absence of hymen meant that penetration had occurred. The P3 form was not filled immediately after the incident and PW1's injuries could have healed.

PW4 SGT. FRANCIS RONO was stationed at the Bamba police station. He took over the file from Cpl. Walumbwa who had been transferred. The appellant had already been charged in court. The case was investigated and the appellant was charged. The complainant's age was assessed. It was established that the complainant was related to the appellant. The appellant was arrested in Kilifi and escorted to Bamba police station.

In his unsworn defence the appellant testified that he is a boda rider. He was twenty four years old. He did not know the complainant. He denied the charges and denied that the complainant was his niece. He saw her for the first time on 22.3.2013 when he was arrested by the police at Matano Mane. Throughout 2012 he was ferrying coconut from Matsangoni to Matano Mane. He went about his duties until 22.3.2013 when he was arrested. He knows PW2 who used to be his girlfriend. He leant on the date of arrest that the complainant was PW2's child.

The issues for consideration is whether the prosecution proved its case beyond reasonable doubt and whether the trial was fair. The first two grounds of appeal involve the amendment of the charge sheet. The record shows that after the last witness testified, the prosecution sought to amend the charge sheet. The main reason given was that there was confusion of the dates. The trial court allowed the request. The charge sheet was amended and the prosecution closed its case. The appellant was not informed that he could call the witnesses who had testified for cross-examination. He informed the court that he had nothing to say. A date for Ruling as to whether the appellant had a case to answer was fixed.

I have seen both the original and the amended charge sheets. The original charge sheet indicated in the main count of incest that the offence occurred on 8.8.2013. The charge sheet further gave the date of arrest as 23.3.2013 and date of appearing in court as 25.3.2013. The substituted charge sheet states the date of the offence as 8.8.2012. The same date is indicated for the alternative count. The date of arrest is given as 23.3.3013 and date of arraignment in court as 25.3.2013.

The effect of the above amendment was to indicate that the offence occurred on 8.8.2012 and not 8.8.2013. By the time the amendment was made, witnesses had already testified and the record shows that they all referred to the date of the incident as 8.8.2012. PW3, the medical officer produced the P3 form and he stated that it was filled on 13.8.2012. The appellant testified that he was arrested on 22.3.2013 at Matano Mane. Definitely, the offence would have occurred prior to his arrest.

Given the manner in which the amendment was done, I do find that there was no miscarriage of justice. The prosecution only substituted the year in which the offence took place from 2013 to 2012. That was a normal human error which did not prejudice the appellant. Even if the witnesses were not recalled, there is no injustice occasioned to the appellant. The trial court ought to have explained to the appellant that he was entitled to have the witnesses recalled for further cross-examination. However, the error by the trial court did not cause injustice. The sequence of events was already established by the evidence on record.

The other form of amendment complained of involves the substitution of the charge by the trial court

from incest to defilement. This is contained in the judgment. The trial court found that the appellant is not related to the complainant. The charge of incest indicated that the complainant was the appellant's niece. In the absence of evidence on blood relationship, the trial court substituted the charge of incest under section 20 (1) of the Sexual Offences Act with that of defilement contrary to section 8 (1) (2) of the same Act.

Section 179 of the Criminal Procedure Act states as follows: -

> **(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**
>
> **(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.**

The above section is of the effect that one can be convicted with an offence which he/she was not originally charged of. The underlying principle of section 179 of the criminal Procedure Act is that the conviction on a different charge should be based on the fact that the particulars of the main charge have not been proved and that the evidence does prove that a minor offence was committed. The effect of the conviction will be that the accused will benefit by being convicted of a lesser offence and this will lead to a less severe punishment.

In the current case, the appellant was charged with incest under section 20 (1) of the Sexual Offences Act. Under this section, a sentence of not less than ten years is the minimum punishment. If the victim is below 18 years, the accused is liable to imprisonment for life. The presumption has always been that life imprisonment is the minimum sentence. My view is that life imprisonment is the maximum sentence under section 20 (1) of the Sexual Offences Act. In some provisions the law uses the term **"shall be liable"** while in some instances the term **"is liable"** is used. I will revert to the issue of the sentence herein below.

Turning to the substitution of the charge by the trial court, it is argued by the appellant that he was not charged with the offence upon which he was convicted. Section 179 of Chapter 75 presupposes that the substitution will lead to a lesser sentence. The minimum sentence under section 8 (1) (2) is life imprisonment. This sentence is similar to the sentence under section 20 (1) if the victim is under 18 years old. There is therefore no lesser punishment to the appellant. My view is that the substitution is quite debatable. Under section 20 (1), the operating words is **"shall be liable to imprisonment for life"** while section 8 (2) states that the accused **"shall upon conviction be sentenced to imprisonment for life"**. The word "liable" is not used under section 8 (2) meaning that imprisonment for life is the minimum sentence under that section.

Section 186 of the Criminal Procedure Act states as follows: -

> **When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.**

The above section equally empowers the trial court to convict a person charged with defilement which is not proved to be convicted with another offence under the Sexual Offences Act. The appellant was charged with incest but was convicted of defilement.

The next issue relates to whether the prosecution proved its case beyond reasonable doubt. The complainant's evidence is that she knew the appellant. The incident occurred at about 3.00 pm. She saw the appellant who asked for a match box. The appellant undressed her. She was only six (6) years old at that time. She was then defiled. Her mother arrived home and started looking for her. She saw PW1

crying and PW1 informed her that she had been defiled by the appellant. The matter was reported to the police. According to PW4, the case was initially investigated by another police officer who was transferred. It is not clear why it took some time to arrest the appellant. However, the O.B reference number is indicated as 25/13/8/2012. This shows that it was reported on 13.8.2012. The offence occurred on 8.8.2012.

The medical evidence indicates that PW1 was defiled. Her hymen was missing. Her age was also assessed on14.8.2012 by Dr. Mwachai L.G. to be six (6) years. This is in line with the evidence of PW2 who testified that PW1 was born on 7.7.2005.

The appellant's defence is that he did not commit the offence. Throughout 2012 he was ferrying coconuts from Matsangoni to Matano Mane. He was arrested on 22.3.2013.

From the evidence on record, I am satisfied that PW1 was defiled. I am equally satisfied that it was the appellant who defiled her. PW1 knew the appellant and gave his name to her mother. It is the same name that was given to the police. The appellant's contention that he used to be PW2's boyfriend is not well grounded. PW2 denied that allegation. The incident occurred during the day and PW1 knew the appellant. At her age of six (6) years, she could easily remember who did to her that grievous act. The defence evidence does not raise any doubt on the prosecution case. I do note that PW1 testified under oath and was not cross-examined. However, her evidence is believable and is corroborated by that of PW2 and PW3. The offence took place and it is the appellant who committed it. The appellant's defence was considered by the trial court.

The age assessment report was produced by PW4, sergeant Rono. The report by Dr. Mwachai L.G. simply indicate the complainant's age to be six (6) years old. The appellant contends that PW4 is not an expert. The intention of the report was to simply establish the complainant's age. There is the evidence of the mother which also gives the date of birth of the complainant. The trial court also saw the apparent age. There was no need for an expert to produce the age assessment report. The appellant did not object to its production. I do find that there was no miscarriage of justice. The production of the age assessment report by the investigating officer did not cause a miscarriage of justice. It is apparent that the child was below eleven (11) years old which still falls within the bracket of section 8 (1) (2) of the Sexual Offences Act.

Turning to the issue of sentence, it is clear that both the offence of incest with a girl of less than eighteen years old and defilement of a girl aged less than eleven (11) years old attract a sentence of life imprisonment. The only difference is that under section 20 (1) the convict is liable to imprisonment for life while under section 8 (1) (2) the convict shall be sentenced to imprisonment for life. The offence was charged from incest to defilement. It is evidence that the complainant was defiled. The presumption under section 179 of the criminal Procedure Act is that the offence upon which the court will substitute from the original charge (offence) shall carry a lesser severe sentence than the original one. Being liable to imprisonment for life in my view means that the sentence can be less than life imprisonment. The sentence under section 8 (2) of the Sexual Offences Act is the minimum. That is life imprisonment. This is a more severe sentence than that under section 20 (1). It should however not be lost that had the prosecution properly counter-checked the appellant's relationship with the complainant, they could have charged the appellant with the offence of defilement. The bottomline is that a child under the age of eleven years was defiled by the appellant. The appellant should be punished for that offence even if he could have been sentenced to a number of years in prison under the offence of incest. The trial court was correct in substituting the charge to that of defilement as the relationship between the complainant and the appellant was not properly established. In any case, the punishment for incest involving a girl of less than eighteen years can lead to life imprisonment sentence.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated and delivered in Malindi this 13th day of February, 2017.

S.J. CHITEMBWE

JUDGE