



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**CRIMINAL APPEAL NO. 147 OF 2011.**

**K L ::::::::::::::::::::::::::::::::::::::: APPELLANT.**

**VERSUS**

**REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT.**

*(Being an appeal from the original conviction and sentence of MIG Moranga – SRM in Criminal Case No. 1652 of 2009 delivered on 20<sup>th</sup> September, 2011 at Kakamega.)*

**JUDGEMENT**

**Introduction.**

1. The appellant herein K L was charged with the offence of incest by male contrary to section 20 (1) of Sexual Offence Act No. 3 of 2006 Laws of Kenya, particulars whereof were that on the 24<sup>th</sup> day of July, 2009 at [particulars withheld] village, [particulars withheld] location within Kakamega south District within Western Province, he unlawfully and intentionally inserted his genital organ namely penis into a genital organ namely vagina of M L a girl aged 11 years who to his knowledge knew is his sister.
2. In the alternative the appellant was charged with the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on the 24<sup>th</sup> day of July, 2009 at [particulars withheld] village [particulars withheld] location within Kakamega South District within Western Province unlawfully contacted his genital organ namely penis into genital organ namely vagina of M L, a girl aged 11 years.
3. The appellant denied the charges but after full trial the court found that he was guilty as charged on the first count whereby he was sentenced to life imprisonment.

**The appeal.**

4. He was aggrieved and dissatisfied with both the conviction and sentence and filed this appeal on his own home made grounds as follows:-
  - (1) *That, I pleaded not guilty to the above appended charge;*
  - (2) *That the learned trial magistrate erred in law and fact by failing consider that the protection of rights on both the prosecution and the defence parties was upheld as there was gross violation of the constitutional rights guaranteed under Article 50 of the constitution of Kenya to a fair trial;*
  - (3) *That, there was a material irregularity in the failure of the prosecution to disclose to the*

*defence all relevant evidence in their possession such as copies of statements of witnesses, copies of documentary exhibits to be produced at the trial and such like items even after the appellant having made several applications before the trial court which was a miscarriage of justice, unfair trial and unconstitutional under Article 50 (2) (c ) and (j) of the Constitution of Kenya;*

*(4) That, the learned trial magistrate erred in law and fact by failing to consider that the appellant's rights guaranteed under Article 50 (2) ( ) and (m) of the Constitution of Kenya were violated at his arrest as the offence arrested was assault and not defilement as charged tried and convicted;*

*(5) That the trial court erred in law by failing to uphold its rights in the trial as there was the need for the sitting court to have directed that an appropriate sample or samples be taken from the appellant at such place and subjected to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test in order to gather evidence and to ascertain whether or not the appellant committed the offence;*

*(6) That, there was a grave misdirection on the part of the trial court by failing to appreciate that there was no material evidence produced by the prosecution as an exhibit over the much spoken about the blood stained clothes in court to ascertain their case;*

*(7) That, the trial court erred in law and fact by basing a conviction on a single evidence of a minor without any corroboration of identification or whatsoever to justify a conviction which was a miscarriage of justice herein;*

*(8) That the trial magistrate erred in law and fact by rejecting the appellant's alibi defence which sufficiently created a reasonable considerable amount of doubt as to the strength of the prosecution case;*

*(9) That the decision of the trial court was made without jurisdiction;*

*(10) That the learned trial magistrate erred in law by failing to consider that there was constitutional violation of the appellant by overstaying in the police cells for more than the required period of 24 hours without any satisfactory explanation by the prosecution as to the delay as no any legal proceedings were allowed against him after the expiry of the 24 hours which was unconstitutional and renders the subsequent trial and conviction null and void;*

*(11) That, the trial court erred in law and fact by basing its decision on belief and anticipations not warranted by the evidence on records to justify a conviction.*

5. The appellant wants this appeal allowed, conviction quashed and sentence set aside.

### **Submissions.**

6. The appellant filed submissions which he wholly relied on in canvassing the appeal. Mr. Oroni opposed the appeal. He relied on the evidence of PW7 and PW2 which showed that the victim is a relative of the appellant. He submitted that the appellant took advantage of a minor aged seven (7) years who had trusted him as a guardian. He added that the appellant betrayed that trust and was rightly convicted. He further adds that the evidence of PW1 was corroborated by PW2, PW3, PW4, PW5 and PW6. He maintained that the appellant's defence was unbelievable and that the prosecution proved its case to the required standard and that the sentence was lawful. He wants the appeal dismissed.

7. This being a first appeal the court will re-evaluate the evidence on record and make its own conclusions bearing in mind that it is the trial court that heard the case and had the benefit of observing the witnesses demeanor as they testified. See the case of **Pandya vs. Republic [1975] E.A. 366 and Okeno vs. Republic [1972] E.A. 32.**

## The prosecution case.

8. The prosecution called six (6) witnesses. PW1 the complainant was taken through a voir dire examination and allowed to give a sworn testimony after the trial court was satisfied that she knew the meaning of telling the truth. This court notes that during the voire dire examination the trial court was assisted by an intermediary (Faurice Miyeka).

9. In her testimony PW1 explained what happened to her and what K (appellant) did to her after her father left the house to look for a job. K took her to the room and to the bed. He threatened her that if she told anyone of what happened he would cut her. In the room K removed her clothes and underpants and defiled her. She told the trial court exactly what K did “he put his “**Shitete**” inside my “**Mshipoto**” .....” She tried to cry but K told her that he would kill her. She went to her aunt F’s (PW4) house but she didn’t tell her what happened. It was at D’s place where she met L (D’s wife) (PW3) who she told what happened. She went to her home later and told her mother but she instead told her to wash the utensils as she did not believe her. She then decided to go back to PW3’s house because she was tired and her mother couldn’t believe her. She was taken to hospital by Priscilla (PW2) where she was treated and they reported the matter at Isulu. She told the trial court that K (appellant) was her brother who she identified on the dock.

10. When she was cross-examined by K she told the court that K had defiled her severally before and she had reported to her mother but her mother did not take any action.

11. PW2 Priscilla Livondo Kubasu, a home based care program member from Chisende Mungo Women’s group told the trial court how she received information from PW4 that PW1 had been defiled. She went to PW4’s home and took PW1 to Eshikhangi health Centre at Bukura where PW1 was examined. They were referred to Kakamega P.G.H. for treatment. They had a P3 form from Isulu Police Base which was filled at Kakamega P.G.H.

12. She told the trial court that K ran away from their home on 26<sup>th</sup> August, 2009 but was later arrested. She told the court that PW1 was ten years of age and produced a baptismal card which showed that PW1 was born on 18<sup>th</sup> September, 1997.

13. PW3, T L told the trial court that on the 24<sup>th</sup> July, 2009 at 8.00 a.m, she saw PW1 playing with her children. At about 4 p.m. she told her to go home but she refused and told her she was tired. It is then that she told her PW3, that when her parents go out every morning K (appellant) formed a habit of defiling her and he would always threaten her PW1 with death. This made her (PW1) afraid of disclosing to anyone. She, PW1 was tired of what was happening to her. PW3 then called her (PW1) mother and asked her if she knew what PW1 was going through but the mother was not aware. She also informed Flora (PW4) who recalled that she often saw M with blood shot eyes after lengthy periods of crying but he had never known why. Together with PW2 and PW4 they reported the case to Isulu Police Post and took PW1 to hospital.

14. PW4 gave an account of how she came to know the case of M, PW1 and how they interviewed the child with the help of a pastor. The child confirmed the claims and they reported to the assistant chief. The child was taken to hospital and they also reported at Isulu Police Post where they were issued with a P3 form.

15. PW5, PC JOHNSON GICHUHI No. 57848 from Isulu Patrol Base was assigned to investigate this case. After noting that the appellant was a brother to PW1 he charged him with the offence of incest and then arraigned him in court. He produced the P3 form and her baptism card i.e. “P.Exh. 1 and PExh. 2” respectively. He told the trial court that the appellant was arrested at Musoli AP camp.

16. PW6, FRANCIS WASIKE, a clinical officer from Webuye District Hospital filled the P3 form for M L. He examined her on 30<sup>th</sup> July, 2009 after she complained of having been defiled by her half brother severally including on the 24<sup>th</sup> July, 2009. He explained the injuries suffered which were one (1) week

old. He found that her hymen was ruptured and he produced the P3 form which was marked as exhibit P4.

### **Defence case.**

17. The appellant was put on his defence. He gave an unsworn statement and denied the charges. He claimed that he did not understand the case he was doing though he was aware of the charges facing him.

### **Analysis and determination.**

18. This court is alive to the fact that the appellant pleaded not guilty to the offence herein. He claims that article 50 of the Kenyan Constitution was violated and that he was not provided with copies of the statements by the prosecution witnesses. I see on record that on the 1<sup>st</sup> September, 2009 the day of plea the appellant did not plead guilty to the charges and was released on a personal bond of Ksh. 50,000/= with one surety of similar amount. On 14<sup>th</sup> November, 2009 the appellant applied to be issued with witness statements and the trial court did order that he be furnished with the said statements at his own expense. It was therefore incumbent upon the appellant to exercise due diligence and see how he would get those statements. He ought also to have asked the trial court for assistance if he encountered any difficulties. There is nowhere in the proceedings that show that the appellant's rights under Article 50 were violated at the time of his arrest. From the reading of the proceedings the evidence shows that the issues which were investigated and interrogated related to defilement and not to assault as the appellant would want us to believe.

19. The trial court took an intermediary in the case because the child was afraid of the appellant. It was a measure or step of protecting the child as explained to the appellant before *voire dire* examination could commence. The intermediary was the girl's (PW1) Sunday Schoolteacher. She volunteered as an intermediary to assist the young girl because her parents were afraid of facing the court.

20. Under the Sexual Offences Act, the court hearing a case of a child complainant in a Sexual Offence has an additional and critical duty and role to play. It has to determine whether the child is a vulnerable witness and this is done at a pre-trial conference. Once a witness is declared a vulnerable witness needing an intermediary the court must make an order for an intermediary to be sought for. See the provisions of section 31 of the Sexual Offences Act which the trial court herein diligently followed.

21. In his submissions the appellant has indicated that the father of the complainant was present when the offence occurred. It is difficult to accept this submission because sexual offences are done in secrecy. A look at the complainant's testimony is that "**there was no one at the time he did it**". This means that their father was not at home when the appellant defiled the complainant. I also don't agree with the submissions made by the appellant that PW1 was not reporting the incident to her parents. She was candid enough to tell the trial court that she reported the case to her mother who brushed it off and didn't take her seriously.

22. On the issue as to why PW6 did not take samples for D.N.A. tests in respect to the appellant, the law in section 36 Sexual Offences Act gives court's discretion to or not to order for this depending on the relevance of this test and the nature of the case. The appellant had the liberty to request which he didn't there was therefore no prejudice suffered by the appellant.

23. This court has also considered the evidence of the defence of the appellant and finds that it does not cause any doubts that the appellant defiled the complainant herein. The alibi evidence was considered by the trial court which concluded that "**a further pointer of guilt of the appellant was his disappearance from home for a month only to be arrested on an unrelated offence on 20<sup>th</sup> August, 2009.**"

24. The prosecution case was consistent and it proved the charges beyond reasonable doubt. On crucial witnesses being left out, I would say that it is not the number of witnesses summoned that matter in a trial but the veracity and credibility of the evidence of the witnesses who have testified that matter. Besides, failure to call witness by the prosecution does not prejudice the appellant's case.

25. The upshot of all the above is that the appeal herein lacks merit and is therefore dismissed.

**SIGNED, DATED** at **KAKAMEGA** this **10<sup>TH</sup>** day of **NOVEMBER**, 2016.

**C. KARIUKI**

**JUDGE.**

**In the presence of:-**

.....**In person** .....**for the Appellant.**

.....**Ng'etich** .....**for the Respondent.**

.....**Anunda** ..... **Court Assistant.**