IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 157 OF 2019

BETWEEN

DAO...APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi, J.) dated 16th December, 2014

in

H.C.CR.APP. No. 93 of 2012)

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JUDGMENT OF THE COURT

1. The appellant, DAO, was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act. He was tried before the Magistrate's court at Thika and convicted in a judgment delivered on 27th February 2012. He was sentenced to life imprisonment. His first appeal to the High Court was dismissed in a judgment delivered on 16th December 2014.

2. The particulars of the charge were that on 1st May 2011 within Kiambu County, he intentionally and unlawfully caused his penis to penetrate the vagina of BW, a child aged 10 years, who, to his knowledge was his niece.

3. The prosecution called four witnesses. BW testified as PW1. Her testimony was that her parents died when she was very young after which she went to live with her grandmother at Murera. The appellant, who is her uncle by virtue of being her late father's brother, was also living with them in her grandmother's house. From sometime in 2009, the grandmother would be away and would only return home on Sundays and then she would go away again. According to BW, the appellant was in the habit of defiling her. It began, she said, when she was in class 2 when her grandmother and her brother were not at home.

4. With particular reference to the incident in question, BW stated that on evening of 1st May 2011 the appellant asked her for money, beat her and had sex with her; that a neighbour, to whom she referred as wa-Sammy, heard her crying and invited her (BW) to her house where BW spent the night; and that the following day the matter was reported to the chief and to Ruiru Police Station after which BW was treated at Ruiru Hospital.

5. Jane Kigoko Maina (PW2) a community health worker as well as a volunteer children worker and a resident of Murera stated that on 25th April 2011, she received messages from the chief and from a lady known as Wamaitha who was "*holding a child who had a problem*"; that she proceeded to the home of the said Wamaitha where she found BW who narrated to her, "*that the uncle had been defiling her*" and that "it *started happening long before this date,*"; that she accompanied BW to the police station and thereafter to Ruiru Hospital where BW was treated.

6. Joan Munene (PW3) a clinical officer at Ruiru Sub-District Hospital, stated that she examined BW, aged 10 years, who reported to have been defiled by her uncle on 1st May 2011; that upon examination she observed that BW had bruises and redness in her private parts and noted that "*the hymen was absent*" and "*there was a discharge*" and "*concluded that there was defilement*."

7. The appellant was subsequently arrested by Corporal Shadrack Kioni (PW4), of Mugutha Patrol Base who was accompanied by the chief.

8. In his defence, the appellant stated that he lived in Ruiru and was a casual worker and knew nothing about the alleged incident; that on his arrest on 10th May 2011, he was not informed of the reasons for the arrest. He denied defiling BW.

9. Based on the evidence, the trial court was satisfied that the prosecution had proved its case to the required standard. In convicting the appellant, the trial court was particularly impressed by the evidence of BW. On appeal, the High Court after evaluating the evidence was also satisfied the offence was proved to the required standard and upheld the conviction and the sentence.

10. Dissatisfied, the appellant lodged the present appeal. In his amended grounds of appeal, the appellant contends that the prosecution did not prove there was penetration; that the age of the complainant was not established; that his constitutional right to a fair trial was violated because he was not provided with witness statements to enable him prepare for his defence; and that the High Court did not properly evaluate the prosecution case.

11. During the hearing of this appeal conducted via video conference, the appellant appeared in person and relied on his written submissions. He urged that evidence presented by the prosecution could not sustain a safe conviction; that the necessary ingredients of the offence were not proved beyond reasonable doubt; that it did not emerge from the testimony of BW that there was penetration in that she did not say her genital organ came into contact with that of the appellant; and that the absence of hymen is not conclusive evidence that the offence was committed. In that regard the decision of the High Court in the case of ***Langat Dinyo Domokonyang vs. Republic [2017] KLR***, was cited. He submitted further that the victim's brother who was allegedly living with them in the grandmother's house should have been called to testify.

12. With regard to the age of the complainant, the appellant submitted that there was no conclusive proof that BW was 10 years old. Referring to numerous court decisions including the High Court decision in the case of ***Nyongesa vs. Republic, Criminal Appeal No. 123 of 2009***, he submitted that proof of age is critical and that since BW's age was not backed by any cogent evidence and no age assessment was undertaken, the conviction is not safe.

13. The appellant further submitted that under Article 50(2)(c) and (j) of the Constitution, he was entitled to have adequate time and facilities to prepare for his defence and the right to be informed in advance of the evidence the prosecution intended to rely on and to have access to the same; that his rights in that regard were violated as he was not supplied with prosecution witness statements. In support, he cited the decision of this Court in ***Thomas Patrick Gilbert Cholmondeley vs. Republic, Nbi. Criminal Appeal No. 116 of 2007 [2008] eKLR*** for the argument that the prosecution is under a duty to provide an accused person with all relevant material such as witness statements in advance of trial. The appellant also relied on a decision of the Supreme Court of India in the case of ***Natasha Singh vs. CB (2013) 5 SCC 741*** to stress that fair trial is the main object of criminal procedure. He stated that when he took the plea, no order was made by the trial court for the prosecution to avail witness statements.

14. The appellant submitted further that both courts below relied on contradictory evidence to convict him; that there were contradictions and inconsistencies regarding the date when the alleged offence was committed thereby creating doubt as to his guilt. The appellant went on to say that his defence was not considered and that had the same been considered, he would have been given the benefit of doubt.

15. The appellant concluded by urging the Court, should it reject his appeal, to interfere with the sentence based on the Supreme Court of Kenya decision in ***Francis Karioko Muruatetu & another vs. Republic, [2017] eKLR***. He urged that the mandatory life sentence is unconstitutional and that the court should exercise its discretion and give a more lenient sentence taking into account that he has been in custody since his arrest on 10th May 2011.

16. Opposing the appeal, learned Senior Assistant Director of Public Prosecutions ***Mr. M.M. O'mirera*** submitted that the charge was proved to the required standard; that in convicting the appellant, trial magistrate properly relied on the evidence of the complainant in accordance with the proviso to Section 124 of the Evidence Act; that the claims by the appellant that his right to fair hearing was violated are belated; that as the appellant did not complain either before the trial court or the High Court about not being provided with witness statements, he cannot do so at this stage; that accordingly this court has no jurisdiction to entertain that complaint. In that regard, the decision of the Supreme Court of Kenya in ***Charles Maina Kitonga vs. Republic, SC Petition No. 17 of 2017*** was cited.

17. We have considered the appeal and the submissions. By reason of Section 361(1)(a) of the Criminal Procedure Code, this appeal, being a second appeal, can only be entertained on matters of law. As stated by this Court in ***Karani vs. Republic [2010] 1 KLR***

> ***73***:
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> ***"By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."***

18. Bearing those principles in mind, two issues of law arise for determination in this appeal. The first is whether the charge was proved to the required standard and whether the 1st appellate court erred in upholding the conviction. The second issue is whether the appellant's complaint that his right to fair trial was violated is well founded.

19. As to whether the charge was proved to the required standard, it was incumbent upon the prosecution to establish the identity of the assailant; the relationship between the assailant and the victim; the fact of penetration; and the age of the victim.

20. In as far as the identity of the assailant and his relationship with the complainant is concern, BW was not in any doubt that the appellant, her uncle, with whom she was living with in her grandmother's house, was the assailant who not only defiled her on the one occasion, but had formed the habit of doing so severally previously. She was also clear in her testimony that the appellant had sex with her. In her own words:

> ***"He beat me and had sex with me. He had sex with me while at home in the night. It was about 9.00 pm. He told me to remove my clothes. I removed all the clothes. It was a skirt, the blouse and the inner wear. He then put me on my bed. The house had one room but there were 2 beds. I lay on my back and he lay on me. I did not scream. If I screamed, he would have beaten me. He would hit me slaps and I would fall down. He would use a cane with a metal bar and that is when my other uncle would shout that he stops."***

21. Based on that testimony we are fully in agreement with the trial court, when it expressed that:

> ***"As to who the assailant was the minor has told "sic" that it was the accused person who is her uncle who defiled her not only on one occasion but severally. The child was candid as to "sic" be events that took place on the evening of 1 May 2011. The court had an opportunity to see the child testify in court and had no reasons to doubt her demeanour. The court will go by the testimony of the minor and find that the accused person indeed defiled her."***

22. The trial court was satisfied, based on the evidence and its observation of BW as she testified that she was truthful, and her evidence was reliable and credible. The requirement of corroboration of the evidence of victims of a criminal offence under Section 124 of the Evidence Act is qualified by the proviso thereto which stipulates that:

> ***"Provided that where in a criminal case 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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

23. Even if corroboration was to be required, the clinical officer (PW3) who examined her ascertained that her hymen was missing, and she had bruises in her private parts. That evidence is consistent with that of BW. The High Court, upon reviewing and evaluating the evidence was also satisfied that the ingredients of the offence were proved. The learned Judge of the High Court observed that BW,

> ***"…gave a detailed account to court on what transpired on the material night. Her evidence coupled with the medical evidence proved that she had been defiled, and it is the appellant who had defiled her."***

24. There are, therefore, concurrent findings of the two courts below that the ingredients of the offence were proved. As stated by the Court in ***Adan Muraguri Mungara vs. Republic [2010] eKLR*** we have a duty:

> ***"…….to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."***

25. With regard to the complaint that the age of BW was not proved, there is no doubt that the age of the victim under the Sexual Offences Act is a critical component. As this Court stated in ***Eliud Waweru Wambui vs. Republic [2019] eKLR***:

> ***"There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt."***

26. That said, a birth certificate or age assessment are not, as asserted by the appellant, the only ways in which the age of the victim can be established. As stated by the Ugandan Court of Appeal in the case of ***Francis Omuroni vs. Uganda, Criminal Appeal No. 2000***:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."*** [Emphasis]

27. In the present case, the trial court conducted *voir dire* in respect of the minor prior to her testimony in the course of which BW stated that, "*I am 10 years old. I am in standard 3 in…children's home*". PW2, the community health worker stated in reference to BW that, "*the child is 10 years old*". PW3, the clinical officer who examined and filled the P3 Form indicated BW's age as 10 years. During cross examination of those witnesses by the appellant, he did not challenge those assertions. In its judgment, the trial court found the age of BW to 10 years and when convicting the appellant referred to BW as "*a child of 10 years*,". The trial court was satisfied that all the ingredients of the offence were proved to the required standard before convicting the appellant. The learned Judge of the High Court, upon reviewing and evaluating the evidence reached the same conclusion. We do not have any basis for interfering with those conclusions.

28. The appellant also complained that there was an inconsistency in the evidence regarding the date when the offence was allegedly committed which, in his view, creates doubt as to his guilt. The appellant is right that there was a discrepancy in the date. The date indicated in the charge sheet is 1st May 2011. PW2 stated that she was at home on 25th April 2011 when she was alerted about BW1. The clinical

officer stated that she examined the complainant on 3rd May 2011 and that the “age of injury was 7 days.” She was however clear that BW1 reported defilement on 1st May 2011. Notwithstanding the discrepancies, the evidence of BW1 as to when the incident occurred was consistent with the date stated in the charge sheet. We are in agreement with the High Court that the discrepancy was not material as it does not go to the root of the prosecution case. As noted by the High Court, in light of the strong prosecution evidence, particularly the convincing testimony of the complainant, the discrepancy is not material as all ingredient of the offence were established.

29. The appellant also complained that his defence was not considered. He has in his submissions asserted that his alibi was not considered by the trial court. That argument is however not supported by the record. All he said in his defence is that he lives in Ruiru; that he is a casual labourer at Yadini Estate; that he was arrested on 10th May 2011 and the arresting officer did not inform him the reasons for his arrest; that he knew nothing about 1st May 2011 when the alleged offence was committed; that, the

> “*child was never with*” him; that the child was away since the closure of schools; and that he asked the police to take him to hospital which was not done. The trial court duly considered his testimony and stated that the appellant “*only narrated to the court how he was arrested and alleged that he was not with the minor on the 1st May 2011*” and concluded that his defence did “*not challenge the prosecution evidence on record*.” The claim that his defence was not considered is therefore not correct.

30. With regard to the complaint that the appellant’s right to fair trial was violated, the prosecution has a duty as the appellant rightly submitted, to disclose to the defence all relevant material that it intends to bring to court in support of their charge. See Court in ***Thomas Patrick Gilbert Cholmondeley vs. Republic*** (above). In the present case, the record shows that throughout the trial, on all occasions when the hearing proceeded, the appellant indicated that he was ready for trial. He cross examined all the prosecution witnesses and did not at any time suggest that he did not have their witness statements. Indeed, as pointed out by counsel for the respondent in this appeal, this complaint was not raised either before the trial court or the first appellate court. It is an afterthought. We do not think that there is merit in the complaint.

31. As for the sentence, Section 20(1) of the Sexual Offence Act provides that:

> ***“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 10 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 18 years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which penetration or the indecent act was obtained with the consent of the female person.”***

32. To buttress the gravity of the offence of incest, under Section 20(3) of that Act, upon conviction in any court of any male person for an offence of incest, the court is empowered to issue orders under Section 114 of the Children Act and in addition to divest the offender of all authority over such female and to remove the offender from his guardianship.

33. In his mitigation before the trial court, the appellant merely prayed for a lenient sentence and stated that he wished to assist his family and that he had health problems and needed medication. He showed no remorse. Under Section 20(1) of the Sexual Offences Act, imprisonment for life is not a mandatory minimum sentence and clearly, the learned trial court did not proceed on the basis that that was the only sentence it could impose. The trial court considered the mitigation and noted that the offence was committed against a child and that the appellant

> “*ought to have been a care giver of the victim, being an uncle to the victim*” and that a deterrent sentence was called for before sentencing him to life imprisonment. We do not have a basis for interfering with the sentence.

34. The result of the foregoing is that the appeal fails and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 25th day of September, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR