IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 199 OF 2016

BETWEEN

JWM .....APPELLANT

AND

REPUBLIC....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Machakos (Mutende, J) dated 28*th October, 2014 in H.C.CR.A NO. 20 OF 2012)*

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JUDGMENT OF THE COURT

1. This is a second appeal by the appellant arising from his conviction and sentence by the Magistrate's Court sitting in Kathumani, which was upheld by the High Court on first appeal.

2. A brief background of this case is that the appellant is the father to the victim, DM (PW1) who was aged 15 years old when the offence is alleged to have been committed. The appellant had been separated from DM's mother in October, 2007 and had married a second wife. PW1 lived with her younger sister AM (PW2), and their father would occasionally visit them on alternative days at their two-roomed house.

3. On the 10th of April 2011, the appellant visited PW1 and PW2. That night since he was sleeping over as usual, he ate and later requested for water to bathe, which PW1 gave him and then spread a mattress for him to sleep on the floor in the sitting room. The girls went to sleep but the appellant is said to have refused to sleep on the floor insisting he wanted to share the bed with his two daughters. According to PW1, she slept next to the wall on the lower part of the bed next to the appellant while PW2, slept on the opposite side. After a while she realized her pants were missing and it was at this point that she realized that the appellant had sexual intercourse with her.

4. On the 11th of April, 2011 their elder sister, MM took them to Nairobi to visit their mother, PW4. PW4 noticed that there was something bothering PW1; she was not eating well and she was standing and walking with difficulty. Unable to open up to her mother, she confided in her mother's friend, one N, that she used to have sexual intercourse with her father and as a result, she was experiencing abdominal pains. She narrated that the father would go home drunk and had defiled her on diverse dates the last being on 10th April, 2011. N in turn told the child's mother about the ordeal.

5. On 18th April, 2011 the child was taken to Blue Women Hospital in Eastleigh where Dr. Beatrice Kirubi, PW5, examined her confirming signs of defilement. The matter was reported at Yatta police station on the 23rd of April, 2011 and the child was then referred to Matuu District Hospital, where she was examined by Benjamin Maingi, a clinical officer at the said hospital. This witness observed the child had a torn hymen but it had healed; according to him it must have been torn about a month prior to the examination. However, no spermatozoa were detected. He then made a report and filled the P3 form which he produced as exhibit before the trial court.

6. The appellant was subsequently arrested on the 28thSeptember, 2011 and charged before the Magistrates' court with the offence of **incest** contrary to **Section 20(1) of the Sexual Offences Act.** The particulars of the offence were that on the 10thApril, 2011 in Yatta district, he committed an act which caused penetration with his penis into the vagina of DM, a female person aged 15 years who to his knowledge was his daughter. He was also charged with an alternative count of **Indecent Act with a child** contrary to **Section 11(1) of the Sexual Offences Act** in that on the same date and place, he did an indecent act with DM by touching her private parts namely vagina.

7. He denied the charge and the trial proceeded with the prosecution adducing evidence of 6 witnesses from which the learned trial Magistrate (A. W. Mwangi SRM), found the appellant had a case to answer and placed him on his defence. In his defence which was

unsworn, the appellant denied having committed the offence stating that his first wife, PW4, had framed him up to punish him for marrying a second wife. He alleged that he had received death threats from PW4 and that even on the 30th September, 2011 his son with PW4 had poisoned drinking water in the house where he lived with his second wife. It alleged that his son had since been arrested and charged with an offence. He based such alleged animosity from PW4 on the fact that she was interested in the family land hence intended to get him arrested. That evidence was corroborated by DW2, Cosmas Mutunga Kaloki, the sub-chief, Mamba sub-location of Yatta District.

8. The trial Magistrate was nonetheless not convinced by the appellant's account of what he said had happened. She consequently found the charge against the appellant proved to the required standard and convicted him vide a judgment delivered on the 27th January, 2012 and sentenced him to life imprisonment.

9. Aggrieved by the said conviction and sentence, the appellant appealed to the High Court relying on 4 grounds which can be summarized as follows:- *that the learned trial magistrate erred in both law and facts by relying on contradictory and inconsistent testimony to convict; relying on a defective charge to convict him; failing to find that the case was a frame up staged by the mother of the complainant due to an existing grudge and failing to find that the defence advanced by the appellant was truthful.* He also faulted the trial magistrate for failing to find that the alibi proffered by the appellant had not been rebutted by the prosecution.

10. The High Court (Mutende, J) re-analysed the evidence adduced before the trial court and finding no merit in the same dismissed it and upheld both conviction and sentence. Upon consideration of the appellant's appeal and the submissions made in that respect, the court was convinced on the basis of the material on record that the evidence of PW1 and PW2 confirmed what transpired on the material night. The court further concluded that there was no doubt that the appellant had committed the offence in question. As regards the sentence meted out, the High Court was equally convinced that the sentence was legal and appropriate in the circumstances and declined to interfere with the decision of the lower court. The appeal was consequently dismissed.

11. It is the said decision that has prompted the instant appeal. The appeal is grounded on the appellant's own homegrown grounds and supplementary grounds filed by his counsel on 9th June, 2017. The said grounds are *inter alia* that the learned Judge of the High Court erred in law by affirming the decision of the trial court yet failed to find that evidence against the appellant was adduced by hostile witnesses; failing to find that the appellant was not afforded a fair trial; relying on a defective charge sheet and by rejecting the appellant's defence which was not rebutted under **Section 212 of the CPC**. All these grounds are subsumed in ground 7 in the supplementary memorandum of appeal which accuses the learned Judge of failing to properly re-evaluate the evidence adduced by the prosecution.

12. At the hearing of the appeal, Mr. Muema learned counsel appeared with Mr. Maweu for the appellant while O'mirera Moses, Senior Assistant Director of Public Prosecutions appeared for the State. Mr. Muema submitted that PW2 was sleeping in the same bed with the sister, PW1 on the night in question. The room was dark and that it was not possible for her to see the appellant commit the offence; in essence suggesting that the conditions pertaining to the scene were not conducive to proper identification. He contended that there was no medical evidence adduced to prove that the appellant is the one who committed the offence. Further, that the medical evidence presented was contradictory in that PW1 was examined on the 20th April, 2011 yet the report relied upon was dated the 18th April, 2011. He faulted the two courts below for failing to address that contradiction.

13. On ground 7, counsel faulted the High Court for failing to evaluate the evidence saying that had the court done so, it would have arrived at a different conclusion. In closing, counsel urged the Court to invoke the principle enunciated by the Supreme Court in **Francis Karioko Muruatetu and others vs Republic [2017] eKLR** and reduce the sentence.

14. On ground 9 on right to fair trial, he submitted citing **Article 50 (2)** of the Constitution that the appellant was never supplied with the witness statements and was therefore denied the opportunity to defend himself appropriately. He urged the Court to consider all the grounds raised in the memoranda of appeal and allow the appeal.

15. In response, Mr. O'mirera, opposed the appeal. He submitted that both courts below relied on the evidence of the victim, her sister, PW2, the doctors, PW4 and PW5 to find that the appellant had defiled PW1. Counsel further submitted that after observing the demeanor of the witnesses, the court believed their testimony and the evidence cannot be impeached at this stage. On the allegations about the darkness in the room as argued by the appellant's counsel, Mr O'mirera posited that the room may have been dark but there was close proximity as they were sleeping on the same bed hence there was no possibility of mistaken identity.

16. Counsel conceded that indeed there were discrepancies in the medical reports but the High Court had considered the same stating that such inconsistencies were not fatal as the difference in the dates was only two days and further that the difference was on the date of the medical examination and not the date the offence was committed, moreover, there was no doubt that the child had been defiled. Counsel further submitted that PW1 was defiled not once but on several occasions. He submitted that this could not have been a case of mistaken identity.

17. On the contention that the appellant was framed, counsel reiterated that the doctor's evidence confirmed penetration and defilement of PW1.

Furthermore, the two courts below had made concurrent findings to the effect that the appellant had not been set up, and this Court cannot depart from those findings.

18. On the right to a fair trial on the basis of failure to supply the appellant with the witness statements, counsel submitted that it is not evident from the record whether the same were supplied or not. In any event, according to counsel what was instructive was that the appellant cross-examined the witnesses extensively. The appellant suffered no prejudice, as he understood the charges and the evidence adduced. Counsel further submitted that the appellant did not demonstrate that he asked to be supplied with the witness statements and that the same were denied to him. In any event, the issue was not raised on first appeal and that it was too late in the day to raise that issue. Counsel reiterated that the issue ought to have been raised before the trial court or before the High Court.

19. In closing, on the issue of sentencing, counsel submitted that the sentence imposed was merited. Counsel submitted that the offence was one of incest where the perpetrator was the victim's father and the sentence was therefore merited. He posited that this appeal had been given extensive media publicity but asked the Court not to be swayed and to consider the appeal purely on its merits.

20. On this last issue, we wish to reassure counsel and all concerned parties that cases before this Court are not tried through the media. Judges have the sacrosanct duty and responsibility to do justice in accordance with the evidence laid before the Court. Furthermore, judicial officers are trained to be blind, deaf and impervious to extraneous matters canvassed outside the court room by parties and their cronies and other sympathisers in the hope that the same would influence the court. This appeal will therefore be determined purely on the evidence contained in the record of appeal, the grounds of appeal analysed above, submissions of both counsel and the law.

21. We remind ourselves that this is a second appeal and our remit is therefore circumscribed by section **361(1)(a) of the Criminal Procedure Code** to matters of law only. We are also enjoined to respect the concurrent findings of fact by the two courts below subject to the test succinctly enunciated in many decisions of this Court including ***Karani vs. R*** **[2010] 1 KLR 73** where the Court pronounced as follows:

> **"This is a second appeal. 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."**

22. Having considered the record of appeal, the grounds of appeal proffered by the appellant, rival submissions of counsel and the relevant law, we discern the issues for determination as follows;-

a. Whether the High Court re-evaluated the evidence presented before the trial court and arrived at the correct verdict;

b. Whether the appellant's right to fair trial was violated and

c. Whether there is any reason to interfere with the sentence imposed on the appellant

23. On the first issue, this Court is tasked to establish whether the High Court as the first appellate court properly re-evaluated the evidence presented before it and whether in doing so, the Court arrived at an erroneous finding. This Court has often times held that the re-evaluation, which is akin to a mini trial need not follow any specific format. What is important is for the court on first appeal to relook critically at all the evidence adduced before the trial court and arrive at its own independent conclusion either way. This duty was amplified in this Court's recent decision in **Eliud Waweru Wambui v. Republic (2019) eKLR** in the following words;

> **"*It*** (the court) **is required to and must be seen to have, consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of the appellant, the only limitation to its task being a remembrance that it is without the advantage, enjoyed by the trial court, of seeing and observing the witnesses as they testified, for which it must make due allowance."**

24. We have studied the record of appeal with a view to satisfying ourselves that the first appellate court discharged its duty of evaluating the evidence before it. We note that the High Court reconsidered the evidence before it in its entirety, the learned Judge found as a fact that the appellant had upon his insistence slept in the same bed with his children. The court found that PW2 who was in the same bed heard what was happening between her sister and her father; there was no other stranger in the room and in view of the proximity and limited space in the bed she could not have mistaken the assailant.

25. The High court, like the trial court, found the complainant truthful, and found corroboration of her evidence in PW2's evidence. The High Court also considered the medical evidence afresh and concurred with the trial court that penetration had been proved. The High Court considered the appellant's claim that he had been framed up by his ex-wife and disbelieved him. These are concurrent findings of fact by the two courts below and we are enjoined by law to show deference to them, more so because we are satisfied that the High Court re-evaluated and gave careful consideration to the evidence before upholding conviction.

26. The appellant further faulted the findings of the High Court citing violation of **Article 50(2)** of the Constitution which provides as follows; -

> "**50. Fair hearing**
>
> **1. Every person has the right to have any dispute *that can be resolved by the application of* law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**
>
> **2. Every accused person has the right to a fair trial, which includes the right;—**
>
> **3. to have adequate time and facilities to prepare a defence*;" (Emphasis supplied)***

The appellant alleges violation of his constitutional rights in that he was not afforded adequate opportunity to defend himself, as he was not availed the witness statements. A careful perusal of the entire record of the proceedings reveals that: the appellant was charged on 29th

March, 2011; the charges in respect of the offences were read to him in a language which he understood and he pleaded not guilty in respect of all the charges in Kiswahili language. After plea there was no application for him to be supplied with witness statements. On all subsequent occasions when the matter came up for hearing, there is no indication that the appellant requested for witness statements and he was denied them.

27. As submitted by the respondent, there is also no indication that the matter was raised as a ground before the High Court. This therefore denotes that at no time did the appellant face any challenges or handicap in the course of the hearing on account of having not been availed witness statements. From the record of appeal, it is evident that sufficient opportunity was availed to the appellant to cross-examine the witnesses who testified and at no point was any objection raised that he was incapable of proceeding with the hearing for lack of witness statements.

28. In the case of **Richard Munene –Vs - Republic (2018) eKLR** this Court held as follows; -

> **"Dealing with the right to a fair trial under Article 50(2) (c) and (j) this Court said in Simon Githaka Malombe V R, Criminal Appeal No. 314 of 2010 that;**
>
> > **"…. Indeed, the availability of witnesses statements to the defense has always been a fundamental facet of this guarantee and avoids the spectre of trial by ambush especially in a criminal case. The High Court, sitting as a Constitutional Court had in the case of JUMA –VS- REPUBLIC [2007] EA 461 reasoned as follows, and we agree;**
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> **'We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence…' "**
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> **The trial court record for 10th January, 2013, in so far as it relates to this question, is to the effect that the prosecution was ordered to furnish the appellant with the charge sheet and witness statements. Subsequently, on 14th March, 2013, the prosecution applied for adjournment to call three witnesses; the clinical officer, one Macharia, the complainant's and one M, as the last two had recorded their statements. On account of that, the trial was stood over to 28th March, 2013 when the complainant and M testified. From that testimony, at least that of the complainant's grandmother, she reiterated that her evidence in court was the same as that in her statement to the police. The appellant exhaustively cross-examined both witnesses and at no stage did he complain that he was handicapped due to witness statements. This ground, for these reasons, must fail." *(emphasis added)***

29. From the foregoing, it is clear that failure to be supplied with witness statements will not *ipso facto* lead to nullification of a conviction. The court must go further and determine whether lack of witness statements was prejudicial to the appellant in the circumstances of the case. As stated earlier, the appellant never requested for the statements throughout the hearing. Had he done so and the same were denied him resulting in his inability to properly defend himself, the Court would have arrived at a different finding. In our view however the ground of violation of the appellant's right to fair trial holds no water and the same, like the other grounds, fails.

30. On the sentence, the appellant urged this Court to interfere with the sentence imposed by the trial court and confirmed by the High Court. Sentencing is a matter of discretion on the part of the trial court. Although the appellant urged the Court to interfere with the exercise of that discretion, other than citing the **Muruatetu** case (supra) which outlawed the mandatory aspect of the death sentence, no other reasons were advanced as to why the Court should interfere with the sentence imposed by the trial Court. We note from the record that the trial court considered the appellant's mitigation before passing sentence. Incest is by all means a very serious offence. A parent is the one person a child trusts most in his or her life. When such parent ceases to be the protector of the child and turns predator, the betrayal of that trust is unfathomable, and in most cases irremediable. That would explain why the law provides for such seemingly harsh sentences for incest.

31. The sentences imposed on the appellant is a lawful sentence, and severe though it might seem, by dint of **section 361(1)(a)** of the Criminal Procedure Code, severity of sentence is a question of fact and certainly outside the realm of this Court. In conclusion, for the forgoing reasons we find no merit in this appeal and dismiss it in entirety.

Dated and delivered at Nairobi this 25th day of October, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

……..…….

JUDGE OF APPEAL

J. MOHAMMED

…….……..

JUDGE OF APPEAL

*I cert*ify that this is a *true copy of the original.*

DEPUTY REGISTRAR