



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 173 OF 2017

SKB.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's

Court at Eldama Ravine Cr. Case no. 483 of 2016 delivered on the 10th day of July, 2017 by Hon. J. I. Tamar, PM]

JUDGMENT

Introduction

1. The appellant was on 10/7/2017 convicted and sentenced to imprisonment for 20 years for the offence of incest contrary to section 20 (1) of the Sexual Offences Act, the particulars of which were that he had “*on diverse dates between the year 2014 and April 2014 at unknown time at [particulars withheld] village in Koibatek Sub-county within Baringo County willfully and intentionally caused his penis to penetrate into the vagina of JK a child aged 14 years who is to his knowledge his daughter.*”
2. The appellant faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, with particulars that he had “*on diverse dates between the year 2014 and April 2016 at unknown time at [particulars withheld] village in Koibatek Sub-county within Baringo County intentionally touched the vagina of JK a child aged 14 years with his penis.*”
3. Upon full trial, the Court find the appellant guilty of the main charge of incest and held as follows:

“I have carefully considered the evidence tendered by the prosecution against the accused person it is not in doubt that the complainant Pw1 is accused person it is not in doubt that the complainant Pw1 is accused step-daughter within the meaning of section 22 of the Sexual Offence Act 2006. The accused therefore, is a step-father of Pw1.

I have also no doubt based on the testimony of Pw1, Pw2 and the medical examination by Pw4 that the accused person had sexual relation with Pw1 her step-daughter. Even where the complainant – Pw1 had sexual relations with other people and there is no evidence to establish that, in the instant case it is not a defence available to the accused person.

Pw1 evidence is well corroborated by the evidence of Pw2 and Pw4 even though corroboration is not a requirement under section 124 of the Evidence Act.

That age of the minor was also established by the report of Dr. Kamau and which was produced by Pw5, the Investigating Officer and which was not challenged by the accused person.

I therefore, convict the accused under section 215 CPC of the offence of incest contrary to section 20 (1) of the Sexual Offences Act.

Dated and Delivered this 10th July 2017

Hon. J. L. Tamar – SRM

10.07.2-017”

Appeal

4. On appeal, the appellant set out his grounds of appeal and filed corresponding written submissions as follows:

“AMENDED GROUNDS OF APPEAL FILED UNDER SECTION 350 (2) (V) OF THE CRIMINAL PROCEDURE RULES CAP 75 LAWS OF KENYA

My Lords, having received and perused the original trial Courts proceedings and its judgment delivered on 10/07/2017 by Hon. J.L. Tamar (SRM), I do beg leave of the Honourable Court to amend my earlier tendered grounds of appeal with the following amended grounds as hereunder;

- 1. That the learned trial Magistrate erred both in law and facts in not finding that the medical evidence was benign and unable to prove penetration.*
- 2. That the learned trial Magistrate erred in both law and facts when she convicted and sentenced me on contradictory evidence.*
- 3. That the learned trial Magistrate erred in law and facts when she convicted the appellant yet failed to note that my rights to fair trial were infringed.*
- 4. That the learned trial Magistrate erred in law and fact when she superintended an irregular trial against the Criminal Procedure Code.*
- 5. That the learned trial Magistrate erred in law when she failed to analyze the whole evidence before making her inference and disregarded my plausible defence without cogent reason.*

WRITTEN SUBMISSIONS

My lords, having perused the proceedings of the trial Court and its judgment, I do humbly seek leave of the Court to outline and expound on my amended grounds of appeal while numbering them in the order as they appear with salient palatable sub-titles.

My lords, it was prosecutorial case that on adverse dates between the year 24/4 and April 2018 at unknown time at [particulars withheld] village in Koibatek Sub-county within Baringo County willfully and intentionally cause my penis to penetrate into the vagina of JK a child aged 14 years who is to my knowledge my daughter. Alternatively, I was charged for indecent act with a child contrary to section 11(1) of the Sexual Offences Act no. 3 of 2006 (facts as for aforesated)

My lord, I did denied the charges which provoked prosecution to call witnesses to prove their case. I was then convicted to serve 20 years imprisonment hence the basis of this appeal.

GROUND ONE (1)

Medical evidence that was seriously benign and unable to prove penetration.

My lords, the Sexual Offences Act no. 3 of 2006 did intentionally elect to prove penetration as one of the basic element of proving defilement. This is why medical evidence becomes the standard of proof and should thus be benign of normal medical motion for it to be able to prove penetration beyond reasonable doubt which is 95% to 99% certitude that indeed it did take place. In the instant case, the good doctor PHILIP K. YATOR purports that on examination, the complainant’s labia majora and minor were reddened. Hymen not intact but old and torn kindly see page 18 line13 – 14. My lord, the above statement of the doctor and the facts of the alleged case are antithesis. They sharply differ like heaven and earth. There is evidence which shows that the complainant had been defiled since 2014 to 2016 April. I therefore submit that the doctor’s findings of reddened labia majora and minora are just but fictions of imaginations bearing in mind how long the alleged incident had taken place.

My lord, to support my contention, the law stipulates under section 48 (1) of the Evidence Act Cap 80 laws of Kenya as outlined gives a platform about a qualified medical man worth to give evidence that he must prove to the Court that he is specifically skilled in that science or Art in issue. The said doctor’s evidence is only based on the history given by the coached minor. The doctor did not lay down the criterial bestowed on him to give a clear case in how he attended the complainant. My lords in the case of Davis – vs- Esinburg Magistrate (1953) section 34 at page 401 the lord president cooper succinctly stated that;

“The function of an expert witness’ duty is to furnish the judge or the Magistrate or the jury with necessary scientific criteria for testing the accuracy for their conclusions as they enable the judge or the jury to form their independent judgment by application of these criteria to the facts provided in evidence “

My lord as already highlighted, it was the doctors findings that were crucial but fell short of fulfilling the required standards of prove as they based on theories and imagination from the history of the complainant.

My lords, I further submit that the above highlighted issues are pertinent as the doctors evidence was benign hence formed no basis.

GROUND TWO

Contradictory evidence that was unproven and below the standard required in law.

My lords; it is the evidence of Pw2 vide page 13 line 3 which says "...complainant is my child the third born aged 13 years." Also in line 5 of the same page "...she married me while I had the child." My lords the above quoted statements of Pw2 are antithesis. They both differ sharply as heaven and earth. The witness (Pw2) purports to have been married to the accused/appellant herein with a child meaning the child was the first born. Invariably the same witness claims that the child is the third born. It is therefore my contention that be it be that it was if the complainant was the third born, then her elder sisters who were together sleeping on the floor of that room could have noticed that. Furthermore, the reason was not given thus for the alleged incident to occur to the elder who were by evidence mature than Pw1 (complainant).

Secondly, it is a clear manifestation that the complainant's evidence is coached. Pw2 claims that the complainant came to him while crying. My lords I fail to understand this episode as the said Pw1 had never cried ever since but opts to cry when she is not allegedly offended as per the allegation. It believed this Honourable Court to find that allegation are sham through blatant coaching hence they cannot form any basis.

Your lordship, the evidence by Pw1 was material evidence which ought to be credible for it to fulfil the requirements of section 124 of the Evidence Act. The complainant is faulted as her evidence is premised on fabrications. She doesn't either support her claim neither prove to show that her mother was away for two weeks which was not proved by any document.

GROUND THREE AND FOUR MERGED

Unfair trial which contravened section 198 (1) of the CPC and section 210 of the CPC.

My lords, I humbly submit that in any proceedings before a Court, it is the accused person whose interests should be protected in adversarial system more than those of the state because the latter often ensures he/she has an edge over the former irrespective of whether the former's right are abused. In the proceedings of the trial Court at the beginning of the proceedings at page 5 lines 12 – 13 say: "The charges and elements are read and explained to the accused person in a language that he understands i.e English/Kiswahili who replies: My lords that is the trend throughout the proceeding. There is no provision for inquiring which language I was comfortable which is the basis of the entire process being fair or unfair. It is after picking the language of choice and not the language of Courts provided for in section 198 (1) of the CPC.

I invite the Honourable Court to the trial proceedings on page 7 line 20 – 21 which says," Accused:- I need statements. I also need time to go through the statements with the assistance of my inmate because I do not know how to read."

My lords; the language interpretation is a non-derogable right enshrined in the Constitution Article 50 (2). The law provides that every accused person has a right to an interpreter without pay. This was a right that ought to have been protected, fulfilled and respected. It was my right to proper language interpretation of my choice not Courts choice and by extension fair trial process. This was not the case whereas the language is indicated as English/Kiswahili as there is no specific language was used. This was overlooked by the trial Court as per my indication of not understanding even the statements. In the cited case of JUSTICE F.N MUCHEMI AT BUNGOMA IN DAVID NYONGESA OKWATENGE –VS- REP (2010) eKLR where the Judge held saying:

"It is clear that the record does not indicate the language used to read and explain the charges to the appellant. The indication of English/Kiswahili is ambiguous because it does not show which of the two language between English and Kiswahili the Court used. There is no record of whether the Court enquired from the appellant what language he understood, such as enquiry would have assisted the Court to decide the language of reading and explaining the charge(s)."

Your lordships, of particular concern here is the effect of the equivocal language interpretation has on the entire process. First and foremost, the language of my choice would have been Pokot dialect of the Kalenjin tribe. The Court decided to elect its ambivalent language interpretation hence vitiating my rights to comprehend the entire trial was hinged on ambivalence and ambiguity of the language interpretation since it is ambivalent to tell whether English was used throughout or Kiswahili or both which weren't the language of my choice. I humbly urge the Honourable Court to apply the principles inherent in the already quoted Lady Justice F.N. Muchemi's holding since it has a lot of affinity with my case as per section 198 (1) of the CPC.

GROUND FIVE

Analysis of the whole prosecution evidence alongside the defence

My lords, in my trial, justice and fairness are paramount to maintain the legitimacy of the legal system and ensuring individuals trusts the legal system. The Courts are obligated to ensure justice to all irrespective of race, sex, marital status, origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. In the instant case the trial Court is faulted for having failed to analyze the prosecutorial case alongside the defence case.

The evidence of Prosecution's was based on fabrications andIt is very clear that the case emanated from continued quarrels in the family which mounted a coached case as per page 11 line 22 "you sometimes quarrel with my mother" This indicates the reus the complainant had in cohorts with her mother simply because of the complainant misbehavior cautions.

Your lordships, to support my contention, the Courts in its opinion stated that, kindly see page 15 line 18 – 19. "points to accused without having eye contact" Indeed my lords, the complainants evidence was total lies i.e she was unable to maintain her eye contact to cover up her plan with the mother. It is my contention that the complainant even did not identify her treatment notes in Court. She does not disclose to Court whether she was given the P3 form in the alleged hospital or not. From the foregoing it does believes this Honourable Court to find that the treatment notes and P3 form emanated from unknown source to unknown person. Failure for the complainant to identify her exhibits is tantamount to saying that they did not belong to her. I pray that the Court

finds it so as per the provision of law.

Additionally, the medical attendance with their referral notes were not availed in Court as evidence. Failure to call the maker of the above exhibits and the exhibits themselves was fatal to the defence. The alleged treatment and referral notes contained primary findings on the complainant which were essential in the instant case. My lords, I humbly ask this Honourable Court to note that the idea of such evidence and these allegencies are a hearsay and they cannot be reliable. It is my humble contention that rules are rules and the rules of evidence must be obeyed in order to ensure justice. Once you start to accept breaches of the rules as being justified by the outcome, then the whole law of evidence could begin to collapse.

Surely my lords, in weighing the complainants and other Prosecution witness's evidence alongside the defence, the Court overlooked the defence without giving cogent reason why she believed the Prosecution evidence which was below the standards required.

Your lordships, at the core of this matter is whether there were any existing circumstances which would weaken the inference of guilt or destroyed it completely. My holding is that indeed there existed a myriad of issues underlying the Prosecution case which destroyed it completely. Firstly, the evidence of the complainant (Pw1) raises many points germane to the operation of criminal justice system. Her evidence is flawed and cannot at all form any basis as per section 124 of the Evidence Act. Kindly see her testimony. It is clear that her veracity is doubtful and unreliable. She claims of having not disclosed the allegation for about 2 years; that is immaterial and cannot happen as she would like the Honourable Court to believe. If indeed the alleged defilement could have occurred then the inference of the Court could have been somebody, bearing in mind the physical changes in girls could clearly had noticed. I pray that the Court re-evaluates with a keen eye the evidence of Pw1 and make out the assumption's in line with the defence as laid down under the law."

5. The DPP opposed the appeal in oral submissions as shown on the record of proceedings of the appellate Court and as follows:

"Appellant

I have presented written submission and I do not wish to add anything.

DPP

We oppose the appeal on conviction but not sentence.

Complainant stated how the appellant who is the step-father defiled her while the mother was away and when she came back from hospital.

The Doctor corroborated the evidence found the labia were red and hymen was not intact and was old and torn.

Medical history – he concluded complainant had been defiled.

Pw5 produced age assessment report indicating complainant at 14 years. Although the evidence of defilement is overwhelming. The appellant is a step-father not the father of the complainant and the offence of incest cannot be proved.

Appellant was charged with alternative charge of indecent act contrary to section 20 (1) of the Sexual Offence Act.

Appellant convicted on wrong charge of incest. I urge Court to use discretion under section 382 Criminal Procedure Code to convict the appellant under the alternative charge of indecent act and sentence him accordingly.

Accused was sentenced to 20 years. The sentence was wrong because being under 18 years and incest has proved the sentence ought to have been life.

Appellant

We had disagreement with the appellant's mother."

Issues of Determination

6. The issues for determination before the Court are whether the offences of incest contrary to section 20 (1) of the Sexual Offences Act or the alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act were proved against the appellant.

The Evidence

7. The evidence before the trial Court was principally as follows:

"PW1

I am SJK, I go to school in [particulars withheld] Primary. I stay with my mother called CC. I also stay with my grandmother and my sibling. They are;

1) SK

2) CK

3) DK

I recall that my mother was once admitted in Eldama Ravine Hospital for two weeks. We were left with my dad SK.

Me and my siblings stay in the same house with my parents. The room is divided by a bed sheet. Dad and mother had a bed and we the children sleep on the floor.

While asleep on dates I can't remember Dad came and held me by the neck it was at night. He had a torch. I also had a torch and I saw him. He held me by the neck and told me not to say anything that I should be quiet and not make any noise. He removed my under pants and pushed my skirt up. He removed also his short trouser. He removed his penis and entered into my vagina. After finishing he told me to dress up. He also dressed and told me not to tell any other person otherwise he would kill me by cutting me into pieces.

He went back to his bed. The other children were asleep. I felt pain. I didn't cry because he had held my neck and told me not to scream.

After that I did not tell anybody because I feared he would kill me. He would then skip a day or two and then again would come to where I sleep and do "tendeo la Ngono" to me.

Court – What is 'tendo la ngono?'

Answer – to rape.

He continued raping me even when my mother was discharged from hospital. My mother didn't hear when dad raped me. I also did not tell her because Dad had threatened me.

On 1st May 2016 I decided to tell mum that Dad had been sleeping and having sex with me. When I told mum that day she told me that she was going to church and told me to remain at home until she comes back.

The following day on Monday I went to school and my mother came later and told the teacher. I was then taken to Solian Dispensary and later I was taken to Esageri Health Centre.

The doctor at Esageri checked me. He pressed my stomach. He also checked my private part. He told us to go back home.

On Tuesday I went back to school where mother again came and took me to Eldama Ravine District Hospital. The doctor at Ravine examined my sexual organ and gave me some medication.

After the hospital my mother took me to Eldama Ravine police station. I recorded statement.

We stayed at my uncle's place in Ravine as it was late, I never went back home. Father was later arrested. My father is present in Court. Points to accused without having eye contact.

Cross-examination by accused

You sometimes quarrel with my mother.

When mother was admitted you used to go and see her and then come back home.

Re-examination

My mother was admitted in 2014. I was then in class five.

PW2

My name is CC. I live in [particulars withheld]. I am a farmer. The complainant is my child the third born aged 13 years. She was born in 2002. I have applied for birth certificate of the child.

The accused is my husband. She married me while I had the child. He is not the child's biological father. I recall on 1st May 2016 in the morning I was preparing to go to church the child had gone to Sunday school and she came to the room crying. She told me that

the father had sex with her several times. I was shocked and sat down. I cried a lot.

I went to church and the following day I took her to Solian Dispensary. I was advised to take the child to Esageri Health Centre. I took her there but again I was told to take her to Eldama Ravine Hospital which I did the following day.

The child told me that the accused used to sleep with her at night. Our house is one roomed I sleep in bed with husband and children on the floor in the same house.

The child told me that the accused had threatened her if she ever disclosed what happened. Shown treatment notes S. No. 7410 MFI – 1 then went to Eldama Ravine police station where I was given P3 form. Treatment note from Esageri MF1 -3. I had a lot of respect for the accused who is my husband. We married in 2007. We have three children with the accused.

I had been admitted at Eldama Ravine Hospital for one week.

Cross-examined by accused

You are my husband. I told the village elder about the incident. I did not confront you when the child told me. I decided to take the child to hospital. The hospital examined the child.

Re-examination

I did not confront my husband immediately. I took the child to hospital when she told me about the incident.

PW3

My name is John Suge retired Chief. I have been Chief for 18 years in [particulars withheld]Location Solian Sub-Location. I know C C she is a resident of my Sub-Location.

I recall 6th May 2016. I was called by the acting Chief Ben Sitienei who asked me to meet him at Solian AP camp over two issues one issues of brewing and a report made by a lady over incest incidence.

We conducted raid together with the Aps and accused was found sleeping in the house with his son. It was around 4:00 am in the morning.

The Ag. Chief had earlier received information regarding the accused alleged incest with his daughter. He was arrested and then taken to police for further action.

The accused who was arrested is in Court. Identified. I knew the accused person. He worked as a driver in a saw mill. I had no differences with accused.

Cross-examination by accused

I didn't know you as a bad man.

PW4

I am Dr. Philip K. Yator attached to Eldama Ravine Sub-County Hospital.

On 5th May 2016 a minor was brought to our facility having been referred by Esageri Health Centre. Here is medical document from Esageri Health Centre. MFI-3 based on the referral notes the victim was examined further and medication given as evidenced by the treatment notes in Eldama Ravine MFI-1.

I also filled the P3 form received from Eldama Ravine District Hospital. I filled on 6th May 2016.

The history of patient is that of defilement severally by person known to her. Reports defiled since class 5 to 7.

The child disclosed the incidence to the mother. The suspect is the victim's father.

On examination, I found that labia majora and minor were reddened. Hymen not intact but old and torn.

PW5

I am No. 75149 CPC Cicilia Githinji based at Eldama Ravine police station I am the Investigating Officer in this case recall on 6th May 2016 a report of defilement had been made at the police station. 9th May 2016 the accused was arrested and brought at the station. I met the complainant and her mother who I interrogated. I found that the victim was treated at Esageri on 4th May 2016

and later at Eldama Ravine.

The complainant told me that on 2014 on date she couldn't remember she was sleeping when she felt someone touching her it was at night. The person strangled her she identified the person as the father. The house is one roomed separated by a sheet. The father then defiled her severally thereafter until she told her mother in 2016. The child was threatened that if she disclose what had been happening he would cut her.

I later came to learn that the accused is a step-father but the mother was married by accused when the victim was so young.

I took the child for age assessment and the child was found to be of 14 years.

The accused was arrested and I took him for medical assessment.

I confirmed also from the mother that she had been admitted at Eldama Ravine Hospital for mental check-up.

Cross-examination by accused

The complainant told us that you defiled her. The complainant know you as father.

Re-examination

I interrogated the child and she told me that the accused is her father.

DW1

I am SKB was a resident Solian. I did not commit the offence. When I was arrested I was told it was because I had alcoholic houses.

I had difference with the complainant. She was sick. The allegation against me was false. The victim in question had a sexual relation with other people. She even at some point disappeared into a neighbor's house. Her mother even complained about the misbehavior."

Analysis of Evidence

8. The trial Court conducted a *voire dire* examination and found the complainant then aged 14 years as being "possessed with sufficient intelligence and understanding the nature of Oath and the duty to tell the truth. Witness to give sworn evidence."

The Court may only have acted in extra caution as the requirement of *voire dire* examination is for children of the tender age judicially determined to be below the age of 14 years. See **Kibangeny Arap Kolil v. R** (1959) EA 92 and Patrick **Kathuruma v. R** Court of Appeal at Nyeri Cr. Appeal No. 131 of 2014.

9. The evidence of Pw1 as to how the step-father continuously defiled her since 2014 when the mother was hospitalized, continuing after the mother came back home until the 1st of May 2016 when she decided to tell the mother as supported by the evidence of the mother Pw2 who recalled the child reporting to her of multiple sexual encounters with her step-father. The mother also testified that she had 3 other children with the accused husband whom she had married when she had already had the complainant. Although the accused alleged disagreement with the mother, it does not explain the evidence of defilement of the child. The mother and father may well have had disagreement but the evidence of defilement was confirmed by the medical examination by Dr. Yator Pw4 who "found that *labia majora and minora were reddened. Hymen not intact but old and torn.*" It is also no answer, as the defence alleged, that "the victim in question that had a sexual relation with other people. She even at some point disappeared into a neighbour's house [and] her mother even complained about the child behavior." The appellant was in the *position of loco parentis* to the child and it was a breach of duty of care to sexually abuse her even though she may also have been abused by other people. I find the testimony of the complainant Pw1 is supported by the mother Pw1 and doctor Pw4 to prove defilement of the child beyond doubt. The appellant was, however, not charged with defilement.

10. The offence committed by the appellant is, however, as conceded by the DPP not of incest contrary to section 20 (1) of the Sexual Offences Act for which the trial Court convicted him. As evident from the evidence the mother Pw1, the appellant is the step-father of the complainant, and the offence of incest is, therefore, not proved as a step-father is not "father" for purposes of the Sexual Offences Act provision on incest. Section 22 of the Act is in the following terms:

"22. (1) In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

(2) In this Act-

a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;

b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;

c) “half-brother” means a brother who shares only one parent with another;

d) “half-sister” means a sister who shares only one parent with another; an

e) “adoptive brother” means a brother who is related to another through adoption and “adoptive sister” has a corresponding meaning.

(3) An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

(4) In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the Court may give an order removing the accused person from the house until the matter is determined and the Court may also give an order classifying such a child in need of care and protection and may give further orders under the Children’s Act.”

The section does not define “half-father.”

11. However, in the proved sexual assault of the complainant is proved the complete offence of indecent act, for which the appellant was alternatively charged. The age assessed report put the complainant’s age at 14 years, while the mother said the child was 13 years old born in 2002 and the Court on *voire dire* must have observed the tender age. I accept as proved that the complainant was a **child**, which is all that is required of an offence of indecent act **with a child**. I convict the appellant for the alternative charge of indecent act with a child.

Conclusion

12. The offence of incest is not applicable to the facts of the case as the appellant is the step-father and therefore not “father” of the complainant for purposes of section 22 of the Sexual Offences Act. However, the appellant is guilty of the offence of indecent act with a child charged as the alternative count in the case.

Orders

13. Accordingly, for the reasons set out above, the conviction and sentence of imprisonment for 20 years for the offence of **incest** contrary to section 20 (1) of the Sexual Offences Act are quashed and set aside, respectively.

14. The appellant is convicted on the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

15. The appellant is sentenced to imprisonment for 10 years from the **10th July 2017** when the appellant was convicted and sentenced by the trial Court.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF JUNE 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.