REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.37 OF 2015

P K K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence in Kericho CM Cr. Case No. 32 of 2014 (O.S)

by Hon. L. Kiniale (SRM) dated 19th August 2015)

JUDGMENT

1. The appellant was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 24th day of April 2014 in Kipkelion District within Kericho County he unlawfully and intentionally caused penetration of his penis into the vagina of his niece, A C, a girl aged 6 years.

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of this offence were that on the 24th day of April 2014 in Kipkelion District within Kericho County unlawfully and intentionally touched the vagina of AC, a child aged 6 years with his penis.

3. The appellant pleaded not guilty to the main count as well as the alternative charge. He was tried before the Senior Resident Magistrate, L. Kiniale in Kericho and found guilty as charged. He was sentenced to life imprisonment as provided by law. He has appealed against both his conviction and sentence and in his grounds of appeal, he argues that his defence was overlooked and he was not given witness statements in time to prepare for his defence before the hearing. He has further argued in his submissions that one D and the mother-in-law of the child's mother were not called to give evidence. It is also his contention that the case against him was a fabrication.

4. The prosecution called 5 witnesses in support of its case against the accused. PW1 was IK, the mother of the complainant, a child of 6 years then in pre-school at [particulars withheld]. The child was born in 2008 as indicated in the clinic card produced in evidence.

5. On 24th April 2014, PW1 had gone to the farm at about 8.00 a.m. with D, one of her 5 children, leaving the others at home. She returned at about midday and was informed by her 2 ½ year old daughter that the accused had given her and A doughnuts and tea. He had then taken these two children to his house. PW1 had noticed that A was dull, then noticed the next day that she could not sit and was sleeping facing down and not playing with others. PW1 had asked her what was wrong but she did not say anything, nor did she say anything the following day, 25th April, 2014. The day after, her daughter, D, had told her that A had informed her that the accused had taken her to his house, given her a doughnut and then put her to bed. PW1 had gone to ask her mother in-law who told her that she had been informed and was very shocked.

6. PW1 had taken A to hospital on 6th May 2014. She had also asked A what had happened and A had informed her that indeed the accused had taken her to bed. She checked her and did not see any bruises but her private parts seemed open.

7. PW1 had gone to the police station and been given a P3 form to take to the hospital, and then she returned it to the police station. The accused had been arrested while they were at the hospital. She stated that there was no grudge between her and the accused, who was her brother-in-law. In cross-examination by the accused, she stated that he had bought two doughnuts and had only given A, the complainant, and the 2 ½ year old, B. A's shoes were recovered from the accused's house after his arrest.

8. The complainant, A, was PW2. She identified the accused as P, 'baba mdogo', who had given her tea and doughnuts. The accused had taken her to his bed in his house and had done 'bad manners' to her. He had removed her panty and done 'bad manners' to her. She had told her mother and she was taken to hospital and given drugs. The accused had done 'bad manners' to her in her private parts, which she pointed at while giving her evidence.

9. PW3 was the father of PW1, the child's mother, and a grandfather of the complainant. He had been asked by the Assistant Chief on 6th May 2014 at [particulars withheld] Shopping Centre whether he knew that his granddaughter had been raped by her uncle, P. He had looked for the village elder and informed him that it was P who had raped A. He had met PW1 and PW2 on 7th May 2014 as they were going to Kipkelion sub-district Hospital. He had later gone to [particulars withheld] and on the way back, had met the accused. He had, after calling PW1 and being told that they were pursuing a case against the accused, got hold of him and raised the alarm, and members of the public had assisted him to arrest the accused. He had then got assistance to arrest the accused from police at Kedowa Police Station. He stated that he had no grudge against the accused, who was his son-in-law as his daughter, PW1, was married to the accused's brother.

10. Instead of cross-examining PW3, the accused stated in Kipsigis: *'I plead for leniency' I ask the complainant to forgive me.'* When asked by the court whether he wished to change his plea, he responded in the negative.

11. PW4 was Weldon Mutai, a Clinical Officer. He had filled the P3 form in respect of the complainant, who had been defiled by a person well known to her who had lured her to his house. PW4 had noted that the complainant, a child of 6 or 7 years, was walking with difficulty. He found that the labia minora and labia majora were normal, but she had no hymen. She had numerous pus cells, suggestive of a sexually transmitted infection. There were no signs of penetration but from the history given, he concluded there was penetration. He had given the complainant anti-biotics and pain killers.

12. The evidence of PW5, PC Daniel Kirui, was that he had received a call from one J R informing him that the accused had been arrested by members of the public while attempting to escape at [particulars withheld]. He had escorted the accused to Kipkelion Police Station. He had recorded statements from the complainant and her mother, and had later charged the accused with the offence. He produced the immunization card in respect of the complainant. In cross-examination, he stated that the accused had been arrested by members of the public at [particulars withheld], where he had ran away to after committing the offence.

13. In his statement which the record indicates was sworn, the accused denied committing the offence. He stated that there was a dispute at home concerning dowry. He alleged that he had told his sister-in-law's family to wait for the cows to become many before they came for them. He alleged that his sister in law and her father had told him that they had become enemies and that is how he was framed.

14. In its decision dated 19th August 2015, the court found that the child was a child of tender years that she had been defiled, and that it was the accused who defiled her. The court noted that examination of the child was done almost two weeks after the incident, by which time most injuries had healed. The court further found that the evidence against the accused was overwhelming and proceeded to convict him.

15. I have considered the evidence above against the accused's grounds of appeal and his written submissions. I have also noted the submissions made by Ms. Keli, learned Prosecution Counsel, in opposing the appeal.

16. The appellant bases his appeal on two main grounds. First, that his defence was overlooked by the trial court. I have considered the defence statement. He alleges in his defence that there was a dispute over dowry between himself and his sister-in-law, the mother of the complainant. This was the reason, in his view, that the charges against him were fabricated.

17. I note from the judgment of the trial court, however, that the court did consider the defence, but found that it did not weaken the strong prosecution case. Indeed, it is to be noted that the accused did not call any witnesses to support his contention that there was a grudge between him and his in-laws, nor did he challenge the in-laws, PW1 and PW3, when they gave their evidence. I note that after the testimony of PW3, the father of the complainant's mother, he actually asked for forgiveness.

18. The complainant also alleges that he was not given witness statements. It is true that he has a constitutional right to be given statements to enable him prepare his defence. However, there is no evidence that he raised the issue of the statements during his trial, and that he was denied the statements. The record indicates that he was ready to proceed with the trial, and was able to cross-examine all witnesses. It appears to me that this ground is raised, as submitted by Ms. Keli, as an afterthought.

19. The appellant has raised an additional ground in his written submissions. This is that one D and the mother in law of PW1, who is his mother, were not called as witnesses. However, I believe that there is no requirement in law for any number of witnesses to be called to testify. Section 143 of the Evidence Act gives the prosecution the right to determine the witnesses to call. From the evidence before the trial court, the witnesses called by the prosecution were able to testify to the facts at issue and to prove the case against the accused beyond reasonable doubt. In addition, as submitted by Ms. Keli, the two witnesses, PW1's mother in law and D, the sister of the complainant, would only have testified to what they had been informed by PW2.

20. The appellant further complains in his submissions that PW3 was in court while PW2 was testifying. However, in my view, there was no prejudice caused to the appellant by the presence of PW3 in court during the testimony of PW2. As appears from his evidence which the accused did not test in cross-examination but instead pleaded for leniency, the evidence of PW3 was confined to his role in effecting the arrest of the accused with the help of members of the public, and handing him over to the police. I therefore find no merit in this ground.

21. Finally, the appellant has argued that the case against him was a fabrication. I have however, considered the evidence that was before the trial court. The complainant was his niece, aged 6 years old as was proved by production of her immunization card. He had done 'bad manners' to her, as she testified, pointing at her genital area. Her mother had noticed that she was not walking properly, and that she was sleeping on her stomach. From the medical evidence, it was established that her hymen was torn, and though she was examined many days after the event, she had numerous pus cells, a sign of a sexually transmitted infection.

22. The complainant had been able to identify the appellant, her 'baba mdogo' or 'younger father', a term of respect for the complainant's father's younger brother- as the one who had done the 'bad manners' on her. There is therefore no doubt that the child was defiled, and neither was there any doubt about the identity of the defiler. This was a man preying on his own brother's child of tender years, and the ingredients of the offence of incest as defined in the Sexual Offences Act have been established. I am satisfied therefore that the conviction

of the appellant was safe. I find no merit in the appeal, and I hereby dismiss it and uphold both the conviction and sentence.

Dated, Delivered and Signed at Kericho this 25th day of September 2018.

MUMBI NGUGI

JUDGE