REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 24 OF 2016

[Being an appeal from the Judgment and Sentence dated 6/5/2016 in the Chief Magistrate's Court at Narok in Criminal Case No 291/2015, R. v. Benedictus Alambo Anzaya]

BAA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of incest contrary to section 20(1) and deliberate transmission of HIV contrary to 26(1) (a) both of the Sexual Offences Act No. 3 of 2006.

2. The state has supported both the conviction and sentence.

3. The appellant was convicted on the direct evidence of the complainant (PW 2), who is her daughter.

4. The appellant testified on oath and called no witnesses.

5. In this court, the appellant has raised four grounds of appeal in his amended petition. In ground one, the appellant has faulted the trial court both in law and fact for convicting him in the absence of proof of the age of the complainant. In this regard, the complainant gave sworn testimony after being subjected to a *voire dire* examination. She testified that she was aged 12 years old.

6. Furthermore, the evidence of Hillary Kiptoo (PW1), the clinical officer, is that he examined the complainant on 26/2/2015 and found her to be ten years old. He found that her hymen was broken. He also found bruises on both labias. Additionally he found a whitish smelling discharge from her vagina. He then put in evidence the P3 form as Pex 1. He also treated the complainant on 19/2/2015 and similarly put in evidence the treatment notes as exhibit as Pex. 2 and the laboratory request form as exhibit Pex. 3.

7. Upon being recalled PW 1 testified that when PW 2 was examined on 19/2/2015, she was not tested for HIV. When PW 2 was admitted on 9/12/2015, she was found to have HIV and TB. As a result, PW 2 was put on treatment. PW 1 then put in evidence further medical reports being exhibit pex 4 and 5, which confirmed the HIV status of PW 2. PW 2 told PW 1 that she has been having sex with her father over a period of time. PW 1 confirmed that the appellant was on anti-retroviral drugs.

Furthermore, PW 1 confirmed that PW 2 was born HIV free.

8. According to the evidence of the investigating officer, No. 92746 PC Juliet Ruto (PW 4) She recovered the clinical immunization card, which shows that PW 2 was born on 11/5/2004 in good health and was HIV free. The card was put in evidence as exhibit Pex 6. The ante-natal clinic card of the mother of PW 2 was also put in evidence as exhibit Pexb.7. Pexb.7 shows that PW 2 was in good health.

9. PW 2 testified that she was 12 years old when she testified on 11/2/2016. Hillary Kiptoo, the clinical officer testified that PW 2 was 10 years, when he examined her on 19/2/2015. The amended charge sheet indicates her age as 9 years old. In view of this evidence, I find that the age of PW 2 was 12 years, since her immunization card indicates that she was born on 11/5/2004. She was not 10 years as found by Hillary Kiptoo, the clinical officer (PW 1).

10. It should be remembered that like other sciences according to *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v. Augustine Munyao Kioko (2007) 1 EA 139*, medicine is not an exact science and that is why expert medical opinion is not different from other opinions and such opinions are not binding on the court. I therefore do not accept the age assessment of Hillary Kiptoo.

11. I also find that the charge sheet which indicates the age of PW 2 as either 9 or 10 years is an allegation, which must give way to the

evidence of the investigating officer, who put in evidence clinical immunization card of PW 2. That card exhibit Pexb. 6 indicated the age of PW 2 as 11 years. I therefore find no merit in ground 1 and is hereby dismissed.

12. Furthermore, in ground 2, the appellant has faulted the trial court for convicting him in the absence of proof of penetration of the vagina by the appellant's male organ. In this regard, there is the evidence of PW 2 that the appellant had sexual intercourse with her. Then there is the medical evidence of Hillary Kiptoo (PW 1), who examined PW 2. According to him, he found upon her genital examination that her hymen was broken. He further found bruises on both labias. He then concluded that that PW 2 had been defiled. I find from the combined evidence of PW 2 and that of the clinical officer that penetration was proved. It should be borne in mind that the sworn evidence of the complainant, who is a child of tender years; according to *Kibangeny arap Kolil v. R (1959) EA 92* does not require corroboration. I therefore find no merit in ground 2 and is hereby dismissed.

13. In ground 3, the appellant has faulted the trial court both in law and fact in convicting him when the prosecution failed to call essential witnesses to testify. The teacher who reported the case was not an essential witness in terms of section 150 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

14. Furthermore, while accepting the principle of law of drawing an adverse inference where the prosecution have failed to call an essential witness as pronounced in *Bukenya v. Uganda (1972) EA 549* I find that the teacher was not an essential witness. I also find that the medical records namely the clinical immunization card and the ante-natal clinic card were properly put in evidence. It was not essential to call the medical personnel who made entries in those cards. The reason being that these were clinic attendance cards of the mother of PW 2 and PW 2 herself. Moreover, it does not matter from whom these medical cards were obtained from, as long as they were relevant and had probative value. I find them to be relevant and they have probative value. I therefore find no merit in ground 3 and is hereby dismissed.

15. In ground 4, the appellant has faulted the trial court in convicting him, when his defence was truthful. The appellant gave sworn evidence and denied the offence. He testified that he was impotent and could not perform any sexual intercourse. The appellant further testified that he did not infect PW 2 with HIV, because she was born with HIV. In this regard, there is evidence that PW 2 was born HIV free according to her mother's ante-natal attendance clinic card, exhibit Pex b 7. It is therefore not true that PW 2 was born with HIV.

16. Furthermore, there is the evidence of PW 2 that the appellant had sex with her. This evidence of impotency is contradicted by that of PW 2. The appellant never put this issue to PW 2 when she testified; it came up for the first time during the defence case. I therefore find it to be an afterthought. Moreover, the trial court which saw and heard the appellant give sworn testimony found it to be incredible and rejected it. That court saw and heard the complainant testify on oath and believed her evidence. I find no basis to interfere with this finding of fact. In the circumstances, I find no merit in this ground and is hereby dismissed.

17. I have re-assessed the entire evidence on record as I am required to do according to *Peters v. Sunday Post Ltd (1958) EA 424.* I therefore find that the appellant was convicted on sound evidence.

Sentence

18. In view of the fact that the appellant infected PW 2 with HIV, who was then aged 11 years old, I find that the sentence of life imprisonment is merited.

19. The upshot is that the appellant's appeal is hereby dismissed in its entirety.

Judgement delivered in open court this 28th day of December, 2017 in the presence of the appellant and Mr. Mwangi for the state.

J. M. Bwonwonga

Judge

28/12/2017