REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 107 OF 2013

S W K.....….APPELLANT

VERSUS

REPUBLIC.RESPONDENT

(Appeal against Judgement, conviction and sentence in Cr. Case No. 32 of 2012, R vs Silvester Wanjau Kariuki at Nyeri, delivered by J. Aringo, R.M. on 28.8.2013).

JUDGEMENT

S W K (hereinafter referred to as the appellant) seeks to quash the conviction and sentence passed against him by the Learned Resident Magistrate in criminal case number **32 of 2012** in which he was convicted on two counts of incest contrary to Section **20 (1)** of the Sexual Offences Act[1] and sentenced to serve thirty years imprisonment for count two and twenty years imprisonment for count one, both sentences to run consecutively.

On count one it was alleged that in the month of January 2012 at [particulars withheld] Area in Nyeri County, intentionally and unlawfully being a male person caused his penis to penetrate the vagina of **N W**, a female person who was to his knowledge his step daughter.

The appellant faced an alternative count of committing an indecent act with a child contrary to Section **11 (1)** of the Sexual Offences Act[2]the particulars of which were that in the month of January 2012 at [particulars withheld] area in Nyeri County unlawfully touched the vagina of **N W,** a child aged **14 years** with his penis.

on count two it was alleged that in the month of January 2012 at [particulars withheld] Area in Nyeri County, intentionally and unlawfully being a male person caused his penis to penetrate the vagina of **M W W**, a female person who was to his knowledge his step daughter.

Alternatively, it was alleged that he committing an indecent act with a child contrary to Section **11 (1)** of the Sexual Offences Act[3]the particulars of which were that in the month of January 2012 at [particulars withheld] area in Nyeri County unlawfully touched the vagina of **M W**, a child aged **9 years** with his penis.

The duty of a first appellate court was authoritatively stated by the Supreme Court of India in the recent decision in the case of *K. Anbazhagan v. State of Karnataka and Others*,[4] where a three-Judge Bench addressing the manner of exercise of jurisdiction by the appellate court while deciding an appeal ruled that:-

> *"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective*

*judgment of the evidence reflects the greatness of mind – **sans passion and sans prejudice**. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."*

PW1, N W, the complainant was aged **14 years** at the time of giving evidence. The court conducted a *voir dire* examination and was satisfied that the minor understood the nature of oath and allowed her to give sworn evidence. Her testimony was that the material day was a Sunday, that her mother was unwell in bed, that the appellant called her into the table room, he held her and blocked her mouth with his hand, she was unable to scream, he removed his trouser using his other hand, he made her lie on the sofa set, he removed her skirt and under wear and held her mouth tightly, he then had sex with her, and warned her not to tell anyone. She told her mother after one week and accompanied her to hospital where she was treated. On 16th July 2012, her mother died and she went to live with her maternal grandmother leaving behind her sister **M W,** but they went for her after three days.

On 31/7/2012 the appellant texted her grandmother asking that the complainant and her sister go to hospital to pick drugs, whereupon she told her auntie that the accused was saying so because he had sex with her. Her sister also said she too had been defiled. They later went to the police. She produced her birth certificate showing she was born on 21.4.1998.

The trial magistrate died and after several court attendances on 14.5.2013, the learned Magistrate explained to the appellant the provisions of Section **200 (3)** of the Criminal Procedure Code[5]and he asked that the case starts a fresh, and the court issued directions to that effect. However, immediately after the court issued the said directions, the appellant changed his mind and asked that the case proceeds from where it had reached stating that he had been in custody for about one year. The court vacated its aforesaid directions and directed that the case proceeds from where it had reached.

PW2 M W W was aged 10 years at the time of giving evidence. The learned Magistrate asked her a few questions and concluded that she may not appreciate the solemnity of giving sworn evidence and allowed her to give unsworn evidence. She recalled the material day in July 2012 when she went home from school, her father called her into the kitchen, he closed the door, put her on a chair and sealed her mouth, he removed her pants and defiled her. Her mother was sick in bed. After her mother died the appellant sent a message that together with her sister **PW1** they be taken to hospital

PW3 G M G testified that the appellant texted her grandmother using broken Kiswahili stating *"W We hapa Husi, wasi VCT, waanze dawa".* The literal translation of the said words is something to the effect that *"Let W, W here at the hospital, for VCT, to start medication."* She called PW1 & PW2 and asked them if they had slept with him and they both said yes. The children said they were defiled by the appellant when their mother was ill in bed.

PW4 N W G stated that she received a text in her phone number [particulars withheld] . The message was for W and W stating that they be taken to the VCT to start medication. They reported the matter to the police.

PW5 DR. Lucille Niyinikunda from Nyeri PGH produced the P3 forms. She examined the two children who had a history of being defiled by their HIV positive father. The Doctor confirmed that the hymen for both children was broken. HIV results were not conclusive and by the time the P3 was filled final results were not ready.

PW6 PC Robert Achieng attached to Nyeri Police Station received the complaint, he issued both P3 forms. He also arrested the complainant and charged him with the offence.

At the close of the prosecution case, the trial magistrate ruled that the appellant had a case to answer on each of the main counts and complied with the provisions of Section **211** of Criminal Procedure Code. **[6]**The accused elected to give sworn evidence and said he had not witnesses to call.

His brief testimony was that his wife, the mother of the two minors died of HIV and that he too was sick

and that he sent the text message because the mother died. He said he was informing the grandparents because they did know and he was informing them so that they could also know. He stated that when the parents are sick, the children should also be tested and treated.

Upon cross-examination, the appellant said he married he mother of the children in 2011, that she had two girls when they got married, the first born was 13 years while the second one was 7 years. The wife died in July 2012 and that when they went for treatment, they were advised that the children also need to be tested. He also stated that the wife was unwell when he married her.

The learned magistrate analysed the evidence of all the witnesses and the above defence and concluded that the appellant was guilty as charged and convicted him and sentenced him to an aggregate sentence of 50 years imprisonment.

Aggrieved by the verdict, the appellant appealed to this court seeking to quash the conviction and sentence and has advanced **4** grounds of appeal which can be reduced into one, namely, **whether the prosecution proved its case to the required standard.**

At the hearing of the appeal, the appellant was represented by **Mr. Muhoho** advocate who filed written submissions in which he attacked the proceedings for the following reasons:-

a. That the evidence of PW1 is stated to be in Kiswahili.
b. That it's not indicated in which language the evidence of PW2 is recorded.
c. It is not indicated whether PW3 was sworn or not.
d. It is not indicated in what language the evidence of PW4 was recorded.
e. It is not indicated whether PW5 was sworn and in which language it was made.
f. It is not indicated what language the evidence of PW6 was given.

In counsels view, the above evidence offends the provisions of Sections **17** and **18** of the Oaths and Statutory Declarations Act[7] and Section **157** & **198** of the Criminal Procedure Code[8]and Article **50 (2) (m)** of the Constitution of Kenya, 2010.

I do not see the relevancy of Section **157** of the Criminal Procedure Code[9] in these proceedings because Sections **154** to **158** of the Criminal Procedure Code[10] relate to Commissions for the Examination of Witnesses and to be precise, Section **157** cited by counsel provides for return of Commission issued pursuant to Section **154** referred to above.

Section **198 (1)** of the Criminal Procedure Code[11] provides that:-

> *198 (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.*
>
> *198 (4) The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili.*

I have scrutinized the original hand written proceedings and hereby confirm that PW1 was sworn and gave her evidence in Kiswahili but the same is recorded in English, which is the language of the court. Thus, it was translated as required, PW2 is shown to have given unsworn evidence. The word unsworn appears on the record. The evidence is recorded in English. In fact all the other witnesses are clearly shown as having been sworn.

On language Counsel submits that an accused must understand the proceedings. I agree with this statement, but a look at the proceedings shows that the appellant not only participated in the proceedings, but thoroughly cross-examined all the witnesses and even made submissions at the close of the prosecution case. There is nothing to show that he never understood the proceedings. Thus, there is nothing to show that Section 198 cited above was not complied with.

As for Sections 17 and 18 of the Oaths and Statutory Declarations Act[12] referred to by the counsel, the opening words of Section 17 are " Subject to the provisions of Section 19...." thus the said section must be read together with the provisions of section 19 which deals with evidence of children of tender years. As mentioned above, magistrate conducted a *voir dire* examination and found that PW1 understood the nature and meaning of an oath and allowed her to give sworn evidence. As for PW2 the magistrate received her evidence on oath after concluding that the child did not understand the meaning of giving evidence on oath. I find nothing to show that the evidence of the two minors was not properly received.

Counsel also submitted that the charges were not proved beyond reasonable doubt, that the allegations were extracted from the minors and that the medical evidence was not reliable. I will revert to this shortly.

Learned counsel for the state submitted that the trial magistrate was right in convicting the appellant on the two counts and urged the court to dismiss the appeal

I have reviewed the evidence on record and the relevant law. Section **20 (1)** of the sexual offences Act[13] provides that:-

> ***20 (1)*** *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 ten years.*
>
> *Provided that, if it is alleged in the information or charge and proved that the female is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.*

To establish a case under the above section, the prosecution must prove the elements of the offence. There must be an **indecent act** or **an act which causes penetration**. Further, the victim must be *a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother.*

The appellant is not the biological father of the two girls, but having married the child's mother, he was in actual fact their *'step-father.'* Does this fact that no biological or blood ties exist between the appellant and the two girls negate a charge of incest? The answer is to be found in Section **22** of the Sexual Offences Act[14] which deals with *'Test of relationship'.* Section **22(1)** provides as follows:-

> *22(1) In cases of the offences 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 …"*
>
> *22(3) A 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.*

My own understanding is that *'half father'* is a term which means exactly the same as *'step-father'* – it means one who is not a biological father of the child but has married the child's mother as in the present case or has adopted the child. Therefore by dint of Section **22(1)** of the Act the appellant being a step-father of the complainant and one who stood in *'locus parentis'* can legally be charged and indeed convicted of the crime of incest with the step-daughters. *'locus parentis'* is a legal term describing a relationship similar to that of a parent to a child.[15] It refers to an individual who assumes parental status and responsibilities for another individual, usually a young person, without formally adopting that person.[16] Thus, the doctrine *'locus parentis'* can provide a non-biological parent to be given the legal rights and responsibilities of a biological parent if he/she has held himself out as a parent

I find no difficulty in believing that the complainants are female persons within the above definition and

that the appellant is their step-father and that the appellant knew them to be his step-daughters. These basic truths which are essential ingredients of the offence of incest were not contested at all.

It is also necessary to bear in mind the definition of penetration which is defined in the Act as '*the partial or complete insertion of the genital organs of a person into the genital organs of another person.'*

It is important at this stage to mention that the evidence adduced established the act of penetration. The Doctor did confirm the hymen for both girls was broken. The lapse of time from the date the offence was allegedly committed and the time it was reported do not weaken the evidence since both complaints explained in a consistent manner what they were subjected to thereby in my view establishing that they were defiled.

The learned magistrate who had the benefit of seeing the witnesses testify believed the above evidence. Upon evaluating and analysing the evidence, I also find it to be consistent, trustworthy and clear. The proviso to section **124** of the Evidence Act[17] provides:-

> *"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"*

The reasons recorded by the court while believing the above testimony is that the trial magistrate found the minors as truthful and that they gave a accurate and honest account of what transpired. The magistrate also noted that their evidence is corroborated by the medical evidence. The magistrate also observed that the results of the HIV tests were not material to a finding of whether there was an act of penetration, though they could have been useful. In any event the medical evidence tendered then was that final results were not yet out as at the time the witnesses testified in court.

In my view, despite their tender age, the complainants were clear in their testimony. On the contrary the defence offered by the appellant did not cast doubts in the prosecution case. Having subjected the entire record to a fresh scrutiny, I find no contradictions which if resolved in the appellants favour would create a doubt in the prosecution's case. I am satisfied that the prosecution proved the offence of incest and that the necessary ingredients of the offence as enumerated above where proved beyond doubt. I find that the evidence adduced proved the offence of incest, hence the conviction was supported by the evidence on record and I up hold the conviction.

On the sentence, it is important to recall that the complainants were aged 14 years and 9 years respectively at the time of the offence. Age was not contested, but was also proved as required in this case. Commenting on the age of a victim in cases of this nature the court of appeal in *Kaingu Elias Kasomo vs Republic*[18] had this to say:-

> *"Age of the victim of sexual assault under the Asexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".*

Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.[19]

The Supreme Court of India in *State of M.P. vs Bablu Natt*[20]stated that '*the principle governing imposition of punishment would depend upon the facts and circumstances of each case.* ***An offence which affects the morale of the society should be severely dealt with.'***

In *Alister Anthony Pareira vs State of Maharashtra*,**[21]**the court held that:-

> *"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"*

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[22]

In *Shadrack Kipchoge Kogo vs Republic*,[23] the court of appeal stated:-

> *"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"*

The proviso to Section **20 (1)** of the Sexual Offences Act provides that:-

> *Provided that, if it is alleged in the information or charge and proved that the female is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.*

I have carefully considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors considering the HIV status of the appellant the age of the victims at the time of the offence, the scar the incidence left in their lives, the health and social implications, the relationship of the appellant and the victims being a step father and a person the children looked upon for un bringing, protection, guidance and the position of trust the appellant had as a parent of the children.

I have also considered the purpose of sentencing and the principles of sentencing under the common law[24] which are:-

i. To ensure that the offender is adequately punished;
ii. To prevent crime by deterring the offender and other persons from committing similar offences;
iii. To protect the community from the offender;
iv. To promote the rehabilitation of the offender;
v. To make the offender accountable for his or her actions;
vi. To denounce the conduct of the offender.
vii. To recognize the harm done to the victims of the crime and the community.

Guided by the above principles and considering the aggravating factors in this case and bearing in mind the sentence prescribed under the law for an offence of this nature, and considering that sentencing is the discretion of the court and can only be interfered with if is shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred, **I hereby find no reason to disturb the sentence imposed by the learned magistrate.**

The up-shot is that this appeal against conviction and sentence is dismissed. The appellant shall serve the full sentence imposed by the learned magistrate.

Right of appeal 14 days

Dated at Nyeri this 23rd day of March 2016

John M. Mativo

Judge

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[1] No. **3** of 2006

[2] Ibid

[3] Ibid

[4]Criminal Appeal No. 637 of 2015

[5] Cap 75, Laws of Kenya

[6] Cap 75, Laws of Kenya

[7] Cap 15, Laws of Kenya.

[8] Cap 75, Laws of Kenya

[9] Cap 75, Laws of Kenya

[10] Ibid

[11] Ibid

[12] Supra

[13] Act No. 3 of 2006

[14] Ibid

[15] legal-dictionary.thefreedictionary.com, also see Law.com Law Dictionary retrieved on 20.3.2016

[16] Ibid

[17] Cap 80, Laws of Kenya

[18]Criminal Appeal no. 504 of 2010 cited in Martin NyongesaWanyonyivs Republic, Criminmal Appeal no. 661 of 2010

[19]See Makhandia J (as he then was in Simon NdunguMuragevs Republic, Criminal appeal no. 275 of 2007, Nyeri.

[20] {2009}2S.C.C 272 Para 13

[21] {2012}2 S.C.C 648 Para 69

[22] See Somanvs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India

[23]Criminal Appeal No. 253 of 2003(Eldoret), Omolo, O’kubasu&Onyango JJA)

[24] Regina vs MA {2004}145A