REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 32 OF 2012

P K……………….……….……..……………………….APPELLANT

VERSUS

REPUBLIC……….……………………………………….RESPONDENT

(*Being an appeal from the original conviction and sentence in Criminal Case No. 442 of 2011 Republic vs Paul Kimosop in the Principal Magistrates Court at Kabarnet by H. M. Nyaga, Principal Magistrate dated 19th October 2011)*

JUDGMENT

1. The appellant was convicted on a count of incest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006. The particulars were that on 26th June 2011, at [particulars withheld] Marigat District, Baringo County, he caused his penis to penetrate the vagina of "JP" (name withheld) a girl aged 11 years whom he knew to be his daughter. He was sentenced to life imprisonment.

2. The appellant has appealed against his conviction and sentence. The original petition of appeal was filed in Court on 23rd November 2011 and contained five main grounds of appeal. On 17th October 2013, the Court granted leave to the appellant to plead an additional ground, to wit, that the learned trial Magistrate erred in law and in fact by imposing a life sentence. The other five grounds can be summarized as follows: that, the evidence of the lab technician and that of the doctor was contradictory; that the medical evidence did not establish penetration; that the trial court failed to appreciate that there was a grudge between the appellant and some witnesses; that the evidence lacked corroboration; that the appellant's defence was not taken into account; and, lastly, that the charge was not proved beyond reasonable doubt.

3. The appellant also filed detailed written submissions to buttress those grounds. At the hearing of the appeal, the appellant added the following: that the age of the minor was not established; and, considering that the appellant is HIV *positive*, while the complainant tested *negative*, he could not have committed the offence.

4. The appeal is contested by the State. The learned State Counsel submitted that with regard to the charges of incest, there was clear evidence of traumatic penetration. The relationship between the appellant and PW5, the daughter, was not in doubt. It was submitted that the evidence of defilement was corroborated by PW2, PW4 and the medical evidence of PW1. The case for the State is that the evidence was overwhelming and not contradictory in any respect. Furthermore, the trial court took into consideration the defence proffered by the appellant and his mitigation. Regarding sentence, the State

submitted that the offender was liable to life imprisonment. In a synopsis, the case for the State is that the evidence established the appellant's guilt to the required standard of proof. I was urged to dismiss the appeal.

5. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported), *Paul Ekwam Oreng v Republic* Eldoret High Court Criminal appeal 36 of 2011 (unreported), *David Khisa v Republic* Eldoret High Court Criminal appeal 142 of 2011 (unreported).

6. The age of the complainant (PW5) was stated as eleven in the charge sheet. On the date of the hearing, the trial court observed that she was *between* eleven and twelve. The learned trial Magistrate cleared the courtroom to receive her testimony. I am satisfied from the record of appeal (hand-written pages 21 and 22 or pages 6 and 7 of the typed proceedings) that a *voire dire* examination was conducted. The court recorded the questions to, and the answers given by the complainant. The trial court formed the opinion that the minor understood the duty of telling the truth. It ordered the complainant to be affirmed.

7. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. The Children Act defines a child of tender years to be one of ten years or below. I think the trial court acted out of an abundance of caution in conducting the *voire dire* examination. In sum the court was trying to establish whether the child possessed sufficient intelligence to understand the duty of speaking truthfully. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. I am satisfied that the court complied fully with the procedure of taking evidence of the minor. See *Macharia v Republic* [1976-80] 1 KLR 260. As I will discuss shortly, the evidence of the minor was also not the *sole* convicting evidence

8. PW5 testified she was eleven years. Her mother PW3 confirmed her daughter was eleven. The complainant gave a vivid account of the events of 26th June 2011. The appellant is her father. She was living with her mother in a place called Kibonjos. On that date, her mother sent her to get school fees from the appellant in another place known as Marigat. The complainant was accompanied by her brother. They got there at about 11.00am. They did not find their father at home. They got the keys where the family normally hid them. They then asked a lady called Esther where the appellant was. The complainant testified that she knew Esther was a friend of their father. They found the appellant consuming a local brew known as *busaa*. The appellant asked the son to go back to school. He then instructed the complainant to go back and wait for him in his house. He borrowed a sum of Kshs 50 from Esther and gave it to the complainant to go and prepare some food. The complainant testified that at about 8.00 p.m. the same day, her father returned with Esther. They quarreled and Esther left.

9. It is later at night that the incest occurred. The complainant testified as follows-

> *"While I was sleeping, I felt my father lying on top of me. He was naked. He removed my underpants and started doing "tabia mbaya" to me. He told me to be quiet but I screamed for help. I heard people outside the house. The door was kicked open and I ran out. The neighbours asked me why I was screaming and I told them. They took me to hospital. I was bleeding in my private parts. I spent the night in hospital.*
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> *In the morning, I went to the police station. My father had been arrested. My mother arrived that morning as I was leaving hospital."*

10. PW2 was a neighbor. She heard the cries of a girl coming from the appellant's room. The screams were loud. She woke up other neighbours. PW4 was also awoken by the screams. PW2 and PW4 found the appellant's door locked. They forced it open when the appellant refused to open. The complainant came out of the room crying. The appellant was inside the room lying on the bed. PW4 had a torch. He

said the appellant was naked. PW2 and PW4 took the complainant to PW2's house. The complainant told them that her father had defiled her. PW2 and PW4 took the complainant to hospital the same night and alerted the police. PW6, Police Constable Wabungo, arrested the appellant at about 1.00 a.m the same night. He found the appellant asleep in his house.

11. PW1 is a clinical officer. He testified that upon examining the complainant, he found lacerations on the labia walls. There were also blood stains on the vaginal fault. The hymen was perforated. There was blood discharging from the vagina. He gave her drugs to prevent H.I.V infection. Laboratory tests were negative. He formed the opinion that there was traumatic penetration into the complainant's vagina. He produced the complainant's P3 form (exhibit 1). PW1 also examined the appellant. He produced the P3 relating to the appellant (exhibit 2). He noted no physical abnormalities. Laboratory tests revealed that the appellant was HIV positive. Urinalysis was negative. VDRL for syphilis was also negative.

12. A number of matters arise from all that evidence. First, the age of the minor was not supported by documentary evidence. Like I have stated both the complainant and her mother confirmed she was eleven. I am alive that the appellant was facing a charge of *incest* contrary to section 20 (1) of the Act. What was *relevant* was not the age of the minor but that she was a blood *daughter* of the appellant. From the *unchallenged* evidence, the complainant was eleven years old. There is thus an important *distinction* from the offences of defilement under section 8 of the Act where age is material as it has a direct bearing on the mandatory sentences. But in the case of incest, once penetration is established, the material inquiry is the *degree* of relationship between the appellant and the complainant.

13. Secondly, I am left in no doubt that the appellant penetrated the complainant. The evidence of the complainant was corroborated by PW1, PW2 and PW4. In particular, it was directly corroborated by the medical evidence of PW1. There was clear evidence of penetration as defined in section 2 of the Act. The person who defiled the complainant could only be the appellant. He is complainant's father and obviously well known to her. The identification of the appellant was thus positive. PW2 and PW4 found the appellant naked on the bed when they broke the door and the complainant ran out. In his defence, the appellant conceded he was *naked*. The appellant was in that sense caught *red handed*. He was arrested by PW6 still sleeping on the same bed that very night. There is another important element: the appellant himself in his defence stated as follows- *"on the material day, my daughter (complainant) and son came to Marigat. They know where I place the house key. I have a girlfriend called Esther who is a drunkard….JP (complainant, name witheld) was to remain behind as I looked for money"*. I find that the appellant had opportunity to commit the incest. There was no one else in that house except him and the complainant. In the circumstances of this case, it would also amount to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669.

14. The appellant tested positive for HIV. Like the learned trial Magistrate found, the complainant may as well get shielded from the virus by the medication she received. It is not a given. All that the tests showed at the time of her examination was that she was *negative*. The appellant's argument that since the complainant was not infected with the virus he could not have committed the incest is a lopsided theory. First, it does not matter that the complainant tested negative; what matters is that the appellant penetrated her. Furthermore, the appellant was not facing a charge of deliberately transmitting the virus.

15. The appellant cast aspersions on the evidence of PW2. He said the evidence was driven by jealousy. He said it was actuated by malice because PW2 wanted to snatch away from the appellant or to take control the *chang'aa* business in the village. Even if I were to believe the appellant on that score, it would not *excuse* the incest. Even if the appellant was *drunk* on the material night, it was self-induced intoxication at the *chang'aa* or *busaa* den. It would not *exculpate* the appellant from the offence. The evidence of the minor, the two neighbours (PW2 and PW4) and that of the clinical officer (PW1) was not contradictory or inconsistent as urged by the appellant. The cross examination by the appellant did not establish a plot to fix him with false evidence. I have not seen evidence of collusion between the minor and those witnesses to frame the appellant on trumped up charges.

16. I have then considered the submission by the appellant that his defence was not taken into account. When the appellant was put on his defence, he said he would call some witnesses. On 27th September

2011, the record shows the appellant's three witnesses were present. He then opted not to call them. He told the court the following-

> *"My witnesses are here in court but I have decided not to call them. I just wanted them to come and hear my defence case.*
>
> *COURT:*
>
> *"It is upon the accused to decide if he wants to call his witnesses. Since he has decided to proceed without them, then he will give his defence. He should not be heard to complain that he had no opportunity to defend himself."*

17. It cannot now fall from the lips of the appellant that he did not have a full opportunity to defend himself. When the appellant took the stand he stated in part as follows-

> *"Later, I went home. I found that Esther had not cooked food. We argued and Esther left. JP (complainant, name withheld) went to fetch water as I cooked vegetables. I told her to cook ugali. She did so. I ate my food outside the house. I told JP to remove the beddings so that I could make a place for her to sleep. I did so then I left. I went to Marigat to look for a friend of mine. I wanted to get a loan. Later I went back home. I found Esther lying outside my house by the kitchen; I assumed that JP was with her. I entered the house and slept. Later I heard people telling me to wake up. They asked me where the girl was. I had removed my clothes. The place I had spread a bed was empty. I was taken to the police station. I missed my clinic to collect my ARV's. I was examined. I am HIV positive."*

18. That defence is implausible in the face of the evidence of the complainant (PW5), PW1, PW2, PW4 and PW6. The learned trial Magistrate considered that defence and found it to be a red herring. He concluded as follows-

> *"The accused states that he just went and slept, only to be woken up by villagers. His defence is just a denial. He has admitted that he was in his house when he was arrested. Therefore, PW2 and PW4's evidence is corroborated by none other than the accused himself."*

19. I find that all the grounds of appeal challenging conviction are devoid of merit. That leaves the matter of the sentence. Section 20 of the Act provides the sentence for incest. The offender is *liable* to life imprisonment. The learned trial Magistrate thus had *discretion* to impose a sentence of life or a lesser sentence. In short, there is no mandatory sentence under the section. As a general rule, sentencing is at the *discretion* of the trial court. But power still reposes in an appellate court to review the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.

20. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may…..…(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

21. In the instant case I am unable to fault the learned trial Magistrate on the sentence. Section 20 provides that the offender shall be *liable* to life imprisonment. I agree with the trial Magistrate that the National Assembly should take a fresh look at section 20. As it now stands, an offender who commits *incest* on a minor of below eleven years can get away with a sentence of a few years up to a maximum of life imprisonment. If the same offender commits *defilement* on any other girl of that age, he would receive a mandatory life sentence. The sentence handed down in this case was well within section 20 of the Act. I am thus not persuaded to disturb the sentence.

22. In the result, I find that the entire appeal is devoid of merit. I uphold the conviction and sentence

handed down by the learned trial Magistrate. The appeal is accordingly dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 19th day of February 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant.

Mr. Mulati for the State.

Mr. J. Kemboi, Court Clerk.