



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 22 OF 2018

PKC.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

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

at Kabarnet Criminal Case no. 32 of 2017 delivered on the 28th day of March, 2018

by Hon. V.O. Amboko, RM]

JUDGMENT

1. The appellant who was convicted of the offence of incest by male contrary to section 20 (1) of the Sexual Offences Act and sentenced to serve imprisonment for life on 18/4/2018, appeals for the conviction and sentence on grounds principally of insufficiency of evidence to convict as set out in the petition of appeal dated 2/5/18:

“GROUNDS OF APPEAL

1. *That the trial magistrate erred both in laws and facts when it convicted me on facts which were poor and not proved whether they existed or not.*
2. *That my lord the trial Court failed to observe that no credible medical evidence to support the alleged penetration, thus penetration was not proved.*
3. *That the P3 form presented had some elements which were unreliable.*
4. *That the most evidence presented were a tall pramid of hearsay with no evidence value.*
5. *That the trial Court erred by shifting the burden of proof to the appellant during judgment.*
6. *That the trial Court failed to appreciate that age as integral component was not proved at all.*
7. *That all elements building the case was fatally ashram and thus erroneous decision.*
8. *That the trial Court failed to observe that the case came into being due to family conflicts between me and the mother (PW2) of the complainant.*
9. *That the trial Court failed to adhere to strict provisions of the law when it failed to grant me opportunity to be represented by counsel/advocate under article 50 (2) (g) (h) 2010 constitution of Kenya.*
10. *That the trial conducted proceedings which were defect dominated especially when PW2 testified and failed to observe the prevalent fabrication in prosecution evidence.*

REASONS WHEREFORE:

I pray that my appeal be allowed conviction quashed, sentence set aside and set free at my liberty.”

2. The appellant subsequently filed supplementary grounds of appeal which are really emphasis on the initial grounds of appeal as follows:

“SUPPLEMENTARY GROUNDS OF APPEAL FILED UNDER SECTION 350 (2) V OF THE C.P.C CAP 75 LAWS OF KENYA.

Your Lordship, upon perusal of the original trial and proceedings, I the appellant being aggrieved and dissatisfied with the Courts decision and judgment, I beg leave the Hon. Court to appeal against the conviction and sentence on the following grounds:

- 1. THAT the trial Court erred in convicting me without establishing the charge of defilement by medical examination.*
- 2. THAT the trial Court erred in law and facts in convicting me on contradicting prosecution’s evidence.*
- 3. THAT the trial Court erred in law and fact in failing to avail the essential witnesses in the case against me.*
- 4. THAT the trial Court erred in law and fact in passing an excessive and harsh sentence in the circumstances.”*

3. At the hearing, the appellant relied on written submissions filed in elaboration of the grounds of appeal and the DPP made oral submissions, as follows:

“Appellant

I have written submissions.

DPP

Appeal is opposed.

Appellant was convicted for incest contrary to section 20 (1) of Sexual Offences Act and sentenced to serve life imprisonment.

Pw1 was a minor aged 9 years 10 months. A child health card indicated that she was born on 26/1/2008. The charge sheet indicates that complainant was 10 years. There is a difference of 2 months which is immaterial as it does not cause any prejudice.

The complainant remains under 18 years as per section 20 (1) and the appellant is the biological father of the complainant. Evidence of Pw1 and Pw2, the mother of the complainant. Both identified the appellant as father of the complainant and confirmed by appellant himself in his defence when he stated that the complainant was his first born daughter. The relationship between appellant and complainant is not in dispute.

Pw1 identified the father as the person who defiled her twice the first time being in March 2017 when her mother had gone to attend a funeral and the 2nd time on 25/11/2017 when her mother had gone to fetch water.

The complainant and appellant were not strangers as the complainant knew the appellant well as the father.

Pw3, a Clinical Officer who examined the complainant testified that upon examination both the labia majora and minora were reddened and that there was no hymen. He concluded that there was evidence of penetration with approximate age of injury being 2 weeks which coincides with the period when the minor was defiled and when she visited the hospital.

Argument by appellant that it was that possible to prove defilement after 2 weeks has no basis as appellant is not a medical expert and the evidence of Pw3 has not disappeared by any other medical opinion.

Appellant in submissions points out the date of the P3 from which shows that P3 was issued on 14/12/17 and that the incident was reported on 13/12/17. The appellant argues that the complainant visited the hospital before reporting to the police.

Both Pw2 and 4 stated that the incident was reported to the Police on 14/12/17 and not 13/12/17. This clearly indicates that the date of 13/12/17 in the P3 form is wrong. However, the said discrepancy in the dates do not cause any prejudice to the appellant as the evidence on record clearly shows that the complainant was defiled by the father the appellant and that she visited the hospital and reported to the police irrespective of the date.

The evidence on record against the appellant is overwhelming and I urge Court to dismiss the appeal for conviction but may review the sentence in line with Muruatetu case.

Appellant in reply

I reiterate the following submissions filed in Court written in Kiswahili language. I do not have anything to reply to the submissions by the DPP.”

Issue for determination

4. The issue for determination in the appeal is whether the appellant was guilty of, and consequently, properly convicted for the offences of incest by male contrary to section 20 (1) of the Sexual Offences Act.

Determination

Relationship and age of victim

5. The relationship of the accused and the victim was established by the testimonies of the Pw1 and the mother Pw2 and admitted by the appellant in his defence. The victim's minor age was proved by her own testimony that she was 10 years and by clinical card produced by the mother indicating that she was born on 26/1/2008, making her 9 years 10 months on the date of offence as charged on 25/11/2017. The discrepancy by 2 months on the age as charged is immaterial because no prejudice is occasioned on the accused in terms of section 382 of the Criminal Procedure Code, and the offence is one of incest with the age being relevant only for purposes of the sentence where victim is "**under the age of eighteen years, when the offender "is liable" to imprisonment for life.** Whether the victim's age was 9 years 10 months at time of offence or 10 years as charged, the offence of incest is proved and her age is still within the bracket of "**under the age of eighteen years**". The ingredient of the offence under the Proviso of section 20 (1) of the Sexual Offences Act, being filial relationship and minor age of the victim are established.

Defilement

6. The evidence of the prosecution witnesses and the defence is set out in full below:

"PW1

I am FJK. I live in Kipsoit I live with my mother and other children.

My mother is called RCK. The other children are E,S and D. My dad is called PKC he is in Court (identifies the accused person). My dad also lives in Kipsoit. I study at [Particulars withheld] primary school. I am in class 4. My class teacher is Mr. B. My mother works in a hotel she ferries water to a hotel. My dad works at Ainamoi he builds roads. My dad goes to work he comes on Saturday and goes back to Ainamoi on Monday. I know where I am, I am in Court.

*My dad did bad manners to me. My dad did bad manners to me. I was fetching firewood alone, E,S and D were at my grandmother place. My mother had gone to fetch water for the hotel. It was in the evening. I had gone to fetch firewood near our house. I finished fetching firewood and I went home. **My father called me, he told me to go where he was, he was in the house. I went to where he was. He did bad manners to me. He did bad manners to me here (she points at her private part).***

He did bad manners to me where I use to urinate. We were in the main room, our house has two rooms. I was in my father's room. That is where my father sleeps.

I lay down my head facing up father slept on top of me, he put something like a stick on the place I used to urinate, he had laid on me with his body his face was facing me.

He had put a blanket over my eyes, my eyes were covered. I had worn a skirt and shirt and panties. He removed my clothes and threw them. I did not scream. He did bad manners, when he finished he told me not to tell anyone. It happened 2 times. It happened on a Saturday my mum had gone for a funeral the 2nd time it happened. I did not tell the first time. I told my mother the 2nd time I did not tell my mother the first time because I was afraid. I told my mother the only what had happened. When I told my mother, she told the doctor at the mission hospital I don't know the name of the hospital. I don't know the name of the hospital.

The doctor told us to go to Kabarnet town we went to Salawa town to get medication. I am ten years old. At the hospital they gave me medication.

CROSS EXAMINATION

Your were at home. When my mother had gone to the funeral. I do not remember the date. No further questions.

Re-examination – Nil."

7. The child Pw1 testified that the father had done bad manners to her by lying on top of her and "putting something like a stick on the place I used to urinate" saying that the father had done the act twice when the mother Pw2 was away to fetch water on the second occasion and at funeral first time it happened, and that she had not told her mother about it the first time because she was afraid but had told her on the 2nd time.

8. Pw2 testified that her child had told her that her father had "removed her panty and lay on her while poking her. She told me she was poked severally on her private part" and that the father had done bad manners on previous time when she had gone to her mother's funeral in Elgeiyo-Marakwet, which was in the month of March 2017 according to Pw2. She recalled that on the 2nd time when Pw1 said she had gone

to fetch water at Kapsoit Centre at around 4.00pm (and when she) returned home at 5.00pm, she found her **“husband PKC at home. I remember PKC was sleeping in the bed and he was drunk. FJK was in the house with the other children.”**

9. Pw2’s full testimony as to PW1’s report of the incident to her, examination and treatment of child as follows:

“PW2

I am RCK, I live in Kipsoit, I am a farmer. I know FJK, she is my daughter. She is my 1st born in class 4. She is 10 years. She was born on 26/1/2008. I have a clinic card to as proof on her date of birth.

Clinic card PMFI 1.

FJK also lives in Kipsoit, with our family. Her father, myself and other children. Her father is PKC, I have 3 other children.

My house has one room. The house is one room and we have partitioned it with a bedsheet. All of us sleep in the same room.

PKC is my husband. He is the father of FJK (accused identified). PKC used to work in Ainamoi in company called “SPI”. It is a construction company that builds roads. PKC used to come home on Saturdays. He used to reside in the company on weekdays.

On 30/11/2017 I was at home in Kipsoit. I was carrying out my household chores in the morning. I saw my daughter FJK was not feeling well. I did not ask her about it. She was looking weak and unhappy. I did not ask her what was wrong. On 21/12/2017. FJK told me she was experiencing a headache, pain in the chest and waist. I took her to Salawa mission catholic hospital. When she was asked by the doctor she indicated that she had a headache, chest and waist pains. The doctor gave her malaria medication. The doctor told us that since it was a weekend we should go back home and came back on the 5/12/2017 so that FJK could be tested for typhoid.

On 4/12/2017 at 1:00 pm I found FJK sleeping not far away from the house. She was sleeping under a tree. I went to where FJK was sleeping. I asked her why she was sleeping far from the house and she told me she did not want to hear noise from her siblings because she was unwell. I sat down next to where FJK was sleeping. Then FJK told me she had something she wanted to tell me. She told me she wanted to tell me something that I should not tell anyone. She told me that her father had done bad manners to her on Saturday that I had gone to fetch water. I asked her what bad manners was and she told me that her father removed her panty and lay on her while poking her. She told me she was poked severally on her private part.

I checked FJK’s private part and I did not see anything. In the evening I asked FJK again and she told me it was not the first time the father had done bad manners. I inquire from her and she told me that the 1st time was when I had gone to attend my mother’s funeral in Elgeyo Marakwet. My mother’s funeral was in the month of March 2017. I do not recall the date. I left FJK to sleep. I remembered the day I went to fetch water was 25/11/2017.

*I had gone to fetch water at Kipsoit center it was around 4:00 pm I returned home at 5:00 pm. When I got home **I found my husband PKC at home. I remember PKC was sleeping in the bed and he was drunk FJK was in the house with the other children.***

On 25/11/2017 it was a Saturday.

On 5/12/2017 I took FJK back to Salawa Catholic Mission, the doctor carried out tests for typhoid but the result was negative. I told the doctor what FJK had told me on the 4/12/2017, the previous day. The Doctor told me to take FJK to Kabarnet district hospital.

On 6/12/2017 I took FJK to Kabarnet district hospital. FJK was examined and given medication. The doctor told me that FJK had been defiled. We went back home. The doctor from Kabarnet district hospital told us to go back on 11/12/17.

On 11/12/2017 I took FJK back to Kabarnet hospital. Her aunt M went with FJK to Kabarnet district hospital and I later joined them. On 13/12/2017 FJK’s aunt M took FJK to the hospital I later joined them. We were going back for guiding and counseling from the doctor.

On 14/12/2017, we reported the incident at Kabarnet police station. We recorded our statements; we were given a P3 which we took to the hospital. I can identify the P3.

P3 Form PMFI 2.

We were also given a card. I can identify it.

Treatment not 6/12/17 PMI3.

PKC was later arrested and brought to Court.

CROSS EXAMINATION

On 25/11/2017 you had arrive. I remember.

On 31/11/2017. You came home, you told me not to give the children water. I know you have other children a part from mine. I have agreed that you can bring those children home. On 6/12/17 I came with FJK to hospital.

M did not record a statement. M did not record because she helped me.

Take FJK to hospital. On 13/12/2017 FJK was not at home.

RE-EXAMINATION – Nil.”

10. Pw3 was the Clinical Officer at Baringo Referral Hospital, Kabarnet who examined the child and found that the Labia was reddened and hyperemic on both Majora and minora, and the child had no hymen. He produced treatment card indicating that the child was first seen on 6/12/2017 and consecutively done on 13/12/2017.

“PW3

I am Michael Cheburet Clinical Officer at Baringo referral hospital.

I have a P3 form in respect of FJK 10 years old. She was defiled by her father twice lastly on 25/11/2017 at her home. She was in fair general condition sober in mind.

Estimated age of the victim is 10 years old. On examination the labia was reddened and hyperemic. The majora and minora.

The child had no hymen. There were no presence of discharge noted. Lab tests carried out HIV test-negative, vdrasyphilis-negative, urine samples – normal full haemogram was normal. Her HP was 124 (within normal).

Approximate age of injuries around 2 weeks. She was given antibiotics analgestics, pain killers and psychologic counseling.

Additional remarks-Laboratory investigations were normal because the incident was reported late. There was evidence of penetration.

I also have a medical outpatient card for FJK who was seen on 6/12/2017. Counseling was done on 13/12/2017. I wish to produce the same in evidence.

P3 Form ex 2.

Treatment note ex 3.

CROSS-EXAMINATION

I am a Clinical Officer. I am the one who filled the P3 form. I did not bring her clothes to hospital the incident happened 2 weeks before. I do not remember who accompanied the victim to hospital.

RE-EXAMINATION – NIL.”

11. Pw4, the Investigating Officer testified that the complainant Pw1 and the mother had reported at the Kabarnet Police station on 14/12/17 at 10.55 am, report being that the child had been defiled by her father on 25/11/17 and that the child had told him that “it was not her first time to be defiled. As the father had defiled her earlier when the mother had gone for a funeral in March 2017”. The witness’s full testimony is as follows:

“PW4

I am no. 101025 PC woman Awour Christine attached to Kabarnet police station. The gender desk. On 14/12/2017 at 10:55 am I was at the office. When the complainant FJK came in the company of her mother. They reported that FJK who was 10 years was defiled by her father 25/11/2017. I interrogated the child she told me that on that day her father had arrived from Ainamoi where he works. He called her to the house and defiled her she informed me that her mother was not at home she had gone to fetch water.

She stayed for 2 weeks without telling anyone as her father had threatened to kill her. After 2 weeks the mother of FJK noticed she was unwell, she took her to Salawa dispensary. She was given Malaria medication but was not taken to the laboratory due to lack of equipment. It was then that she told her mother that she had been defiled by the father. They were referred to Kabarnet hospital. They were treated and they came to report to Kabarnet police station.

As I was recording the statement the child told me it was not her first time to be defiled. As the father had defiled her earlier when her mother had gone for a funeral in March 2017. I issued them with a P3. It was filled and returned to the station. The father had threatened to kill FJK if she told the first time she defile. I have child card which confirms she was born at 26/1/2008.

Child Health card Ex 1.

The accused person was arrested, I interrogated him and charged him with the offence before court.

CROSS EXAMINATION – NIL

RE-EXAMINATION – NIL.”

12. When put on his defence the appellant made an unsworn statement admitting that the complainant child was his first born daughter and alleging that the charges were frame up by the victim’s mother who was his first wife who he said had lied as on the material date 25/11/2017 he was at work and he had told her that he *would not go home as he did not have money*, as follows:

DW1

I am PKC. I live in Kabelmet sub-location. Lelmen location, I used to work in [Particulars withheld] as a casual employee. On 25/11/2017 I was at home at 4:00 am. The chief and officers came to my house. They knocked I opened the door.

They arrested me and took me to Salawa Ap camp.

At Salawa AP camp after 2 hours at around 11:30 am. I was taken to the Marigat police station. I later brought to court.

RCK gave false testimony she testified that the incident happened on 25/11/2017 but I was at work in SPR. I had a second wife. RCK is my 1st wife. When I got employed at SPR I used to go home on weekends. On 25/11/2017 I did not go home. RCK said I went to my 1st wife. I had told that on 25/11/2017 I would not go home as I did not have money.

RCK has used FJK to frame me. FJK is my first born daughter.”

Conclusion

13. Weighing the evidence of the prosecution against the unsworn statement of the defence and bearing in mind the standard of proof of beyond reasonable doubt, I find that the appellant’s defilement of the victim’s evidence of defilement by her father was corroborated by the evidence of her mother who came to discover the matter upon the child’s complainant’s of illness and later disclosure of the father’s acts leading to medical examination which established sexual penetration with the evidence of the Clinical Officer that the hymen was absent and that the victim’s labia majora and minora were reddened and hyperemic on the examination, two weeks from date of defilement. The Clinical Officer recorded on the P3 that:

*“Laboratory examination done were all negative, or normal because the incident was reported late (that is) two weeks after defilement. **However from history and physical examination there was evidence that there was penetration”.***

The court has no medical evidence to suggest that the hyperemic labia could not be detected on examination two weeks after the fact.

14. The alibi defence of the appellant must be rejected in view of the consistent evidence of the complainant (Pw1) and the mother (Pw2) as confirmed by the medical evidence of Pw3. Even though the appellant suggested there could have been a grudge between him and the mother of complainant over his taking a second wife, there is no explanation why a ten (10) year-old should lie about her father having defiled her on two occasions with detailed description as to the act and circumstances surrounding the acts – that the first was done when the mother had gone for a funeral and the later one when she had gone to fetch water – the two occasions being months apart according to the mother, in May and November 2017, respectively. In this regard, I would in accordance with the principle in ***Okeno v. R*** (1972) EA 32 makes “*allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses*”, and, consequently, defer to the trial court’s finding while convicting the appellant that the complainant was intelligent and truthful, as follows:

*“The accused person in his defence told the court that PW2 his wife was using PW1 to frame him because she had a grudge against him as he had a second wife. **I had the opportunity [to] examine the complainant’s intelligence, I found she was intelligent and gave evidence under oath. I also observed her demeanour. She appeared truthful. It is unlikely that he complainant would fabricate her evidence.** If the complainant had been coached by her mother in an effort to frame the accused person, cracks in her testimony would have been made during cross-examination. However, the complainant’s evidence was not shaken during cross-examination.”*

Occurrence Book (OB) record of report to the police

15. The apparent inconsistent dating of the P3 form indicating to have been issued on 13/12/2017 with cancellation on date to include 14/12/17 when the Investigations Officer testified the report was made to the police station does not, as submitted by the DPP, derogate from the facts established that the victim had been defiled and examination undertaken in Kabarnet Hospital which revealed evidence of defilement by the absence of hymen and hyperemic labia majora and minora according to Pw3. In the interest of justice, the court called for additional evidence by way of the Original Occurrence Book record from Kabarnet Police Station pursuant to section 358 of the Criminal Procedure Code. From the OB record, the report in OB 12/14/12/2017 is in terms as follows:

“OB NO. 12 of Thursday 14th December 2017

At 1055hrs: **DEFILEMENT REPORT MADE:** To Station is one I/F/A namely RCK c/o Salawa Tel 072243[withheld] who reports on 25/11/2017 her husband namely PKC defiled her daughter namely FJK [name initialized] aged 10 years while she was away. The girl informed her two weeks later. She then took her to hospital and now seeks police assistance.”

16. It was clear that the writing on the P3 form showing that the report had been made on 13/12/2017 was erroneous. However, as held by the Court of Appeal in the OB record is not evidence of any fact in the case other than the fact of the report. It was useful however, in ascertaining the correct date of the report to the police and in testing the consistency of the evidence subsequently adduced in court. See section 165 of the Evidence Act. It is also clear from the evidence of Pw2 that the child was first examined on the allegation of defilement on 6/12/2017 at Kabarnet District Hospital when she was referred on 11/12/2017, 13/12/2017 before reporting the matter at Kabarnet police station on 14/12/2017, where they recorded statements and were given a P3 medical examination from which they took to the hospital for completion. On cross examination, Pw2 said that she was aware that the accused had other children apart for hers and that she had agreed that he could bring them home and that Mercy the child’s auntie who had assisted her in taking the child to hospital had not recorded a statement.

17. The appellant’s identity and relationship with the complainant being confirmed and the act of defilement proved against him, the offence of incest by male contrary to section 20 (1) of the Sexual Offence Act is proved. Accordingly, the court affirms the conviction of the appellant by the trial court therefor.

Appeal from sentence

18. In passing the sentence of imprisonment for life on the appellant, the trial court said:

*“**Court-** I have considered the accused person’s mitigation. **The Sexual Offences Act prescribes life imprisonment for an accused person who is found guilty for the offence of incest.** It is very sad to note that the accused person who was supposed to be the protector of the minor turned to be her tormentor. I sentence the accused person to life imprisonment. Right of Appeal 14 days.*

V.O. Amboko, RM

18/4/2018.”

19. The appeal from sentence succeeds in that section 20 (1) proviso of the Sexual Offences Act only sets out the **maximum** sentence for which the offender in the offence of incest by male where the victim is a child below the age of 18 years. As held in **Opoya v. Uganda** (1967) EA 752, the phrase “*shall be liable*” used in the Proviso provides the **maximum**, and not **mandatory**, penalty and the trial court in this case, with respect, fell into error in sentencing the **first offender** herein the **maximum** penalty. See **Arissol (Josphine) v. R** (1957) EA 447, 449 and **Wanjema v. R** (1973) EA 493, 494.

20. The court, however, takes a serious view of the matter considering the tender age of the victim who was 9 years 10 months at the time of the offence, and of the fact that incest on a child is just **defilement** by a relative, and a relative offender should not suffer any lighter sentence than would be imposed on a non-relative. Indeed, it should be more severe to deter so minded relatives who have ready access, and therefore ample opportunity, to defile the children.

Orders

21. Accordingly, for the reasons set out above, pursuant to section 354 (3) of the Criminal Procedure Code, the appellant’s appeal from conviction for the offence of incest by a male person contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006 is dismissed.

22. However, pursuant to section 354 (3) (b) of the Criminal Procedure Code, the sentence of life imprisonment shall be reviewed to **imprisonment for twenty (20) years** for the offence of incest by a male under section 20 (1) of the Sexual Offences Act herein committed by the first offender appellant on a child aged 9 years and 10 months.

23. The sentence of imprisonment for twenty (20) years shall commence pursuant to section 333 (2) Proviso of the Criminal Procedure Code on **19th December 2017**, when the appellant was first remanded to await his trial.

Order accordingly.

DATED AND DELIVERED THIS 6TH OF MAY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.