



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

(CORAM: MAJANJA J.)

CRIMINAL APPEAL NO. 218 OF 2013

BETWEEN

T I L.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M.I.G.

Moranga, PM delivered on 14th November 2013 at the Kakamega

Chief Magistrate's Court in Criminal Case No. 56 of 2012)

JUDGMENT

1. The appellant, **T I L**, was charged and convicted on two counts of incest contrary to **section 20(1)** of the *Sexual Offences Act ("the Act")*. It was alleged that on the night between 11th and 12th August, 23012, in Kakamega East District, he intentionally and unlawfully caused his penis to penetrate the respective vaginas of OS and PM, who were to his knowledge his daughters. He was sentenced to concurrent life sentences on both counts. He now appeals against conviction and sentence.

2. The thrust of the appellant's appeal is that the prosecution failed to prove its case beyond reasonable doubt. He contends that the medial evidence was inconclusive and doubtful and that the prosecution failed to call the investigating officer. He also complained that he was not medically examined in order to confirm that he was the perpetrator. The respondent's case is that the prosecution proved all the elements of the offence.

3. As this is a first appeal, I am required to review all the evidence and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I never heard or saw the witnesses testify.

4. The prosecution case was that on 12th August 2012, PW 1, a village elder in Virhembe Sub-location was at a funeral when she was brought two children who were sick with fever and were jigger infested. She made an announcement about the children at the funeral but no one responded. She was advised by the assistant chief to take them for treatment and in due course, the two children revealed that they had been sexually assaulted by their father. She wanted to take them back home but they refused to go home as they told her that their father had beaten their mother and had sexually assaulted them. She reported the matter to the police station and took the children to hospital for examination and treatment.

5. One of the children, PM (PW 2) was affirmed after a *voire dire* and she told the court that the appellant was her father. She testified through PW 1, who was also appointed as an intermediary. PW 2 identified the appellant as her father and narrated what had taken place as follows;

I know the [appellant]. He is my father. I do not stay at home with him anymore. Because he wronged me. He used to show me something which he used to put in my thing here, down here (points at genital area). He used to remove the thing from inside his trouser. He did so at night. We stayed. We stayed in the same house as [my sister].

When he removed this thing, he put his thing into this place (points at her genital area). I felt pain between my legs. He put it inside

from the front not on my backside, not on my thing, between my legs)

6. OD (PW 3) was also affirmed after a *voire dire* and she also testified through PW 1, the intermediary. She also identified the appellant as the father and narrated the things he had done to her. She stated, in part;

My father did bad things to me. He carried me and did bad things to me in his house. He removed his thing from under his underpants and put here between my legs. He lifted my clothes and did there bad things. He put his thing into mine here (points at an area between her legs). It happened twice. I did not tell anyone.

7. Both PW 2 and PW 3 told the court that after the assault, the appellant chased them away and that is when they met PW 1 who organized for them to be taken to hospital.

8. PW 4, the Clinical Officer, who examined the children at Kakamega Provincial Hospital examined them. In respect of PW 3, he observed that she was malnourished. He noted that the hymen was missing and her private parts were inflamed. When the blood and urine were tested, she was found to have contracted gonorrhoea. He also examined PW 2. Although there was nothing remarkable with her genitalia, she had a urinary tract infection. He produced the age assessment reports done by another doctor which showed that PW 3's was 8 years old while PW 2 was 6 years old.

9. The arresting officer, PW5, testified that he arrested the appellant at his home.

10. In his sworn defence, the appellant stated that the two children got lost from home on 12th July 2012 and on the following day he started searching for them. He only learnt that the children had been found and taken to Kakamega.

11. At this point I wish to point out that under **section 20(1)** of the **Act**, incest is proved by either penetration or indecent act hence penetration alone is not an essential ingredient of the offence. What distinguishes the offence of incest from defilement under **section 8(1)** of the **Act** or committing an indecent act with a child under **section 11(1)** of the **Act** is the relationship between the accused and the child.

12. The appellant admitted that PW 1 and PW 2 were his daughters which is one of the prohibited relationships under **section 22** of the **Act**. The issue for determination is whether the prosecution proved penetration or an indecent act by the appellant. "Penetration" under **section 2** of the **Act** means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person." "Indecent act" means "any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration"

13. The evidence against the appellant largely depends on the credibility of the testimony of PW 1 and PW 2 who gave graphic details of how the appellant sexually assaulted them. Under **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and allows the court to convict an accused where the trial court on the basis of the evidence of the victim without corroboration if, for reasons to be recorded, the court believes the child was saying the truth. Having heard PW 1 and PW 2, the trial magistrate, recorded her impression and findings as follows;

I had the privilege to observe these young girls they appellant honest and truthful and I did not observe any elements of coaching or incite(ment) or malice towards them) further they appreciate consistent in their testimonies and they gave me no reason to doubt they were telling the truth.

14. I have looked at the evidence on record, it was graphic, consistent and credible. It is detailed in a manner that it can be when a child is giving evidence. Both PW 1 and PW 2 remained unshaken even in cross-examination and I have no reason to depart from the findings of the trial magistrate.

15. If any corroboration were required, it is to be found in the testimony of PW 1 who found them in a distressed state and who was informed by the children that their father had sexually assaulted them. They also refused to go back home as they were in fear of the appellant. The medical evidence also supported the case of penetration although I would not that in respect of PW 2 it was inconclusive. This though does not undermine the prosecution case as medical evidence is merely corroborative and the offence of incest is proved by establishing an indecent act.

16. At this stage, I reject the appellant's submission that the case must fail since he was not examined. As the Court of Appeal noted in **Geoffrey Kioji v Republic, NYR Crim. App. No. 270 of 2010 (UR)**;

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

17. In his defence, the appellant contended that the children were lost from home but he did not put this issue to them in cross examination. He did not report the issue to the authorities or take any step consistent with his position as a parent who care for his children. His defence was therefore an afterthought.

18. The appellant complained that certain witnesses were not called. **Section 143** of the **Evidence Act** does not require the prosecution to call

all or any witnesses to prove a fact. It states that, “No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact.” In **Bukenya and Others v Uganda [1972] EA 549**, the Court held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. I do not think that failure to call the investigating officer was prejudicial to the appellant as the evidence against him based on the clear and credible testimony of PW 2 and PW 3 which was sufficient to support the conviction.

19. The appellant was sentenced to concurrent life sentences. Under **section 20(1)** of the **Act**, an accused is liable to life imprisonment if the victim is under the age of 18 years. In **MK v Republic NRB CA Crim. App. No. 248 of 2014 [2015]eKLR**, the Court of Appeal held, following **Opoya v Republic [1967]EA 752**, that the meaning of the word “liable to” in **section 20(1)** of the **Act** means that the sentence is the maximum and not mandatory hence the court misdirected itself. The life sentence is commensurate with the mandatory sentence imposed when a person is convicted of defilement of a child below the age of 11 years under **section 8(2)** of **Act**. The life sentence was therefore legal and proper.

20. The conviction and sentence are affirmed.

21. The appeal is dismissed.

DATED and DELIVERED at KAKAMEGA this 4th day of April 2018

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng’etich, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.