



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 168 OF 2017

J K K.....APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

[An appeal from the original conviction and sentence of Cr. No 669 of 2015 in the Principal Magistrates Court at Eldama Ravine delivered on the 19th day of September, 2016 by Hon. R.Yator SRM]

JUDGMENT

1. The appellant herein was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act and an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act the particulars of which were that during the month of April, 2015 at unknown date within Baringo County committed an act which caused penetration of his penis into vagina of J J K a child aged 13 years who is to his knowledge his daughter. The alternate was that on the month of April at unknown date within Baringo County, committed an act which caused his penis to come into contact with the vagina of J J K a child aged 13 years.

2. The evidence presented by the prosecution and the defence before the trial court was, principally, as follows:

1. ***“PW1 J J K testifying upon a voire dire examination upon which the trial court found that “the minor does not understand meaning of oath hence shall give unsworn evidence and she is reminded of importance of telling the truth.”***

I am 14 years old and I school at [particulars withheld] Primary School class six. In April, 2015 I was at home alone and Sister J J had gone to fetch cows and my mother was away in Kiptumo. It was around midday preparing lunch. My father came and called me and I responded, I was outside the house and he told me to sit down on the grass, he was lying down on the grass and I sat next to him and he held me (court notes she hesitates to talk further) he pulled both my legs and he did bad manners to me and he had his clothes on and he removed my pant and he opened his zip and he used his thing for urinating (penis) and inserted into my private parts and he said if I tell anyone he will kill me. I felt pain when he defiled me, I tried to scream and he left me alone. I then stood up and escaped and stood outside the house and he left. When I escaped I left my pant behind and I did not know where it went. I did not tell anyone nor my mother. Later I noticed blood coming out from my privates when I had escaped and I wiped and it did not stop bleeding. I used a piece of cloth to wipe. I did not tell anyone and when father was later arrested, I told my mother on a Monday that he had defiled and the following day we came to police station together with my mother and sister J J and we then went to the hospital and the doctor examined me and we went home.

Cross-examination by Accused:

You defiled me in April and I do not know month you were arrested and I do not recall if I recorded it was in July. I do not recall month I was taken to hospital. I was preparing lunch for myself and J J. That day I also prepared lunch during lunch hour and sometimes we used to prepare in the morning. I was brought to hospital and I was given medicine but I do not know for what disease.

2. **PW2 F C K**

I come from Sigoro and I am a peasant farmer. On 11th July, 2015 unknown time I was at my parents’ home – Kiptunu together with some of my children and others I had left at Sigoro at home. Their father is accused in court (points out). I stayed in Kiptunu since November, 2014. The accused is my husband and I stayed till July, 2015 at my matrimonial home and I had disagreed with him and I left my matrimonial home. I had left him with two of my daughters one aged 13 years and another 8 years and they were school going at [particulars withheld] Primary. The one aged 13 years was in class 5 and the other class 4.

While at home, I learned accused had been arrested and I was telephoned from police station to take the two girls aged 13 and 8 and took them to the station and before going to station I asked the children what had happened and the police had told me the

children had been raped and it was officers from Eldama Ravine Police Station.

I asked the children and the one for 13 years told me the father defiled her while alone preparing lunch and he called her behind the house and then held her and forced her to sit down then defile her and he removed the child's pant and did not tell me if accused removed his clothes. That the 8 years old was looking after cows. I then took the children to police who then took the children to hospital where she was examined at Eldama Ravine District Hospital and we were together with the police and they wrote some treatment chit and it is the one in court. We then returned to the police station and recorded statements and I was given p3 form which we took to the doctor and filled it. I do not know how accused was arrested. The child was born on 6th February, 2002 and I have the child notification (MFI-3). Before accused chased me away we had never disagreed. At the moment I live at my matrimonial home with all my children.

Cross-examination

The Police first telephoned my neighbour Chelagat as I had no phone she came to find me at Kiptunu. Chelagat comes from Sigoro and chelagat found me at Kiptunu where she came to find me. Chelagat knows of the offence relating to the big child and we did not frame you. We went with one officer to the hospital. I was at my paternal home when offence occurred now am at my matrimonial home, I did not intend to jail you so to be at your home. I did not sell any of my cows nor possession. I am not using the children against you.

Re-examination

We did not obstruct the doctor from examining the child. Kiptunu to Sigoro is a footing distance. I was not the only one recording statement but I was explaining as police records.

3. PW3 Dr. Muendo Charles Mike

I work at Eldama Ravine District Hospital where I have worked for two years. I have P3 form and medical chits which I prepared on 14th July, 2015 of a minor 13 years brought by the mother and escorted by the Police with history of sexual assault by known person on April, 2015. **She was of fair general observation an on examination and external genitalia was normal with whitish discharge from the vulva and no visible injury and hymen was intact.** There was an impression of defilement in the 72 hours and hence several tests including urinalysis and VDRL and PTC and she was not put on treatment and the test result showed normal urinalysis and VDRL and PTC were negative.

The clothes were not blood stained and she said she had washed them and **she reported to hospital three months after offence hence we could not get much. She had normal external genitalia and no visible injuries and no trauma to vagina but whitish discharge and cervix was normal. We classified as grievous harm and I signed it on 14th July 2015.**

Cross-examination by accused

Examination was normal apart from whitish discharge which can be a result of many factors. The complainant ought to be examined within 72 hours. Accused can be tested but before he has done many things like showering and it can be test of his sperm or pubic hairs and it must be immediately after the act.

We did not examine you as it was after three months of offence the drugs I put her on was of the whitish discharge. Clothes had been washed and were earlier with blood stains and did not see the clothes. In offence relating to minors history matters and that the child was treated. I have my ID confirming names and I do not have my Kenya Medical card in court.

Re-examination

I examined the child after three months of offence and such could not do high vaginal swab as it is supposed to be done immediately to see if sperms are present and vagina would have also undergone changes and also would affect state if any injuries or hymen. The child and mother said clothes were blood stained at the time of offence. The medical reference number supposed to be given by hospital and it is not my personal number. The whitish discharge is due to Candidiasis which is caused by many things and is very rare in children.

4. PW4 No. 73161 CPL Julia Cherop

I am stationed at Nkubu Police Station, in 2015 I was at Eldama Ravine Police Station and I am the Investigating Officer herein. **On 13th July, 2013** I was in the office when mother to complainant one F C K came and **made report that in April, 2015 complainant was defiled by the father and report made in OB** and I took them to crime office and continued with interrogation and I discovered that complainant herein was home on unknown date in April, 2015 at 1.00 pm. And had been left with other children to prepare lunch for them as they went to herd cattle and complainant was playing alone outside and that the father arrived and went behind the house and called complainant. **PW1 went to hear what the father wanted, he held her and forced her to sit down and she screamed and she tried to pull away and the father then held her and went beside the house and sat. After an hour he called again by names telling to tell her to go for sugar the father was holding Ksh.50/= when she wanted to hold the money, the father held her and pulled and forced her to lie down and removed the child's pant before opening his zip and defiling her, the child screamed but accused covered her mouth with the hands but continued to defile her then he threatened her not to tell anyone. He then left leaving the child while crying and the child said she saw blood from her private parts and she did not tell anyone.**

On 11th July, 2015 mother of the complainant discovered that her eldest child was found to be expectant while staying with the aunt in Nairobi and when asked whose pregnancy it was she said it belonged to the father. The mother had separated with the father and she then came back to her children to inquire if they had also been defiled by the father and that the complainant herein also said she had been defiled. I do issue a P3 form which was filled by the doctor and I got a birth notification card of the child. The accused was arrested on 13th July, 2015 and I found [him] **in cells in relation to the defilement case of the other child he had impregnated.**

Cross-examined by accused

The charges were amended for attempted incest to incest. From my statements it indicates attempted defilement but later changed to incest as per charges and it is incest and I had recorded my statement before charges were amended. The child had said she had been defiled by the father and after investigations it was confirmed he was the father and had defiled her. You were charged on 14th July, 2015 and amended I do not recall the date you were arrested but as per file it was on 13th July, 2015 and brought to court on 14th July, 2015. The child said she saw blood stains in her private parts and she came after some days of offence and already washed her clothes. Chelagat is no witness in this case but in the other defilement case. You were not taken for medical examination. There was no independent witness except from mother and child.

Re-examination

Report was made three months later in July, Chelagat was not around hence cannot be called as witness. No witness saw offence and complainant was warned not to tell anyone.”

5. The appellant testifying as DW1 made sworn evidence and stated:

“DW1 J K K

I come from Sigoro location and I deal with timber business. In April unknown date as per charge sheet I do recall. The case ought to fairly differences as I married another wife hence differences with my earlier wife (PW2) who had gone to their maternal home and Jelagat got chance to separate me from PW2. We had a shamba differences with Jelagat after her brother Nicholas Kipruto Rop came to my home on 4th July, 2015 telling me I will not harvest nor plough in 2016 and I will see consequences and I was arrested later and after arrest PW2 went to my home and sold cows, sheep and power saw 272 extra power on 28th September, 2015.

Cross-examination by prosecutor

My first wife is F C K (PW2) and second wife S J K and complainant is my daughter born by first wife PW2 and I disagreed with her when I married second wife. My daughter is 13 years old and at time of arrest she was in class six. I am not familiar with investigation diary. I know how to read. When the child testified she said she did not know the date of offence. I only had land disputes with Jelagat who is not my witness but told PW2 the child had been defiled.”

6 The trial magistrate in a judgment delivered on the 19th of September, 2016 found the appellant guilty and convicted him giving reasons as follows:

“I have considered both the prosecution and defence evidence and exhibits produced herein. Firstly, it is not denied that indeed the accused was the biological father of the victim as he in fact confirmed this in his defence. It was well proved that at the time of the examination three months after the alleged offence, the child was 13 years old as per P. Exhibit 3.

On whether the accused did defile the daughter, the doctor stated that at the time of the examination three month after the alleged offence, the genitalia looked normal and the hymen was intact though she had whitish discharge which could be occasioned by the child who was hesitant and in fear while testifying courageously told the court of how the father pulled her while sitting on the grass before defiling her after which she noticed she was bleeding from the private parts and she used some pieces of cloth to wipe. The doctor testified that the period could have had a change on condition of the genitalia. It is also noted that the child reported to her mother after his father was arrested in July, 201. It is also noted that the child stated the accused threatened to kill him if she told anyone and furthermore the child’s mother on material date had since separated with the accused and was away at her maternal home and had been left at her father’s custody together with her younger sister.”

3. The appellant through his Petition of Appeal against conviction and sentence of life imprisonment stated his amended grounds as follows:

The trial court erred in both law and facts when it convicted me:

1. *Without observing that penetration was not proved.*
2. *And failed to notice that I was improperly arrested by unknown people.*
3. *And failed to observe that age was not proved credibly as required.*
4. *Using language which accused was not fluent and could not understand.*

5. *Without appreciating the variance between particulars and evidence.*
6. *On the evidence on purported incompetent clinical officer*
7. *Using feeble, dangerous and uncorroborated evidence of the girl*
8. *denied me opportunity to be represented.*
9. *On poor investigation*
10. *Failed to comply with section 210 and 211 of the Penal Code*
11. *Contravened section 43 of Sexual Offences Act*
12. *On conspired prosecution evidence*
13. *On a grudge by mother of the complainant*
14. *Clothes proved nothing*
15. *Contravened section 50(2) (p) life sentence is illegal.*

4. In his written submission based on the amended grounds, the appellant submitted on 11 grounds as follows:

1. “Ground one: penetration was not proved

I rely on PW3 evidence the examination was self-explanatory. The child was not sure of the date when the incident took place. This raises eyebrows on the probability of the allegations. Whitish discharge does not hold any water since it can be a result of many factors. Therefor either evidence cannot be used to incriminate me to the offence. The trial court was gravely misdirected in finding the accused guilty in absence of penetration which was not proved. The evidence that the complainant bleed through the ordeal was not corroborated by medical evidence or the expert witness. The hymen was intact, in the upshot it is evident that the complainant was not defiled. By incest was proved as to previous nor the present accusations.

2. Ground two: unknown mode of arrest

Article 49 and 50 of the Constitution lay down the rules of justice, it should be observed that the exact date when the incident took place is not known. Secondly the people who arrested the accused are not known it was important for them to be summoned to court. It is not known how the report reached the police, I contend that there were some people who invoked my arrest but were not summoned. I rely on **Ndegwa vs. Republic** [1985] KLR 534 and **John Kenga vs. Republic** [1984].

3. Ground three: age of complainant as not proved as required by law

The complainant was aged 13 during the time of the incident, when she testified she alleged she was 14 years. The birth certificate was not produced before court. see **Joseph Njaarambi Karura vs. Republic** [1982-1988] KLR. **Stephen Syende vs. Republic** [2009] eKLR held that:

“the age of the complainant is of paramount importance as a mistake on assessment can cost a citizen his liberty for long time sometime for life.”

Semion Wanjala vs. Republic [2011] eKLR judge held that:

“in such offences when age is of essential importance the prosecution has a burden of proving the age of the complainant to the standard required in criminal law that is beyond reasonable doubt.”

The trial court’s decision was wrong when it failed to consider that part of the charge was not proved.

4. Ground four: language used was unusual to the appellant

The trial court was required to inquire from the accused person as to what language he understood first before the controversial. That prejudiced the accused materially and fundamentally.

5. Ground five: variance between particular of the charge and evidence

The person who testified as J J K is not the same who identified herself in court. The charge sheet was amended and not the alleged names this was enough to prejudice my trial. The amended charge was read while the appellant was sick.

6. Ground six: the clinical officer was incompetent.

Clinical practitioners must be certified, qualified and registered PW3 was not a certified doctor and not registered by the Kenya Medical and dental practitioners.

7. Ground seven: the evidence of woman and girls alone is fatal to a safe conviction.

In *Musukari vs. Republic* [1986] KLR court stated inter alia:

“it has been said again and again that in a case of alleged defilement or sexual offence is dangerous to convict on the evidence of a woman or girl alone sometimes it is dangerous because human experience has shown that girls and woman do sometimes tell entire false story which is very easy to fabricate but extremely difficult to refute. Such fabricated stories for all sorts for reasons and sometimes for no reason at all.”

The learned magistrate did not warn himself on the dangers of uncorroborated evidence.

8. Ground eight: the trial denied me the opportunity to be represented by counsel

I was not informed to employ counsel nor given counsel at state expense. The trial court was silent about the matter.

9. Ground nine: poor investigations

This is a case will made-up characteristics. Most of the facts were not roved nor investigated.

10. Ground ten: both section 210 and 211 of the CPC were infringed

I was not given an opportunity to sum up my case according to section 210 the record is silent. The options of giving evidence were not explained.

11. Ground eleven: particulars of the charge were framed in accordance with section 43 of Sexual Offences Act

The words of the offences were poorly frames contrary to the provisions of section 43 there were omissions of the words ‘intentionally’ and ‘unlawfully’ and the initials of true names were withheld.”

5. The DPP did not oppose the appeal, and Ms. Macharia, Ass. DPP made the following oral submissions submitted as follows:

“Ms Macharia

Appeal is not opposed. Appellant convicted of incest by male contrary to Section 20 (1) of Sexual Offence Act and sentenced to life imprisonment on 19/9/16. Charge sheet indicates that offence committed during the month of April 2015, on an unknown date. Evidence of Pw1 was that she was at home alone and her sister had gone to fetch cows and the mother was away at Kiptumo. Her father came and called her while she was outside the house. He pulled her by both legs and did “bad manners to her”. She did not tell anybody about it. She only told her mother later when her father was arrested from another offence about (3) months after the incident. Evidence of Pw4 at page 23 line 18 – 25 is different from that of Pw1. Pw4 talks of the appellant sending the complainant with a 50 shilling note for sugar and while insisting to be given money the father held her and defiled her.

The complainant did not mention anything about this in her testimony.

The statement of Pw1 and Pw4 on how the offence occurred is contradicting and the contradiction should be used for the benefit of the appellant.

Pw3 is the doctor who explained to complainant.

In his testimony he said upon examination there were no visible injuries and the hymen was intact.

The external genitalia was normal. On Cross-examination at page 20 in line 18 – 20, he said that on examination all was normal apart from a whitish discharge which could be as a result of many being one having infection on sexual assault.

The doctor failed to explain the presence of the hymen (3) months after the alleged incident. The evidence was not sufficient to convict the appellant and I urge the court to quash the conviction.”

Determination

6. Upon considering the evidence presented by the prosecution and the defence afresh as required of a first appellate court (See *Okeno v. R* (1972) EA 32), the court agrees with the DPP that it was unsafe to convict the appellant in the circumstances of this case where there was glaring discrepancies in the evidence of the complainant PW1 and that of the investigating officer (PW4). The evidence of the Investigation

Officer contained evidence to which the complainant who is the person who alleged underwent the act of defilement did not testify to.

7. In addition, the medical evidence given by PW3 did not corroborate the allegation of defilement by the complainant. The doctor found no evidence of penetration as hymen was intact and the genitalia was normal. In any event, the medical examination was conducted 3 months after the alleged defilement, and it was of little value as proof of the alleged defilement. The medical evidence is also self-contradictory as the **external genitalia was normal with whitish discharge from the vulva and no visible injury and hymen was intact**, what was the basis for the *'impression of defilement in the 72 hours'* and the assessment of injury as grievous harm. Which injury? When the testimony was that there was no visible injury. PW3, the doctor was categorical that the complainant **"reported to hospital three months after offence hence we could not get much. She had normal external genitalia and no visible injuries and no trauma to vagina but whitish discharge and cervix was normal. We classified as grievous harm and I signed it on 14th July 2015."**

8. In the circumstances where mother of the complainant (PW2) who is also the wife of appellant conceded estranged relations with the appellant which had occasioned their separation the defence of trumped up charge raised a reasonable doubt. The complaint in the charge having alleged taken place three months earlier was only raised by the complainant when the mother asked whether she could also have been defiled following the report by another child of the couple who had alleged she had been impregnated by the appellant. The complaint in this case appears to have been solicited by the police through one Chelagat and the mother. The Investigating Officer (PW4) said that "The accused was arrested on 13th July, 2015 and I found [him] ***in cells in relation to the defilement case of the other child he had impregnated***". The mother PW2 testified that –

"While at home, I learned accused had been arrested and I was telephoned from police station to take the two girls aged 13 and 8 and took them to the station and before going to station I asked the children what had happened and the police had told me the children had been raped and it was officers from Eldama Ravine Police Station. I asked the children and the one for 13 years told me the father defiled her while alone preparing lunch and he called her behind the house and then held her and forced her to sit down then defile her and he removed the child's pant and did not tell me if accused removed his clothes."

9. In view of the discrepancy of the evidence of the child and the investigation officer, the child may have been coached on her testimony. The police were clearly on a fishing expedition that since the appellant had been arrested over the alleged defilement of an older child, he may also have defiled the younger ones.

10. Having reached a conclusion that it was unsafe to convict the appellant on the evidence before the court, and in view of the concession to the appeal by the DPP, the court does not have to consider the other grounds of appeal raised by the appellant.

Orders

11. Accordingly, for the reasons set out above, the conviction and sentence of the appellant for the offence of Incest contrary to section 20(1) of the Sexual Offences Act are respectively quashed and set aside.

12. There shall, therefore, be an order for the immediate release of the appellant unless he is otherwise lawfully held on account of any other criminal proceeding.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF OCTOBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.