REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 67 OF 2014

G K……...…….…….....APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(*Being an appeal from the original conviction and sentence in Criminal Case No. 1022 of 2013 Republic v Gilbert Kiptoo Barbos in the Senior Resident Magistrates' Court at Iten by Ms. R. Ndombi, Acting Senior Resident Magistrate, dated 10th April 2014.)*

JUDGMENT

1. The appellant was convicted on *two* counts of deliberate transmission of HIV contrary to section 26 (1) (b) of the Sexual Offences Act; and, stealing contrary to section 275 of the Penal Code. He was sentenced to serve *fifteen years* imprisonment for deliberate transmission of HIV; and, *six months* imprisonment for theft. The sentences were to run *consecutively.*
2. The particulars of the count of deliberate transmission of the virus were framed as follows-

> *"That on 2nd September 2013 at about 9:00pm [particulars withheld] Elgeyo Marakwet County, having actual knowledge that he was infected with HIV, he intentionally, knowingly and willfully did an act of sexual intercourse [sic] with B.J. [particulars withheld] reasonably knowing was likely to lead to her being infected with HIV".*

3. Regarding theft, the particulars were that on the same date at about 7:00am, he stole Kshs 1,000 and one mobile phone all valued at Kshs 4,000 the property of B.J. *[particulars withheld].*
4. The appellant has preferred an appeal. The *original* petition was filed on 22nd April 2014. On 13th July 2015, the appellant was granted leave to amend the grounds of appeal. There are four *amended* grounds. First, that there were contradictions between the findings in the judgment and the sentences for the respective counts; secondly, that the police should have conducted an identification parade; thirdly, that learned trial magistrate erred by convicting the appellant on contradictory and uncorroborated evidence of PW1 and PW5; and, fourthly, that the charge sheet was defective or at variance with the evidence of PW5. At the hearing of the appeal, the appellant relied entirely on written submissions filed on 11th February 2016. I heard the appellant to say, in

a word, that the charges were not proved beyond reasonable doubt.

5. The appeal is contested by the State. The learned State Counsel submitted that from the medical examination of the appellant, it was established that he was HIV positive, a fact known to him. The appellant engaged in sexual intercourse with the complainant without any form of protection. He was thus properly convicted of deliberate transmission of the virus. It was submitted that the appellant was positively identified by the complainant and the owner of the lodging (PW3). The appellant's name was G K but had lied about his name to PW5. The State contended that the charge of theft was also proved beyond reasonable doubt. In a synopsis, the case for the State is that the appellant's culpability was established. I was implored to dismiss the appeal.
6. 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).
7. It is material that the appellant was *acquitted* of a third count of rape contrary to section 3 (1) of the Sexual Offences Act. The learned trial magistrate found that the complainant's version of events was *"ridiculous"* because *"she agreed to meet a stranger, then accompany him at night [from Eldoret] to an unknown town [Iten], go to a hotel for supper, then accompany him to a lodge, book a room, enter and sit on the bed"*. The lower court also found that there was *no* evidence she had been drugged by the appellant. I agree entirely with that finding. There was insufficient evidence to show that the sexual intercourse was *non-consensual*.
8. PW1 was a waitress at Nova Hotel. She testified that she met the appellant on 2nd September 2013. She was asked by her colleague, H, to call the appellant whose brother wanted to hire a cashier at a different hotel. PW1 called the appellant. They agreed to meet outside the hotel. It was about 7:30 in the evening. They travelled together from Eldoret to Iten, arriving at about 9:00pm. The appellant paid her fare. It was the first time the complainant was visiting Iten Town. They went for supper at a hotel in Iten. The complainant did not eat. The appellant then led her to a lodging. They went to room number 2. There was electric lighting. She testified that the appellant went outside for half an hour. When he returned he sat next to her. She claimed she felt like she had been drugged. The appellant then locked the door, undressed her and had sex with her four times. The complainant said that the appellant did not use any protection.
9. The next morning, she found out that Kshs 1,000 was missing from her purse. The appellant asked her for her phone to call the appellant's brother. The phone was worth Kshs 3,000. He disappeared with the phone. It is after that that she reported the matter to the care taker of the lodging and to Iten Police Station. At that point, she did not know the name of the appellant. She gave the police a description of *"a tall man with long hair"*.
10. She was given a P3 form and referred to Moi Teaching and Referrral Hospital. She later consulted a doctor who prescribed some *ARV* drugs. On 16th September 2013, the appellant was arrested at the same lodging in the company of another woman. PW1 was summoned by the police to Iten. She identified the appellant as the person who had sex with her on 2nd September 2013.
11. PW2 was a clinical officer at Iten District Hospital. On 17th September 2013, he examined the appellant. He established he was HIV positive. He said he asked the appellant if he knew he was positive. The appellant answered in the affirmative. He produced the P3 form for the appellant (exhibit 3).
12. PW3 was the proprietor of the lodging. He confirmed that he knew the appellant as a customer. He had been a customer for about a month. He said that at times the appellant would sleep alone; at other times with a partner. He testified that on 2nd September 2013, the appellant paid Kshs 200 for hire of room number 2. He was accompanied by a woman. The next morning he saw the couple *"prepare themselves and leave"*. He later received a complaint that PW1 had lost Kshs 1,000 and her phone to the appellant.
13. PW4 was Dr. Yatich of Moi Teaching and Referrral Hospital. On 3rd September 2013 he examined the complainant. On the genitalia, he found *"tenderness and hymenal tears; there was*

no vaginal discharge; the redness and tenderness indicated vaginal penetration". He also found that the complainant was sexually active. HIV and syphilis tests were negative. There were no sperms. He said further tests on HIV would be necessary after three months as there "remained a risk" that an infection had occurred.

14. PW5 was the investigating officer. He said that the complainant gave the appellant's name as *A*. On 16th September 2013, he received information that "A" had been seen with another girl at the lodging. He went there and found the appellant. The appellant at first admitted he was *A*. Apparently, the girl found with the appellant had also been lured from Eldoret with the promise of a job. At the police station, they discovered some *ARV* drugs from the appellant's pockets. The *Ampath Clinic* card of the appellant identified him as G K and *A* K B. PW5 summoned PW1 who identified the appellant.

15. I have then considered the defence proffered by the appellant. He said that on 2nd September 2013, he went to Ravine to transport a cow. The vehicle broke down. He guarded it as it was being repaired until 8:00pm. The following day he went to Moi University to deliver other cows. On 4th September 2013, he went back to work until 15th September 2013. On 16th September 2013, he was at the Kabarnet Bus Stage when two men and a woman arrested him and took him to Iten Police Station. He said Kshs 7,000, his belt and his *Ampath Clinic* card were taken from him by the police. The next day, he was taken for the medical examination at Moi Teaching and Referral Hospital.

16. A number of issues arise from that evidence. I will deal first with the *identification* of the appellant. PW1 met the complainant at Eldoret at about 7:30 in the evening. They travelled together to Iten, arriving there at about 9:00pm. They went for supper at a hotel in Iten. The appellant then led her to the lodging. They went to room number 2. There was electric lighting. PW1 testified that the appellant went outside for half an hour. When he returned he sat next to her. Clearly, PW1 had spent sufficient time with the appellant to recognize him. She did not know his true name. In fact she only described him to the police as *"a tall man with long hair"*. On 16th September 2013, she recognized him at the police station as the person who led her to the lodging and had sexual intercourse with her.

17. Granted that evidence, an identification parade was not necessary as urged by the appellant. The identification of the appellant was never in doubt. His claim that he was away in Ravine transporting a cow; or, repairing a lorry until 8:00pm was a red herring. The use of multiple identities such as "Amos" was a smokescreen to cover his tracks and schemes. It does not render the charge sheet defective or at variance with the evidence of the complainant or PW5. The appellant was in addition identified by PW3 as the person who booked room number 2 on 2nd September 2013 in the company of a woman. That corroborated the evidence of PW1. I have reached the inescapable conclusion that the appellant was *positively* identified by PW1. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Obwana & Others v Uganda* [2009] 2 EA 333.

18. The next key question is whether the appellant deliberately transmitted HIV. First, there is no doubt that the appellant was HIV positive. That was confirmed by PW2, the clinical officer. The critical question is whether he *knew* he was *positive*. PW2 testified that the appellant confided in him that he was HIV positive. PW5, the investigating officer, testified that he recovered from the appellant an *Ampath Clinic* card and *ARV* drugs. The corroboration came from none other than the appellant. In his sworn testimony he confirmed that Kshs 7,000, his belt and his *Ampath clinic card* were taken from him by the police. I thus readily find that the appellant was *HIV positive*; and, he *knew* about it.

19. PW1 testified that the appellant did *not* use any protection when he had sex with her. True, no sperms were found in her vagina. It was long after she taken a bath at the lodging and travelled to Eldoret for the examination. True, she did *not* get HIV from the encounter. But section 26 (1) (b) of the Sexual Offences Act criminalizes conduct that *"is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease"*.

20. So long as the appellant *knew* he was positive, his *reckless* sexual conduct amounted to *deliberate* transmission of HIV *irrespective* of whether the other person got *infected*. The mischief that the Act intended to cure is self-evident. I have already found that the appellant *knew* he was HIV positive. PW4 confirmed that PW1 had been penetrated. From the evidence of PW1, it is the

appellant who had sexual intercourse with her on 2nd September 2013. I thus concur with the learned trial magistrate that this count was *proved* beyond reasonable doubt.

18. Section 26 of the Act provides for a minimum sentence of fifteen years. That is the sentence that was handed down to the appellant. I do not agree with the appellant that there was a mix up in the judgment. The count relating to deliberate transmission of the virus in the charge sheet was count II. The learned trial magistrate found the appellant guilty. I have studied the *original handwritten* transcript of the lower court. The learned trial magistrate correctly sentenced the appellant to serve fifteen years imprisonment on count II. The typed record has omitted part of the hand-written text thereby giving the erroneous impression that the sentence related to theft in count III. I do not thus find any merit in the submissions by the appellant on that point.
19. From the evidence of PW1, I am *not* satisfied that *all* the ingredients of the offence of *theft* were established. PW1 only stated that in the morning, she found out that Kshs 1,000 was missing from her purse. She nevertheless accompanied the appellant back to Iten Town without complaining of the theft. The appellant asked her for her phone to call the appellant's brother. The phone was worth Kshs 3,000. He disappeared with the phone. PW1 did not lead evidence that she had the sum of Kshs 1,000 on the night of 2nd September 2013. It can only be an *assumption* that it is the appellant who stole it in the morning. Why did she *not* complain about the money when she accompanied the appellant back to Iten Town that morning? The circumstances under which she gave the appellant her phone *willingly* to call someone do not fully disclose the offence of theft.
20. Like I stated earlier, I have closely studied the original handwritten transcript of the lower court. It is not true that the learned trial magistrate did not sentence the appellant on count III. She sentenced him to serve six months imprisonment; the sentence to run consecutively. The typed record at the bottom of page 39 (hand-written pagination 53 at the top) has omitted some text and gives the wrong impression that the sentence of 15 years related to count III only. But having found that key ingredients of the offence of theft were not proved, it is now all water under the bridge.
21. In the end the appeal relating to conviction and sentence of six months imprisonment for the offence of theft in count III of the charge sheet succeeds. The conviction and sentence for theft are set aside. The appeal against count II in the charge sheet is dismissed. I uphold the conviction and sentence for the offence of deliberate transmission of HIV. The appellant shall accordingly continue to serve the sentence of fifteen years handed down by the trial court.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 3rd day of March 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant (in person).

Ms B. Oduor together with Ms. Mokua for the State.

Mr. J. Kemboi, Court Clerk.