REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 289 OF 2010

SMD……..…….…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal against conviction and sentence in the judgment delivered in the Nyeri Chief Magistrates' Court Criminal Case No. 98 of 2008 (Hon. J. Kiarie) on 11th November, 2011)

JUDGMENT

The appellant was charged and convicted of the offences of incest contrary to **section 20(1)** of the **Sexual Offences Act No. 3 of 2006** and deliberate transmission of H.I.V or any other life threatening sexually transmitted disease contrary to **section 26(1)(a)** of the same Act.

In the first count, it was alleged that on diverse dates during the year 2006 and 2007 (later amended to read 2008) at Kamakwa area in Nyeri district within central province, the appellant committed an act of penetration to D K M a child of tender age who to his knowledge was his daughter.

According to the particulars in the second count, it was alleged that on diverse dates during the year 2006 and 2007 (amended to read 2008 in Nyeri district within central province, the appellant deliberately transmitted a life threatening sexually transmitted disease of HIV Aids to DKM.

Upon conviction the appellant was sentenced to life imprisonment on the first count and fifteen years imprisonment on the second count with both sentences running concurrently; he appealed against the conviction and sentences on the following grounds:-

1. The learned magistrate erred in law and in fact in convicting the appellant based on doubtful and questionable prosecution evidence;
2. The learned magistrate erred in law and in fact in convicting the appellant when the charges against him were not proved;
3. The learned magistrate erred in law and in fact in disregarding the appellant's defence.

At the hearing of the appeal, the appellant relied on written submissions in which he expounded on the foregoing grounds of appeal. He basically submitted that there was no cogent evidence linking him to the crimes for which he was charged and convicted and that the evidence of the complainant, who was a minor, was not corroborated.

The appellant also disputed the fact that he was medically examined; in any event, so he argued, that there was no spermatozoa that was detected on the complainant and therefore the offence of incest or sexual assault was not established.

The evidence of the P3 form which the trial magistrate relied upon to convict the appellant was also contested; it was the appellant's argument that that document ought to have been produced by the maker thereof and not any other person. Apart from the absence of this particular witness, the appellant argued that two other witnesses, one of whom was the complainant's elder sister and the person who allegedly reported the offences to Nyeri children's office were not called to testify.

On the question of his defence the appellant submitted that his evidence, though unsworn was not challenged by the prosecution and the learned trial court ought not to have disregarded it.

Mr Njue Njeru for the state opposed the appeal; he submitted that the appellant's sister who would have testified had ran away from home and the neighbour who reported the matter to the police feared retaliatory attack by the appellant. Counsel argued that failure to call the two was neither prejudicial to the appellant nor was it fatal to the prosecution case. The learned counsel for the state cited **section 143** of the Evidence Act (cap 80) and submitted that no particular number of witnesses may be called to prove a fact; it is the prosecution's discretion to call any number of witnesses it pleased.

Mr Njeru submitted that the evidence as submitted was cogent and consistent with the appellant's guilt. Counsel submitted that there was also sufficient corroboration that the complainant had been defiled; her evidence was corroborated by the medical evidence.

Regarding traces of spermatozoa, counsel submitted that to prove penetration, it is not necessary to show that there was ejaculation; medical evidence to show that there was penetration was sufficient.

Counsel cited the decision by the Court of Appeal in **Kisumu Criminal Appeal No. 183 of 2009 Joshua Otieno Oguga versus Republic** for the position that it is not always necessary that a document must be produced by its maker particularly in cases where medical evidence is required.

Counsel for the state submitted that the appellant's defence was a mere denial and no new issues were ever raised; in any case the court duly considered it and found it to be a sham. The learned counsel for the state asked the court to uphold the conviction and the sentences as meted out by the trial court.

I have considered both the appellant's and the state counsel's submissions but before coming to any conclusions it is necessary and in fact obligatory on this court, as the first appellate court, to reconsider and analyse afresh the evidence that was presented at the trial for it is only then that it can determine whether the trial court's decision should be upheld as urged by the state counsel or it should be upset altogether and allow the appeal. In the Court of Appeal decision of **Okeno versus Republic (1972) EA 32**, where this issue was addressed, the court remarked that:

An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof).

There is no dispute and it is apparent from the record that the complainant, **D K M (PW2),** was the appellant's daughter. According to her, in 2005 she was living with her father together with her elder sister in the same house; apparently her mother was deceased. Sometimes later, her sister disappeared from home and the complainant was left to live with the appellant alone.

According to the complainant, while she was in class three, her father "turned her into his wife"; she explained this to mean that he had sexual intercourse with her regularly from the year 2006 to December, 2007. He temporarily stopped this habit when her sister came back home in February, 2008 but resumed this behavior as soon as her sister disappeared again.

Sometimes in February, 2008, the complainant opened up to a neighbour and told her what the appellant had been doing to her. The neighbour took the case up with the children's officer. This officer reported the matter to the police who arrested the appellant. The complainant testified that she was found to have been infected with HIV when she was taken to hospital for examination.

Though she testified on oath after the court was satisfied that she understood the nature of an oath and after conducting a *voire dire* examination, the appellant opted not to cross-examine the complainant.

Paul Kisari (PW3) was the children's officer to whom the complainant's case was first reported; he testified that at the material time, he was the Nyeri District Children's Officer and was engaged as such in the then Ministry of Gender and Children's Services. The witness testified that the complainant's case was reported to her on 23rd January, 2008 and that whoever made the report also gave her the name of the complainant's father and their residence; on 27th January, 2008, her informer called her on phone and told her that the child had been defiled. The witness went to the appellant's house accompanied by a police officer from the DC's officer and a prison warder. The lady who had alerted or tipped the witness of the appellant errant conduct was also with them. She told the court that when they arrived at the appellant's house the police officer tried to push the door open since nobody was responding to their knocks.

The house itself was single-roomed and inside it they found the complainant standing by a basin of water with soap in her hands. The appellant was on his bed trying to put on his trousers. According to this witness, the complainant told them that the appellant had just finished defiling her and had asked her to clean herself. The police officer is said to have asked her not to clean herself and he immediately arrested the appellant.

After they were taken to Nyeri police station, this witness interrogated the complainant and established from her that the appellant had been defiling her for more than two years and that he mostly accosted her on weekends. The officer took the appropriate steps to have the child declared a child in need of care and protection as a result of which she was committed to a children's home for shelter and education.

This witness also accompanied the complainant to hospital where upon examination she was found to have been infected with HIV.

The officer who arrested the appellant Corporal **Joseph Karithi (PW5)** testified that indeed he was attached to Nyeri District Commissioner's office at the material time. He told the court that **Paul Kisari (PW3)** had sought security so as to be accompanied to the appellant's house where the complainant had reportedly been defiled. This witness testified that he found both the complainant and the appellant in the house and that it was the complainant who opened the door them; she was said to have been washing utensils while appellant was in bed.

Dr Betty Cherotich (PW1) produced the P3 form filled by Dr Metto regarding the findings on the health status of the appellant after he examined her. The witness testified that Dr Metto could not come to court because she was engaged elsewhere and in any event, being her colleague, she was familiar with her handwriting.

This witness testified that the according to the Dr Metto's findings, the complainant was aged eleven and that at the time of examination she was found to be in a fair general condition; however, there was laceration on the lower vaginal wall; her hymen was also broken and there was a vaginal discharge. She was also found to be HIV positive. An examination was also done on the appellant who also tested HIV positive. The witness produced the two P3 forms in respect of the appellant and the complainant; these documents were duly admitted in evidence.

The police officer who took up the matter at the station and investigated the case was police constable **Regina Kanari (PW4)**. She testified that on 27th January, 2008, she was at Nyeri Police station when Paul **Kisari (PW3)** called her and reported that the complainant had been defiled by her father. The officer told the court that together with Paul Kisari, they took the complainant to hospital where she was examined and treated. She also took the complainant's statement in which the complainant told her that

the appellant had been defiling her since 2006 until the time he was arrested in 2008. The officer also interrogated the neighbour who reported the matter to the children's office though she could not take her statement because this particular person feared that the appellant could retaliate and harm her; in these circumstances, the witness decided to treat her as an informer.

The officer testified that both the appellant and the complainant were examined at Nyeri Provincial General Hospital and that according to their medical reports, they were both were found to be HIV positive.

In his defence, the appellant gave an unsworn statement and testified that he never committed the alleged offences. According to his evidence, when he was arrested, he was preparing to leave when he heard people talking outside his house; soon thereafter they entered his house and one of them, who identified himself as a corporal, arrested him and took him to the police station.

That is as far as the evidence taken at the trial went.

As noted the first of the two counts with which the appellant was charged was based on **Section 20(1)** of the **Sexual Offences Act; this section provides as follows:-**

20. (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

From the evidence proffered at the trial, it was proved that the appellant was the complainant's daughter and no evidence was led to the contrary. The complainant testified that she was one of the appellant's two children; the elder one having disappeared from home while the only other member of the family, their mother, was deceased. Her evidence was not challenged or contradicted and thus there is no doubt that she was the appellant's daughter as understood under this provision of the law.

The second crucial element which had to be proved was whether an indecent act or an act causing penetration had been visited upon the complainant by the appellant. The evidence of **Dr Betty Cherotich (PW1)** was beyond any doubt that the complainant had been sexually assaulted; the doctor's findings contained in the P3 form which was admitted in evidence showed that the complainant had sustained a laceration on the lower vaginal wall; the doctor also established that her hymen was broken and there was a vaginal discharge. The complainant was also diagnosed of HIV.

Section 2 of the **Sexual Offences Act** defines "penetration" as the partial or complete insertion of the genital organs of a person into the genital organs of another person. That the complainant's lower vaginal wall was lacerated, and that her hymen was broken and also that the complainant was infected with HIV are all factors which go to show that there was 'penetration' as understood in **section 2** of the **Act** regardless of whether these factors considered separately or together. The evidence on record provides sufficient proof that the complainant was sexually assaulted as to leave no doubt that she had either been subjected to an indecent act or an act which caused penetration as contemplated under **section 20(1)** of the **Sexual Offences Act**.

The contention by the appellant that the P3 forms ought to have been produced by the doctor who examined the patients and filled the forms does not hold for the simple reason that **section 77** of the Evidence Act allows a person other than the one who prepared a report such as the P3 forms in issue to produce them; this provision of the law states:

77. Reports by Government analysts and geologists

1. **In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**

2. **The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**

3. **When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.**

When the Court of Appeal was faced with the same question **in Kisumu Criminal Appeal No. 183 of 2009 Joshua Otieno Oguga versus Republic**, the Court interpreted **section 77(1)** and **(3)** of the **Evidence Act** to mean that if the appellant, as it is in this case, "*wanted the medical report to be produced by a doctor, he had to apply to the court to summon the doctor who prepared the report, otherwise there was nothing in the **P3** form being produced by PC*". In this appeal before the Court of Appeal the same question of the P3 form having been produced by someone else other than the maker was raised; the Court dismissed it as a non-issue in view of the express provisions of **section 77(1) and (3)** of the **Evidence Act.**

The next question is whether the appellant was the person behind the complainant's sexual assault. The main evidence from which the answer to this question can be found was from the complainant herself; she told the court that for more than two years she had perpetually been subjected to defilement by the appellant. The learned magistrate had the advantage of seeing and hearing her and she accepted her evidence as cogent and credible; though from where I sit I do not enjoy the same advantage, there is nothing on record to suggest that the complainant was not a credible witness. Her testimony appeals to me to have been given by a credible, cogent and a truthful witness. The appellant chose not to cross-examine her though she gave a sworn testimony and thus her evidence was not challenged.

Although the appellant submitted that the complainant's evidence ought to have been corroborated, corroboration was not necessary in view of the nature of the offence and also because the learned trial court was satisfied that the complainant was telling the truth. The question of corroboration in such circumstances has been addressed by **section 124** of the **Evidence Act (Cap. 80)** and leaves no doubt that relying on the evidence of the complainant alone was neither fatal to the prosecution case nor was it prejudicial to appellant's defence; it says:-

124. Corroboration required in criminal cases

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

The proviso to this section was cited by the Court of Appeal sitting in Kisumu in ***Samson Oginga Ayieyo v Republic [2006] eKLR*** where a similar question arose; it was held by the Court that;

The proviso,(section 124) which we reproduced earlier, empowers the trial court to convict even without corroboration, an accused person on the basis of the evidence of the child affected, if it is satisfied that such victim was a witness of truth.

But even if corroboration was required, the medical evidence indicated that the complainant had been assaulted as she claimed and in the manner envisaged under **section 20(1)** of the **Sexual Offences Act**.

Thus assuming the appellant was to successfully contest the direct evidence against him, circumstantial evidence would, in my view, be overwhelming; looked at in its entirety, the evidence goes to show that the appellant had the opportunity and the means to commit the offence of incest. I appreciate that not every man who lives with his daughter alone would be inclined to commit the kind of crime that the appellant committed and indeed nobody would have taken it on the appellant were it not for the complainant's complaint and the evidence submitted in proof of the fact that the appellant had indeed sexually assaulted her in circumstances that amount to incest. In this regard, I would adopt the words of "**Wills on Circumstantial Evidence"** in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** on circumstantial evidence that:-

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

I am persuaded the inculpatory facts here are incompatible with the innocence of the appellant and are incapable of explanation upon any other reasonable hypothesis than that of his guilt. The prosecution in my view established facts from which the inference of guilt may be drawn.

The last question on this first count is the question of the age of the complainant. This question is material because it bears serious connotation on the sentence meted out against the appellant; the proviso to **section 20(1)** of the **Sexual Offences Act** under which the appellant was charged states that if it is alleged in the information or charge and proved that the female person the accused person is alleged to have committed incest with is under the age of eighteen years, then the accused person shall be liable to imprisonment for life regardless of whether the act that caused penetration or the indecent act was obtained with the consent of the female person.

According to evidence of **Dr Betty Cherotich (PW1), the complainant was aged 11;** this was the age that was indicated in the medical card which was attached to the P3 form that was admitted in evidence. It was indicated in the P3 form itself that the estimated age of the complainant was 11 years. When she testified, the complainant told the court that she was 11 years old and that she was in class five.

The evidence of the complainant's age was not contested and looking at the ground upon which the appeal is based the appellant has not taken any particular issue with the appellant's age. It is therefore beyond doubt that the complainant was a minor and in any event below the age of eighteen years.

I am satisfied that the prosecution proved beyond any shadow of doubt that:-

a. The complainant was the appellant's daughter;
b. The appellant sexually assaulted her; and
c. She was aged below eighteen years.

Having proved these crucial elements of the offence of incest, the learned magistrate rightfully convicted the appellant of this offence; however, considering the appellant's person's health and mitigation, I would think that the sentence of life imprisonment, which is the maximum sentence, was harsh; I would tamper with it and reduce it to twenty years imprisonment and the sentence shall run from the date of conviction in the subordinate court. In tampering with the sentence I have also taken into account that the appellant remained in custody for the entire period of his trial.

The evidence on the second count is intertwined with that of the first count except to add here that the appellant was examined and established to be HIV positive; in the absence of any circumstances or evidence to the contrary, there is no doubt that, in the course committing the offence encapsulated in the first count, he transmitted this disease to his daughter. In the circumstances the appellant was properly convicted and sentenced on the second count. I uphold the sentence on the second count and both sentences shall concurrently as ordered by the learned magistrate.

As for the question of his defence, the learned magistrate duly considered it and found it to be a sham; the court noted:

I find no valid legal issue in the defence accused raised. It is a sham…..looking at the entire evidence, I have no doubt left that the accused defiled his daughter and infected her with H.I.V virus.

I also do not find any basis in the appellant's contention that his unsworn statement was not challenged. Though he relied on **section 212** of the **Criminal Procedure Code (Cap 75)** in his submissions, there is nothing new that that appellant raised in his defence relevant to the charges against him that should have prompted the prosecution to adduce evidence in response thereto. For better understanding why the appellant's contention is misplaced, it is necessary to quote that section here; it provides as follows:

If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

As noted, apart from merely denying having committed the offences appellant did not introduce any matter which the court could have considered or required any particular response from the prosecution.

I am inclined to come to the conclusion that, except for the alteration of the sentence in respect of the conviction on the first count from life imprisonment to twenty years imprisonment which shall run from the date of conviction in the subordinate court, the appellant's appeal is dismissed.

Signed, dated and delivered in open court this 6th February, 2015

Ngaah Jairus

JUDGE