REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.51 OF 2014

(From original conviction in criminal case no.688 of 2013 of the CM's Court at Kilifi)

G K T.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of incest contrary to section 20 of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the appellant on diverse dates between 1/10/2012 and 31/12/2012, at [particulars withheld] of Kilifi Township in Kilifi County caused his penis to penetrate into the vagina of D G a female person who is to his knowledge his daughter.

The appellant was convicted and was sentenced to life imprisonment. The grounds of appeal are that no age assessment report or birth certificate were produced to determine the age of the complainant, that the case was not proved beyond reasonable doubt, that the provisions of section 36 of the Sexual Offences Act were not complied with, that key witnesses were not called to testify, that section 200 of the Criminal Procedure Code was not complied with and that the appellant's defence was not considered.

In his written submissions the appellant contends that different ages were given before the complainant. It is not clear whether she was 11, 12 or 13 years old. The age was important because of the sentence. The medical officer who testified noted that the complainant was in good condition. It was necessary for the trial court to have ordered for DNA test as required by section 36 of the Sexual Offences Act. The doctor did not visit the scene or see the complainant. It was alleged that PW2 was taken to hospital by the District Children Officer but the officer was not called to testify. This was a crucial witness who ought to have been called to testify. One magistrate handled the matter and when the second one took over section 200 of the Criminal Procedure Act was not complied with. This made the trial a nullity. The appellant raised an alibi defence but it was not considered. The defence evidence was not challenged. The appellant relies on the case of **Essentale vs Uganda 1986 [EACA)** on the issue alibi. The court in that case, held that the accused does not have to establish that the alibi is reasonably true. All that he has to do is to create doubt as to the strength of the prosecution case.

Ms Mathangani, state counsel, conceded the appeal on the ground that section 200 was not complied with. The appellant was not allowed to recall the witnesses who had testified. Counsel urged the court to order a re-trial as the judgment was delivered in 2014.

Four witnesses testified before the trial court. PW1 was the complainant's mother. She testified that she was married to the appellant. The complainant, PW2, is her daughter from her first marriage. PW1 was born on 27/3/2001. In November 2012, they were asleep when PW2 called her aloud. She

tried to go and check her in her bedroom but the appellant informed her that he had already assisted her and taken her for a short call. A few weeks later, the same thing happened. At one time the appellant disappeared from the bed and she traced him in the children's room naked. In December 2012, PW2 became pregnant and she informed PW1 that it was the appellant who had defiled her. The appellant procured an abortion and burned the foetus. The matter was then reported to the police.

PW2 was the complainant. She testified that she was twelve years. The appellant is her step father. She was a class five pupil. In October, 2012 the appellant went to her bedroom alleging that he had taken her to go and urinate. He inserted his fingers into her vagina. The appellant went again on another night and defiled her. In November, 2012 she discovered that she was pregnant. She went to Kilifi District Hospital for pregnancy test and it was positive. The appellant gave her some tablets and upon taking them, she aborted the foetus. The appellant buried the foetus. The matter was reported to the police.

PW3 Sergent Dorcas Kagwira was based at the Kilifi Police Station. The report was made on 20/2/2013. She investigated the case and had the appellant charged with the offence. PW4 Dr. Malik was based at Kilifi district Hospital. He examined PW2 and filled her P3 form on 14/3/2013. He noticed vaginal bleeding.

In his sworn defence, the appellant denied committing the offence. He testified that his first wife died and left him with eight (8) children. PW1 took him to the chief on the allegation that he had defiled PW2. He denied those allegations. It is his evidence that PW2 was forced by PW1 to implicate him. PW1 confessed that she had paid Ksh.10,000/= to the police. He married PW1 when PW2 was only one year old. They live in a four bedroomed house in [particulars withheld], Kilifi. He had a dispute with PW1 since 2012 as he discovered that she had another lover in Malindi. PW1 does not want him to distribute his wealth to the children from his first marriage. He is a businessman.

The State conceded to the appeal on the ground that section 200 of the Criminal Procedure Code was not complied with. The record of the trial court shows that the two witnesses testified before D. Kinaro, SRM while PW3 and PW4 testified before Mrs Obura, PM. Mrs Obura took over the matter on 23/1/2014. the proceedings do not even indicate that section 200 of the C.P.C was considered. In most cases, the High Court will not interfere with the proceedings of the subordinate court if the section 200 CPC is somehow dealt with. What is paramount is whether there was any prejudice on the part of the accused. In the event that the accused was informed of his rights under section 200 or that the accused applied to have witnesses recalled under that section but the request was declined, the superior court will consider whether the accused was prejudiced by such a denial. In the current case, there was no mention of section 200 at all. This makes it difficult for this court to ignore the appellant's contention that the section was not complied with.

I have read the appellant's grounds of appeal and submissions. The appellant has belaboured so much on the issue of age. The only reprieve under section 20 (1) of the Sexual Offences Act is when the complainant is above 18 years old. There is no evidence that PW2 was above 18 years old. The other contentions that the medical Doctor PW4 did not notice any injuries on PW2 cannot be of any value to the appellant. The incident occurred in October and November 2012 and the Doctor examined PW2 in March, 2013. This situation also deals with the contention that section 36 of the Sexual Offences Act was not complied with. There were no samples for testing. The claim that D.N.A ought to have been conducted is misplaced as the foetus was removed. How could the D.N.A test be conducted?

The alleged offence occurred in October/November, 2012. The judgment of the trial court was delivered on 8/9/2014. The main issue is to enable the appellant to have the opportunity of cross examining the witnesses further if he so wishes which opportunity was not granted. This makes the trial not to be fair as required by the law. Non-compliance with section 200 of the Criminal Procedure Code does not lead to automatic acquittal. The evidence on record is not hearsay.

For the interest of justice, I do allow the appeal. The conviction and and sentence is hereby set aside due to non-compliance with section 200 of the C.P.C. the interest of justice calls for a retrial as the

case was only concluded last year. The prosecution is likely to avail the witnesses. The appellant shall remain in custody until when he takes a fresh plea before another magistrate.

In the end, the appeal is allowed. There shall be a re-trial of this case.

Dated, signed and delivered at Malindi this 2nd day of July, 2015.

SAID J. CHITEMBWE

JUDGE