



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 214 OF 2011

J K T.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 4903 of 2009 Republic vs Jonathan Kipkosgei Tigin in the Resident Magistrates' Court at Kapsabet by G. M. Mutiso, Resident Magistrate dated 21st October 2011)

JUDGMENT

1. The appellant was convicted on one count of incest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006. He was also convicted on two other counts of committing indecent acts with his two daughters contrary to section 11(1) of the Act. He was sentenced to 20 years imprisonment on count I and another 20 years on count III. The sentences were to run concurrently. The appellant was acquitted on counts II, IV, V, VI, VII and VIII which related to incest or acts of indecency with two other daughters and deliberate transmission of HIV to all the four complainants.
2. The particulars of count I, were that on 20th November 2009 in Nandi District, the appellant “*caused his penis to penetrate the vagina of [name withheld], a girl aged nine years a person...he knew to be his daughter*”. The particulars of alternative charge, on which he was also convicted, were that on the same date, he caused his penis to come into contact with the vagina of the same complainant contrary to section 11(1) of the Act.
3. The particulars of the alternative charge to count III were that on 20th November 2009, in Nandi District, the appellant “*caused his penis to come into contact with the vagina of [name withheld], a girl aged five years*”.
4. The appellant has appealed against his conviction and sentence. The original petition of appeal was filed in Court on 4th November 2011. On 6th December 2012, the appellant was granted leave to amend the petition. The amended petition of appeal was filed the same day. It raises eight main grounds. Some grounds are overlapping or repetitive. For example, grounds 2 and 5 state that the appellant was framed by his wife who coached the complainants to make false accusations against him.
5. The other grounds can be summarized as follows: first, that the evidence of the clinical officer (PW1) was untruthful and the entries she made on the respective P3 forms were exaggerated; secondly, that since the appellant is HIV positive, he should have transmitted the viruses to the complainants. Since the complainants tested negative, he could then not have committed the offences;

thirdly, that there was no prove of penetration or indecency; fourthly, that the evidence was false, contradictory or illogical; and, lastly that the trial court shifted the burden of proof to the appellant. In a nutshell, the appellant contends that the charge was not proved beyond reasonable doubt.

6. The appellant has also filed detailed written submissions to buttress those grounds. On the hearing of the appeal, the appellant added the following: that the complainants should have testified ahead of the clinical officer and his wife; that the complainants have since recanted their evidence; and that the trial court was unfair to the appellant. For example, he had prayed for recall of the clinical officer to the stand. However, the trial court declined to accommodate the appellant.

7. The appeal is contested by the State. The learned State Counsel submitted that with regard to the charges of incest and indecency, there was clear evidence of penetration and contact with the minors. The relationship between the appellant and PW3, the daughter was not in doubt. It was submitted that the evidence of defilement was corroborated by the mother (PW2) and the medical evidence of PW1. The case for the State is that the evidence was overwhelming and not contradictory in any respect. Furthermore, the trial court took into consideration the defence proffered by the appellant and his mitigation. Regarding sentence, the State submitted that the appellant got off with a light punishment. In a synopsis, the case for the State is that the evidence established the appellant's guilt to the required standard of proof.

8. 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 have neither seen 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 Orenge v Republic Eldoret High Court Criminal appeal 36 of 2011 (unreported), David Khisa v Republic Eldoret High Court Criminal appeal 142 of 2011 (unreported).

9. The material complainants, PW3 and PW4, were minors. I am satisfied from the record of appeal (pages 44 and 45) and at pages 14 and 15 of the typed proceedings that a *voire dire* examination was conducted. The court reached the opinion that the two could be affirmed. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. In sum the court would be trying to establish whether the child possesses sufficient intelligence to understand the duty of speaking truthfully. See Republic v Peter Kiriga Kiune Criminal appeal 77 of 1982 (unreported), Johnson Muiruri v Republic [1983] KLR 445. I am satisfied that the court complied fully with the procedure of taking evidence of a minor. See Macharia v Republic [1976-80] 1 KLR 260. As I will discuss shortly, the evidence of the minors was also not the *sole* convicting evidence. I cannot then say that there was non-compliance with section 124 of the Evidence Act.

10. PW1 gave a vivid account of the events of 20th November 2009. The appellant is her father. They were living in a one roomed house. She testified as follows-

“The room we live in is separated by a sheet. The accused switched off the tin lamp. After one hour, the accused came and held my buttocks and arms, I screamed. The accused took firewood and hit me on the right leg with it. I kept quiet...he removed my underpants. I cried. The accused inserted his penis into my vagina. It was painful. I screamed. The accused bit my hand. The accused told me ‘I am opening the way, when you will be married, your husband will do this to you’. He released me...then my mother [PW2] came at 10.00pm. I told her what the accused had done to me. On the following day she took me to Maraba hospital”.

11. PW4, the other daughter, testified that her father “removed my underwear, slept on my stomach, he inserted his thing into my thing. It was painful. I told my mother”. PW2, their mother, confirmed that when she returned to the house at 10.00 pm, the two minors narrated to her about their

ordeal. When she took PW4 outside for a short call, the minor complained of pain in her genitals. PW2 said that PW3 had an injury on her head. When PW2 was cross examined, she said she used to go away when the appellant assaulted her. They had been married for ten years. She took the daughters to hospital the next day and reported the matter to Songor Police Station.

12. PW1, Martha Chebet, is a clinical officer at Meteitei Hospital. She examined both PW3 and PW4 on 23rd November 2009. She filled in the P3 forms (exhibits 1 and 3 respectively). She testified as follows-

“[PW3] was bruised on the labia minora and anus, there was no discharge. The hymen was intact. HIV test was negative, urynalysis revealed pus cells. I gave prophylaxis for HIV”.

13. Regarding PW4, the clinical officer testified as follows-

“On 23/11/2009, I examined [name withheld]. She had bruises on the labia minora and vaginal discharge that was whitish. Pus cells were detected in urynalysis. HIV test was negative”.

14. A number of matters arise from all that evidence. First, the evidence of the two minors was corroborated by the clinical officer. The evidence of their mother also fortifies the narrative of the minors. The minors gave a vivid account of the incidents. The evidence of the minors, their mother and that of the clinical officer was not contradictory or inconsistent as urged by the appellant. The cross examination by the accused did not establish a plot to fix him with false evidence. Other than the admission by PW2 that the appellant would occasionally assault her, I have not seen evidence of collusion between the minors, their mother or clinical officer to frame the appellant on trumped up charges.

15. The injuries to PW3’s private parts were *consistent* with *partial* penetration. Penetration is defined in section 2 of the Sexual Offences Act as follows-

“‘penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

16. The appellant argued that since PW3’s hymen was intact, there could have been no penetration. First, penetration does not have to be full or complete. The bruised labia minora and anus were proof of *partial* penetration. As the appellant was the father of PW4, the offence of incest as defined in section 20 (1) of the Act was established. By virtue of his contact with those parts of PW3’s anatomy, I accept the finding by the learned trial Magistrate that it was *“proved beyond reasonable doubt that the accused committed an indecent act with PW3 who is his daughter and was nine years at the time of the offence”*.

17. Regarding PW4, I accept the finding of the trial court that although there was no full penetration, the elements of an act of decency were proved. In any case, the clinical officer found pus cells in PW4’s urinalysis and a whitish vaginal discharge. The appellant took issue with that and said the whitish discharge could have been anything else including mucus. But the pus cells in the urinalysis point in a different direction.

18. The argument that because he is HIV positive and that the daughters never got infected with HIV does not discount the defilement or the acts of indecency. The appellant was the father of the complainants. They were all together in the house on the material night. The mother of the minors was away until 10.00pm. From the time lines in that evidence, the appellant had a clear *opportunity* to commit the offences. In the circumstances of this case, it would also amount to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669. The appellant’s cross-examination of PW1, PW2, PW3 and PW4 did not shake their evidence. The totality of all that evidence points very strongly to the *guilt* of the appellant.

19. The appellant has taken up cudgels on the order of witnesses at the trial. There is no requirement in the Criminal Procedure Code that the complainants must testify first. It would of course be desirable or more logical for a complainant to testify first. What would have been fatal would be the failure to call the complainants. Certainly, I do not see the prejudice that was occasioned to the appellant. Even assuming the order of witnesses was irregular(which is not the case), it is the kind of procedural slip curable by section 382 of the Criminal Procedure Code.

20. I have then considered the defence proffered by the appellant at his trial. He stated as follows:

“On 20th November 2009, my wife went to a party. She came home while I was asleep....I opened for her and asked her why she remained outside when C [son] entered the house. I told her she must have been committing adultery. In the morning my fellow mason came to my home and we went with him to work. I went to the Assistant Chief. We agreed that my case with my wife would be heard the following day. I was later informed the police were looking for me. Later Administration Police arrested me. I was taken to Metetei Sub-district Hospital where I found PW2 and PW1, PW3, PW4 and PW5. A sample of my blood was taken. The nurse talked to me. She told me that I would be charged with a serious offence. All the evidence produced by the prosecution was lies. My children were coached to lie about me”

21. The appellant then made closing submissions along the lines adopted in this appeal. The burden of proof, subject to section 111 of the Evidence Act, rested entirely with the prosecution. The marriage of 10 years between the appellant and PW2 was not a bed of roses. The couple used to fight. The appellant was HIV positive. From the cross examination of PW2, she admitted she used to go away when the appellant assaulted her. On the material night, the appellant accused her of adultery. She came home late at 10.00pm. It was PW3 who prepared dinner for the family. I cannot then rule out grudges between the appellant and PW2. But I am not satisfied that the minors were lying in court. Their evidence was consistent and was corroborated by the medical evidence. Like I said, there was no clear-cut evidence of collusion to frame up the appellant.

22. There is however an important matter. The record shows that on 25th February 2011, the appellant applied for the recall of PW1, the clinical officer. The learned trial magistrate ruled as follows-

“the accused was present when PW1 testified and he cross-examined her fully participated in the proceedings. I see no reason to recall PW1. There are no provisions in the Criminal Procedure Code permitting the accused to recall a witness. Application dismissed.”

23. That was a misdirection. First there are clear statutory provisions allowing recall of a witness. First, Section 150 of the Criminal Procedure Code gives power to the court to recall a witness who has already been examined. Secondly, section 146(4) of the Evidence Act empowers the court to recall a witness for cross examination or other examination. Whereas the court has power to refuse the application, the appellant had made the prayer early and before PW2 (his wife), PW3 and PW4 (the complainants) took to the stand. The appellant had cross examined PW1 at length on 22nd December 2010. Before PW2 could take the stand, he made the application to recall PW1. He did not lay any foundation other than to state he needed to cross examine her further. No other witness had testified to raise any contradictory evidence or to raise a basis for the recall of PW1. So much so that the learned trial Magistrate exercised his discretion fairly. In any case, I see no prejudice that was occasioned to the appellant. Even assuming there was a procedural irregularity, it was curable by section 382 of the Criminal Procedure Code. It did not prejudice the fair trial of the appellant.

24. Regarding the sentences meted out I agree with the learned State Counsel that the appellant got off with a light sentence. Under both sections 11(1) and 20(1) of the Act, the offences of incest or indecency with a child attract a sentence of *not less* than ten years. But under the proviso to section

20(1), if the victim of incest is under the age of eighteen years, the accused *shall* be liable to *life imprisonment*. PW3 was a minor at the time the offences occurred. The appellant was only sentenced to 20 years imprisonment.

25. In the result, I find that the appeal is devoid of merit. I uphold the conviction and sentence handed down by the learned trial Magistrate. The entire appeal is accordingly dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 2nd day of October 2014

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant.

Ms.....for the State.

Mr. Kemboi, Court Clerk.