



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G. B. M. KARIUKI & MURGOR, J.J.A.)

CRIMINAL APPEAL NO. 158 OF 2013

BETWEEN

A G K.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Ochieng, J.) dated 26th September, 2011 in

HC.CR.A.248 OF 2007)

JUDGMENT OF THE COURT

The appellant, **A G K**, was charged in the Chief Magistrate’s Court at Thika with committing two (2) offences of incest by a male contrary to Section 166(1) of the Penal Code, with his two daughters on diverse dates between 2004 and 2006. He also faced alternative charges of indecent assault on the two females under the age of 16 years contrary to Section 144(1) of the Penal Code. The names of the two daughters duly stated in the charge sheet were aged seven and nine years at the time of the trial. He was found guilty on the main counts and ordered to serve 25 years in prison for each. The sentences were to run concurrently.

The learned trial magistrate was satisfied on evidence tendered that the two victims were children of the appellant; he had defiled both of them by having carnal knowledge with them, when he slept with them in the same bed during the time their mother had left the matrimonial home. The appellant’s defence that the charges had been laid against him on the instigation of the mother was dismissed as being untrue.

The appellant appealed to the High Court (**Ochieng, J**) on several grounds in that the sentences were illegal; he had not been brought to court within 24 hours of his arrest, but after 13 days in detention; the evidence was inconclusive and uncorroborated and that some essential witnesses did not testify. It was added that he was convicted on a statutory provision different from that stated in the charge sheet.

After hearing the appeal, the learned Judge went over the evidence on record afresh and concluded that the grounds of appeal had no merit. He dismissed the appeal concluding that even as Section

166(2) of the Penal Code provided for the sentence of 5 years, the victims were under 13 years of age, and on conviction the sentence was life in prison. Therefore the sentence of 25 years handed down was lawful.

Being further dissatisfied with that, the appellant has lodged this second appeal claiming that his conviction was based on mere allegations; the prosecution case could not be relied on; there was no investigating officer and he was denied justice.

When the appeal came up for hearing, the appellant filed written submissions to which **Mrs. G. W. Murungi**, learned Assistant Director of Public Prosecutions, made a reply and the appellant responded.

The appellant told us that a charge that spoke of the offence having been committed on diverse dates between the year 2003 (2004?) (sic) and 2006 was not specific as to the time of the offence. Mere allegations had been put forth by the complainants and these led to his conviction. Even the doctor's evidence could not support the allegations. He added that the examining doctor relied on the evidence of PW2 (the child aged 9 years) to give an opinion when he examined the witness 13 days later. Someone else had seen her earlier yet he was not called as a witness. That evidence did not relate to an offence which allegedly occurred over 3 years period. The appellant repeated that he had been held in police custody for over 15 days before being produced in court, thereby breaching his constitutional rights to be produced in court within 24 hours of arrest. Again the appellant said that the charges against him were fabricated on the instigation of the victims' mother, who though had been away from the matrimonial home when the offences were allegedly committed, had her mind on taking away from the appellant some sums of money he had in the house to be used for construction. And that all evidence tendered constituted lies.

Mrs. Murungi opposed the appeal basically stating that the evidence in the lower court was strong, direct and overwhelming coming from PW2 (the daughter/victim) who shared the bed with her sibling (PW1). The sibling had been too overwhelmed to testify against their father, the appellant, who committed the offences during the period their mother had left the matrimonial home. That PW2 told the learned trial magistrate how their father inserted his male member in their private parts over a long period, a fact that the doctor verified as penetration and recorded the same in the P3 forms exhibited. Those who testified included the teacher of the children, an investigating officer (PW5), besides the children. Counsel discounted the ground that the charge sheet was not exact as to the time the offences were committed, because PW2 testified that their father defiled them many times over a long period. Therefore, the statement that the offences were committed on diverse dates, between 2004 and 2006 was in order. It did not cause doubt or prejudice to the appellant in any way. As for the alleged grudge with the appellant's wife, we heard that both the two courts below dismissed it finding that she was away from home during the commission of the offences. And finally that the delay to take the appellant to court was due to non-availability of the P3 form. That that explanation was rendered to court's and found satisfactory.

This being a second appeal we are enjoined by the provisions of **Section 361(1) of the Criminal Procedure Code** as has been enunciated in many decisions of this Court, including **Njoroge vs Republic [1982] KLR**

388 that: -

“On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence.”

Thus, addressing the initial grounds of appeal side by side with the amended grounds the appellant filed with his written submissions, is it that on points of law, we should allow this appeal? Though not so specifically said, the ground that the lower courts found against the appellant on mere allegations and not reliable and cogent evidence laid as proof can be maintained in law. It is required

in criminal prosecutions that charges are predicated on

particulars which point to breach of the law, requiring proof beyond a reasonable doubt in order to convict.

In the appeal the charges read that on diverse dates between 2004 and 2006 the appellant had carnal knowledge of his two girls whom the trial court found to be the daughters of the appellant. That he slept with them in the same bed and defiled them many times. Medical evidence established that there was vaginal penetration and given that PW1 was too traumatized to testify, the court was satisfied that on the totality of evidence, the appellant committed the offences of incest. He did so many times over the period between 2004 and 2006 and thus the charges properly read that the offences were committed on diverse dates. Accordingly, the charge sheet was not defective and evidence presented was not on mere allegations. It was sufficient to sustain a conviction. After the evidence established that the victims were the children of the appellant who defiled them, and after discounting the defence of a grudge by his wife, the lower court's conclusion was that: -

“The accused was the person who had sexually assaulted them. I therefore find that the prosecution have proved their case beyond reasonable doubt and the accused is convicted of count I and II.”

When the appellant moved to the High Court, the learned Judge approached the appeal as he was bound to, and stated thus,

“I have reevaluated all the evidence on record and drawn my own conclusion. I will thus take in account my said conclusions as I analyze the submissions made before me.”

The record shows that the evidence of each witness including that of P.C . **Peter Ndulumana** (PW5), the investigating officer was reviewed. So contrary to the claim by the appellant that there was no investigating officer in the case, indeed there was one – PW5. He even gave an explanation as to why taking the appellant to court was delayed. The learned Judge noted:

“He explained that the delay occurred because the P3 form had not yet been filled --- because the children were far, at the Kandara Children's Home.”

Taking that explanation in regard, the learned judge also cited the case of **Julius Kamau Mbugua V Republic Cr.A.No.50 of 2008**, noting that the appellant's right under Section 72(6) of the now repealed Constitution had not been violated. If it had been, the appellant could have recourse by filing a claim for damages in separate civil proceedings and not as a defence in criminal proceedings such as these.

So all in all the two courts below made concurrent findings that the charges were properly laid and sufficient evidence was led to prove them. There was also the concurrence on the sentence. **Section 166(1) of the Penal Code** provided for life imprisonment for the offence of incest to a female person under the age of thirteen years. The trial court imposed 25 years. The High Court confirmed it as lawful. We find that the subordinate court had the power to impose it and so it remains.

Accordingly, we find that this appeal has no merit and we hereby dismiss it in its entirety.

Dated and Delivered at Nairobi this 3rd day of October, 2014

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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