



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. E005 OF 2021**

**JMC .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against the conviction and sentence from the Original SO Criminal Case No. 41 of 2019 in a judgment delivered on 25<sup>th</sup> day of June, 2020 by Hon. N.C.Adalo – Senior Resident Magistrate)**

**CORAM: Hon. Justice S.M.Githinji**

**Mr Mwangi for the state**

**Appellant in person**

**J U D G M E N T**

**JMC**, the appellant herein, was charged in the lower court with the main count of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars of this offence are that on the diverse dates between December, 2018 and January, 2019 at [Particulars Withheld]village, Kinangoni Sub-Location, Samburu location Kinango division of Kwale County within Coast region, the appellants intentionally penetrated the vagina of the UC with his penis, who was to his knowledge his step-sister.

In the alternative, the appellant faced a charge of committing an indecent act with a child, contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

The particulars hereof being that on the diverse dates between December, 2018 and January, 2019 at [Particulars Withheld] village, Kinangoni Sub-Location, Samburu Location, Kinango division of Kwale County, within Coast region, the appellant intentionally touched the vagina of UC, a girl aged 16 years.

The prosecution case is that at the time of the alleged offence, that is on diverse dates between the month of December, 2018 and the month of January, 2019, the complainant in this case was about 16 years old. Though the family was living at [Particulars Withheld], Pw-1 the complainant's mother was working at [Particulars Withheld]. The husband to Pw-1 is deceased, and was polygamous. He had two wives and the accused herein belongs to the first family and the complainant the second family. Both families were living at the same compound though in different houses. In February, 2019 Pw-1 left home for work. She left her siblings namely U, M, S and S with the appellant herein. According to the complainant, in December, 2018 the accused one night left his house and went to the room where she was sleeping. He switched off the lights and toucher her breasts. He then left for his room. On another day the appellant was sent to get some branches to construct a house. He urged the complainant to accompany him to the bush. While there he asked her to remove her clothes. She removed the underpant. The appellant removed his boxer and shirt. He asked her to lie down but she refused. He then had sex with her while standing. She felt pain and he threatened her against screaming. He said if she screamed he would kill her as they were the only two of them in the bush. After that they took the branches home and she did not tell anyone.

In May, 2019 after Pw-1 had returned home she noted a change on complainant's facial appearance. She asked her the last time she had her monthly periods and she said she did not know. She interrogated her further and she started crying. She was taken to Kinango dispensary where they were told that she was pregnant. They went back home. The uncle interrogated her and she said she was impregnated by the appellant. On 13/5/2019 she was taken to Samburu Health Centre. She was examined and the hymen was absent. She was pregnant and had no vaginal discharge. The pregnancy was about 18 weeks old.

The matter was reported at Samburu Police Station. Pw-4 investigated the case. A P-3 form was issued. It was filed by Pw-3 who confirmed defilement resulting to early pregnancy. The appellant was then charged with the offences.

By 5/11/2019 the complainant had given birth and the prosecution applied for DNA test to ascertain the paternity of the child. Samples were got from the appellant, the complainant(victim) and the newly born child, one LMD. The DNA was conducted at Mombasa Government Chemist. The result is to the effect that the appellant is 99.99% the biological father of LMD.

At the close of the prosecution case the Court found that the appellant had a case to answer and accordingly placed him on his defence.

The appellant in his sworn defence alleged that he was a matatu conductor. He had lost his uncle in 2019. Some family members alleged that it is the appellant's mother who had bewitched the said uncle. The chief was aware of the allegation and were told to settle the dispute at home. The accused sought permission from work to address the issue. They were to deliberate on 12/5/2019. He was however arrested and taken to Samburu Police Station. He was fixed as the complainant had alleged she had sex with siblings namely R and M. She was beaten to fix the appellant. The appellant denied commission of the offence.

The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. He was convicted and sentenced to serve 10 years imprisonment.

Aggrieved by the said conviction and sentence he appealed to this Court on the grounds that; -

- 1. The offence was not proved by the prosecution beyond reasonable doubt.**
- 2. Prosecution case was contradictory.**
- 3. Convictions and sentence were against the weight of the evidence.**
- 4. The defence was not adequately weighed.**

The appeal was canvassed by way of written submissions and both parties filed their submissions.

I have considered the preferred charges, evidence adduced by both sides, judgment passed and sentence, the grounds of appeal and filed submissions.

I find this an open and shut case. There is no dispute that the complainant is a half-sister to the appellant as they share one parent, the father. Test of relationship under section 22 of the Sexual Offences Act is therefore well met, and beyond any doubt. The DNA test which confirms the appellant is the biological father of the child given birth to by the complainant, leaves no doubt that he is the culprit. DNA test when properly conducted, as was done in this case, is evidence enough on it's own to establish parenthood beyond reasonable doubt. The evidence when weighed together with the complainant's evidence that it is the appellant who committed incest against her, cannot be doubted. Given the weight of evidence against the appellant's appeal, it appears by bringing it up the appellant was taking a chance on luck, of which is rarely a factor in a Court of justice. His appeal lacks merit and is dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2021**

.....

**S.M.GITHINJI**

**JUDGE**

**In the presence of: -**

1. Mr Mwangi for the State
2. The Appellant in person