



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CRIMINAL APPEAL NO. 26 OF 2019**

**JOM.....APPELLANT**

**=VRS=**

**THE REPUBLIC.....PROSECUTOR**

***{Being an Appeal against the Judgement of Hon. B. M. Kimtai – PM Keroka***

***dated and delivered on the 3<sup>rd</sup> day of July 2019 in the original***

***Keroka Principal Magistrate’s Court Criminal Case No. 978 of 2016}***

**JUDGEMENT**

The appellant was tried, convicted and sentenced to a term of imprisonment for 20 years for the offence of incest contrary to Section 20 (1) of the Sexual Offences Act.

The particulars of the offence were that on 15<sup>th</sup> August 2016 in Masaba North Sub-county within Nyamira County the appellant intentionally touched the vagina of NKN with his penis knowing her to be his niece.

The complainant testified that she was twelve years old and that on the material day at about 3pm she was at the river washing clothes. When she returned home the appellant who is her uncle (father’s brother) and also their neighbour found her in the kitchen. He grabbed her and removed her pant then removed his clothes and inserted his penis into her vagina. She stated that she started crying and that when her mother found them she too begun to cry and it was then that the appellant pulled up his trousers and left. Her mother took her to a dispensary at Machururiati but they were referred to Keroka District Hospital where she was examined and given medicine. Her evidence was corroborated by her mother (Pw2) who narrated how she went home and finding the kitchen door half open, she went in and found the appellant who is her brother-in-law having sex with the complainant. She stated that she got shocked and sat down and started crying. She stated that when the appellant saw her, he put on his trousers and left.

Joel Ongera (Pw4) a Clinical Officer at Nyamira Hospital gave evidence and produced the complainant’s P3 Form evidencing that she was seen and examined at Keroka District Hospital on 16<sup>th</sup> August 2016 and that there was penetration. The complainant’s evidence although it did not require corroboration (**see Section 124 of the Evidence Act**) received more than sufficient corroboration from the two witnesses I have singled out.

The appellant elected to remain silent as he was entitled to do. My finding however is that even had he raised the issues he has raised in his submissions in this appeal the evidence against him was so overwhelming that he could not have been believed. He readily admits that he was aware the complainant was his niece, his brother’s daughter and hence the relationship between them was proved. I find no merit in the grounds of appeal.

The appellant was accorded time to defend himself in the proceedings and from the manner he conducted the cross examination of the witnesses, he understood the charge facing him well. He therefore was accorded a fair trial. I am not persuaded that the evidence against him was fabricated. The sentence was lawful and reasonable in the circumstances and I see no good reason to disturb it. Accordingly, the appeal is dismissed in its entirety.

**Signed, dated and delivered in open court this 23<sup>rd</sup> day of January 2020.**

**E. N. MAINA**

**JUDGE**