



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO.77 OF 2012**

**EKC.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the sentence of Life Imprisonment by Hon. V.***

***Karanja (RM) in Bomet SPM'S Criminal Case No.8 of 2012 delivered on 6/11/2012)***

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

1. The Appellant was sentenced to Life Imprisonment for the offence of **INCEST** Contrary to Section 20(1) of the Sexual Offences Act (SOA) No 3 of 2006.
2. The particulars of the offence were that on 8/4/2012 at around 8 p.m. at Cheptakum Location in Bomet District within the Rift Valley Province, the Appellant caused his penis to penetrate the vagina of MC, a girl aged 5 years whom the Appellant knew to be his daughter.
3. The Appellant was charged with an alternative count of **INDECENT ACT** Contrary to Section 11 (i) of the Sexual Offences Act No.3 of 2006 in that on the same material particulars as in Count 1 (above), the Appellant intentionally caused his hands to come in contact with the vagina of MC a child aged 5 years.
4. The brief facts of the case were PW.1 (MC) a girl aged 5 years told the Court that the Appellant who is her father removed her clothes and did bad things in her private part when her mother had gone to fetch herbal medicine.  
  
She said the Appellant warned her not to tell her mother. PW.1 said her mother found the Appellant doing bad things to her and he wanted to cut her with a panga.
5. PW.2 the victim's mother said she went to a neighbour's house with **ZK, the victim's older brother** and left the victim with the Appellant.
6. PW.2 said the Appellant is her husband and the victim their daughter. She said they lived in a one roomed house where there was one bed and the children were sleeping on the floor.
7. When PW.2 returned after 30 minutes, she found the door locked from inside, when she peeped through the wooden window she saw the Appellant defiling PW.1, their daughter.
8. PW.2 raised alarm and she ran away to a neighbour's house. PW.1 was taken to Longisa Hospital the following day.
9. **PW.3, CHRISTINE RONO**, a Clinical Officer attached to Longisa District Hospital Examined the victim on 12/4/2012. PW.3 said on examination, she found the victim had bruises on the labia and hymen was not intact. The Clinical Officer also noted urinary vaginal discharge and yeast cells.
10. The Appellant said in his defence that he did not defile the Minor. He asked the victim's mother to forgive him and said they should live as a family.
11. The Trial Court found the Appellant guilty as charged and sentenced him to Life Imprisonment. He has appealed to this Court on the following grounds:-

***(i) THAT he was not given a fair hearing and further, that his rights under Article 50 of the Constitution were violated as the***

*charge was defective and yet the Appellant was sentence to Life Imprisonment.*

*(ii) THAT the burden of proof was shifted to him.*

*(iii) THAT the Trial Court dismissed the Appellant's strong defence.*

12. The parties were directed to file written submissions in this appeal. The Appellant submitted in writing through his Counsel as follows:-

*(i) THAT the sentence of Life Imprisonment was not based on any tangible evidence and further that his rights under Article 50 of the Constitution of Kenya were violated as Section 154 of the Criminal Procedure Code was not complied with.*

*(ii) The Appellant's Counsel also submitted that the victim said it was not the first time and yet the charged did not indicate that the act was done on diverse dates.*

*(iii) It was further submitted that the Clinician did not indicate the degree of injury and further that the Prosecution shifted the burden of proof to the Appellant when the apology made by the Appellant was treated as a confession.*

*(iv) It was further submitted that the mother entered through the window as she had a plan to fix the Appellant and further that children are more easily persuaded by their mothers than fathers and the factor of influence cannot be ruled out.*

*(v) It was also submitted that the Appellant did not cross-examine the victim and further, his defence was not taken into account and further that the evidence of PW.2 should be expunged from the record as she is a spouse and not a competent witness.*

13. The Respondent opposed the Appeal and submitted as follows:-

*(i) THAT the Trial Court did not rely on hearsay evidence as alleged on the 1<sup>st</sup> ground of appeal. All the evidence was direct.*

*(ii) The Respondent also submitted that there is no evidence that there was a grudge between the Appellant and his wife and further the Appellant said in his defence that he apologized for being a drunkard and promised to stop drinking alcohol.*

*(iii) The Respondent submitted that on page 20 of the Record of Appeal, the Trial Court considered the defence by the Appellant.*

*(iv) The Respondent further submitted that the Prosecution evidence was consistent and corroborative and based on direct evidence rendering the conviction safe.*

14. This being a first appellate court, the duty of the 1<sup>st</sup> appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion bearing in mind that the Trial Court had the advantage of seeing the witnesses.

15. In the case of **Kiilu & Another v. Republic** [2005]1 KLR 174 the Court stated as follows;

*“1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.*

*2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; It must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”*

16. The issues for determination in this appeal are as follows:-

*(i) Whether the Appellant was accorded a fair trial Under Article 50 of the Constitution.*

*(ii) Whether the Prosecution proved the guilt of the Appellant to the required standard.*

*(iii) Whether the Prosecution shifted the burden of proof to the Appellant.*

*(iv) Whether the Trial Court considered the defence by the Appellant.*

17. On the issue as to whether the rights of the Appellant were violated, I find that it is evident from the record that the Appellant participated fully in the trial and he had an opportunity to cross-examine the witnesses and I also find that the Appellant was served with witness statements. There is nowhere in the record that the Appellant raised the said issue before the Trial Court.

18. On the issue as to whether the Prosecution proved the guilt of the Appellant to the required standard. I find that the prosecution relied on direct evidence and not hearsay as alleged by the Appellant.

19. PW.1, the victim said the Appellant defiled her on the floor of their house where she was a sleep with her baby brother.
20. PW.2, the mother and PW.4 the elder brother of the victim and the wife to the Appellant had gone to a neighbour's house to get herbal medicine.
21. The two (PW.2 and PW.4) returned and found the door locked from inside. They peeped through the wooden window and saw the Appellant on the act defiling the minor.
22. The Medical evidence corroborated the testimony of the victim and I find that there is overwhelming evidence against the Appellant.
23. I find that penetration was proved and there is evidence which has not been controverted that the victim is the Appellant's daughter.
24. On the issue as to whether the burden of proof was shifted to the appellant, I find that there is no indication that the Trial Court relied on the apology to convict the Appellant. There is direct evidence that the Appellant was caught red handed on the act of defiling his own daughter.
25. The submissions by the Appellant's Counsel that there was a plan to fix the Appellant and further that the mother has a higher influence on children of tender years than the father was not raised at the trial and the same is an attempt to adduce evidence at appeal stage.
26. There is no evidence that the mother of the children influenced them to testify against their father.
27. I also find that PW.2 is a competent witness against the Appellant as this case involves an offence against their child.
28. On the issue as to whether the Trial Court considered the defence by the Appellant, the record of appeal at page 20 shows that the Trial court stated as follows:-

**“Though the Accused Person denies committing the offence, I do find his defence unsustainable and the same well rebutted by the Prosecution evidence..”**

29. I find that this clearly indicates that the Trial Court considered the defence by the Appellant and found it unsustainable.
30. I find that the Appeal herein lacks in merit and I accordingly dismiss it and uphold both the conviction and sentence.

**Delivered, signed and dated at Kericho this 19<sup>th</sup> day of November, 2020.**

**A. N. ONGERI**

**JUDGE**