



**REPUBLIC OF KENYA**

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

**HCCRA. NO. 257 OF 2017**

**MMM.....APPELLANT**

**-VERSUS-**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant was charged with offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006.
2. Particulars being that on diverse dates between December 2015 and April 2016 at Nzau District within Makueni County, MMM intentionally and unlawfully caused his male genital organ namely penis to penetrate into the female genital organ namely vagina of MM, a child aged 15 years old who was to his knowledge his daughter.
3. The Appellant pleaded not guilty and the matter went into full trial. He was convicted and sentenced to serve life imprisonment.
4. Being aggrieved by the aforesaid decision, the Appellant lodged instant appeal and set out 5 grounds of appeal:-

**1. THAT** the Trial Court erred in point of law when not finding that his right of a fair trial was infringed as is enshrined in article 50(2) (h) (j) of the Constitution of Kenya 2010.

**2. THAT** the Trial Court faulted the points of law and fact that the prosecution did not prove their case beyond reasonable doubts as is required by the rule of law.

**3. THAT** the prosecution evidence was riddled with contradictions, malice and inconsistencies hence could not have been relied to base the conviction.

**4. THAT** the Trial Court further erred in law when rejecting his defense of alibi without giving any cogent reason for so doing as is stipulated in Section 169(1) of the penal code.

**5. THAT** since the Appellant cannot recall all that transpired at the trial court, he humbly plead to the Honourable Court to furnish him with the trial records, so as to enable him prepare more tangible grounds upon the hearing of this appeal of which he would also wish to be present.

5. The parties agreed to canvass appeal via submissions. The Appellant filed his submissions but prosecution submitted orally.

**APPELLANT SUBMISSIONS**

6. The appellant submitted that, Trial Magistrate erred by not considering that the conduct and state of mind of the complainant was biased toward the Appellant.

7. He argues that, trial Magistrate convicted the Appellant without considering that the said child's father was not known, the magistrate has the power to request for the DNA to be conducted for him to give the accurate judgment which can justify the alleged offence. Hence it led to injustice.

8. He complained that the trial court failed to help the accused person by not protecting his right to fair trial but not only concentrating on the magnitude of the crime only, this occasioned in justice which can only be remedied by acquittal. He relied on the case of Elijah Njulia

Wakianda –Vs- Republic (2016) which held that;

**“..... The officer presiding is not to be a mere umpire aloofly observing the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often intimidating judicial process.”**

9. He submitted that it was the duty of the court to ensure his right of fair hearing was observed during the trial thus urges court to find that he was not accorded a fair trial in this particular matter.

10. He submitted that the prosecution failed to prove its case to the required standard as DNA was to test was not done to establish the father of the unborn child which would have connected appellant or exonerate him with offence.

11. The appellant contend that the trial court erred in rejecting the Appellant defense of alibi without giving any cogent reason for doing. He relies on the case of Owen Kimotho –Vs- Republic Cr. App. No. 93 of 1983 which held that ;

**“where an accused person forwarded an alibi as answer of the charge, he does not assume any burden of proving that answer and it is a misdirection to refer to any.”**

12. Also in Stephen Mungai Macharia –Vs- Republic Appl. No. 1 of 1994, where it was held that;

**“.....we would state here that when the Appellant put forward an alibi defense as his defense, it was upon the prosecution to disprove it since an accused person is under no obligation to prove his innocence as the burden of proving a case against an accused remain on the prosecution throughout the trial.”**

### **RESPONDENT SUBMISSIONS**

13. The state counsel submitted that, the case was proved beyond reasonable doubt. The victim was his own daughter. She knew him very well, no mistaken identity. Her evidence was not shaken during cross examination.

14. It is contended that, the appellant raises issues under Article 50 constitution as he was not accorded an advocate by the state. His rights were read to him. He ably represented himself. There was no prejudice or injustice occasioned to him. Article 50 (2) (h) – it is not absolute that accused has to be provided with an advocate.

15. The respondent contended that, the appellant also complains under Article 49 that he was not taken to court within 24 hours. If it is true, that does not affect the conviction but he can seek compensation.

16. He also raised issues under Section 173 E.A as DNA was to have been conducted to confirm the baby born was his. The section is not mandatory but discretionary.

17. There is allegation of bad blood between victim and Appellant same was not raised during cross-examination but only in defense.

18. The issue of alibi was also raised in defense but in cross examination same was not raised. Appellant claims he did not understand the language of the court. However he told court he understood Kiswahili. He answered to charges in Kiswahili and so is his defense. He cross-examined in Kiswahili.

19. But as for PW4 DM, he sought to proceed in Kamba language. Same allegation of not understanding language is baseless.

20. On the sentence, same was life which was mandatory as child was under 18 years.

### **ISSUES**

21. After going through the proceedings and submissions, I find the issue are:-

- **Whether appellant right to fair trial was violated?**
- **If in above in negative, was case proved beyond reasonable doubt?**
- **Was defense considered?**

### **ANALYSIS AND DETERMINATION**

22. On the first issue, we look at the provisions on Fair hearing vide **Art 50 (2) (h) and (j)** which states that;

**(2) Every accused person has the right to a fair trial, which includes the right—**

**(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;**

**(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;**

23. The appellant did not intimate that he would need an advocate during trial as he would be substantially prejudiced if he proceeded in person. He stated that he was ready to proceed and proceeded with his defense. In any event the right of representation is not absolute and any violation can be remedied via compensation.

24. On complaint that he was not informed in advance of the evidence he was to face, the appellant never complained of not being supplied with same and opted to proceed with trial. The record does not show that appellant ever intimated that he was not supplied with evidence prosecution intended to rely on.

25. The appellant also complained relying on provisions of Article 49 that he was not taken to court within 24 hours. If it is true, that does not affect the conviction but he can seek compensation.

26. On merit, the offence of incest by male persons is created by **Section 20 (1) of the Sexual Offences Act No. 3 of 2006** which states:-

**“Incest by male persons**

**(1) Any male person who commits an Indecent Act or an act which caused penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than 10 years.**

**Provided that if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which caused penetration or the Indecent Act was obtained with the consent of the female person.”**

27. The trial court considered the evidence on record and formed opinion that, PW1 was confident and forthright in her testimony. She explained in detail how the accused who is her father defiled her on several occasions over a period of five months as a result of which she conceived.

28. PW2 testified that PW1 was 15 years old and that the accused was her father. PW4 the doctor, confirmed that there was penetration of PW1 which resulted in her pregnancy.

29. The P3 and the birth certificate (P. Exhibit 2 and 3 respectively) show that PW1 was defiled and that she was born on 01/05/2001 and that the accused is her father. The accused himself acknowledged that PW1 is his daughter.

30. The trial found that, the accused's unsworn statement was not convincing. The appellant accused PW1 of escaping from home but her escapes have been explained by PW1, PW2 and PW3 who said that PW1 feared the accused, could do harm to her.

31. The unsworn defense statement was incapable of clearing any doubt in the mind of the trial court that the accused was engaged in an incestuous relationship with PW1 who was his 15 years old daughter.

32. This court agrees with trial court as much after going through the record and evaluating the evidence as per the law required and as obligated as a first appellate court duty. **See OKENO VS R (1973) E.A 32).**

33. The appellant also raised issues under Section 173 E.A as DNA was to have been conducted to confirm the baby born was his.

34. The section is not mandatory but discretionary. In any event the same was never raised during prosecution case but only in passing when appellant gave his defense.

35. There is allegation of bad blood between victim and Appellant same was not raised during cross-examination but only in defense.

36. The issue of alibi was also raised in defense but in cross examination same was not raised.

37. Appellant claims he did not understand language of the court. However he told court he understood Kiswahili. He answered to charges in Kiswahili and so is his defense. He also did cross examination in Kiswahili.

38. But as for PW4 DM, he sought to proceed in Kamba language. Same allegation of not understanding language is baseless.

39. The appellant complained that his defense was ignored. The trial considered the same which was essentially mere denial with some element of the alibi but court found that the same unsworn defense could not stand on the face of the overwhelming prosecution case.

40. This court finds as much;

i. The totality of the above findings , is that the appeal has no **merit and same is disallowed with the following orders;**

**a. -The appeal is dismissed**

**b. The conviction is affirmed and sentence confirmed**

**SIGNED, DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF JANUARY, 2019 IN OPEN COURT.**

.....

**HON. C. KARIUKI**

**JUDGE**