



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 156 OF 2015**

**BETWEEN**

**NAE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the original conviction and sentence of Hon. C. M. Wattimah, RM*

*dated 4<sup>th</sup> November 2015 at the Magistrates Court at Kapsabet in Criminal Case No. 2630 of 2014)*

**JUDGMENT**

1. The appellant, NAE, was charged, convicted and sentenced to life imprisonment for the offence of incest contrary to **section 20(1)** of the **Sexual Offences Act** (“the Act”). The particulars of the offence were that on diverse dates between the month of June 2010 to the month of August 2014 within Nandi County, the appellant intentional and unlawfully caused his penis to penetrate the vagina of AVN, a girl aged 15 years who was to his knowledge his daughter.

2. The appellant now appeals against conviction and sentence on the basis of his petition of appeal and written submissions. In summary, he contends that the charge sheet was defective, that the prosecution failed to prove the offence against him beyond reasonable doubt, that the evidence was full of contradictions and inconsistencies and that his defence was rejected without consideration. He further contended that he was a victim of mistaken identity. The respondent submitted that the prosecution proved all the elements of the offence of incest beyond reasonable doubt.

3. The duty of this court, being a first appellate court, is to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**). In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.

4. The child, PW 1, was sworn and she testified that she was 15 years old and that the appellant was her father. She recalled that on one night, in June, 2010, she opened her eyes and saw it was the appellant. He forced her to keep quiet and used his penis to penetrate her vagina. She recalled that he had done this on previous occasions and even later after she had reported the incident to a neighbour and moved out of the home. When she returned after her mother came back, the appellant continued to sexually assault her even after he married another wife after chasing away her mother. When the appellant told her to leave in August, 2014, she reported the incidents of defilement to PW 5.

5. PW 5 testified that on 24<sup>th</sup> August 2014, PW 1 approached her for food and asked directions to her mother’s home as she had been chased away by the appellant. PW 5 called PW 2 who went to PW 5’s home and found PW 1. PW 1 told her that the appellant had been sexually assaulting her. PW 5 took PW 1 to the Children’s office and reported the matter to the police.

6. The Clinical Officer, PW 4 testified that when she examined PW 1 on 23<sup>rd</sup> August 2014, she found the child had a broken hymen and the pregnancy test was positive. The High Vaginal Swab disclosed pus cells and epithelial cells. PW 1 was also diagnosed with a Urinary Tract Infection (“UTI”). She also examined the appellant who had a UTI. She informed that the court that a UTI was contracted by the sexual intercourse. She concluded that there was an act of penetration in respect of PW 1. The investigating officer, PW 1 confirmed that she carried out the investigation and charged the appellant.

7. In his defence, the appellant denied the charges and stated that the case against him had been fabricated by the neighbours.

8. The appellant was charged with the offence of incest under **section 20(1)** of **the Sexual Offences Act, 2006** states as follows:

20. (1) Any male person who commits an indecent act or an act which causes 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 ten 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 causes penetration or the indecent act was obtained with the consent of the female person. [Emphasis mine]*

9. From the definition, the prosecution may either prove an indecent act or an act of penetration by a person who is within the prohibited relationships. An “*indecent act*” under **section 2(1)** of the **Act** is defined as an unlawful intentional act which causes, “(a) *any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration.*” While “*Penetration*” under **section 2** of the **Act** means, “*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*”

10. I have reviewed the evidence and I am satisfied that testimony of PW.1 was clear and consistent as to what took place. She knew the appellant as her father and in fact testified that the appellant had violated her several times before. The trial magistrate considered the decision in light of the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which allows the court to convict an accused on the basis of uncorroborated testimony of a victim of a sexual offence, if the court, for reasons to be recorded believes the child to be telling the truth. The trial magistrate was satisfied and she held as follows:

*In this case, this court had the opportunity to hear and see the victim, who tearfully gave her evidence in court, though she could not remember the exact dates, she could remember the months and the unfolding event. This is quite understood considering the victims age. The accused is the biological father to the victim and lives together after separating with the victim’s mother..... The accused is the only parent the victim could look upto.; I find no reason why she should want fabricate such serious allegations against her own father. I find the victim’s evidence is believable and I am convinced that what she said was truthful.*

11. In the circumstances, the other evidence was merely corroborative and supported what the child had stated. Since the child stated that she had been subjected to penetration many times, the medical evidence could not point to a specific incident. The evidence also shows that PW 1 conceived and gave birth to a child who was subjected to a DNA test. The Government Analyst, PW 8, testified that the child was not fathered by the appellant. In my view, this does not exonerate the appellant for the simple reason that the act of defilement is proved by penetration and not conception. There was evidence that in fact the child had been sexually assaulted by someone else but PW 1’s testimony pointed to several incidents of sexual assault by the appellant.

12. The appellant’s defence was a mere shadow in light of the prosecution evidence. The appellant did not suggest to PW 1 in cross-examination that there was a grudge between him and her or her mother that would have led to the charges. He also did not elucidate on the nature of the grudge against him in his defence to enable the court weight it against the prosecution case.

13. The prosecution proved the elements of the offence of incest including the relationship which was admitted by the appellant. In addition, the age of the child was established to be 15 years old.

14. Although the appellant was sentenced to life imprisonment under **section 20** of the **Act**. This is only the maximum sentence provided. The appropriate sentence in my view is 15 years’ imprisonment.

15. I affirm the conviction but quash the sentence of life imprisonment and substitute it with 15 years’ imprisonment.

**DATED and DELIVERED at ELDORET this 23<sup>rd</sup> day of APRIL 2019.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Oduor, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.