

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 65 OF 2017

LC.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence of L. Kiniale – SRM delivered on the 29th June, 2015 in Siriria SRM Sexual Offence Case No. 9 of 2016)

J U D G E M E N T

The appellant has appealed against his conviction and sentence of life Imprisonment in respect of the offence of **defilement of a child contrary to section 8(1) as read with section 8(2) of the sexual Offences Act No. 3 of 2006.**

In this court the appellant has raised six grounds in his amended petition of appeal. Of these six grounds, the most important is ground three. In that ground, the appellant has faulted the trial court both in law and fact in convicting him for the offence of defilement. The evidence produced indicated that it is the offence of incest that was committed. I will consider ground 3 first.

The evidence in this regard, is that the victim who was a minor. The appellant was his biological father. The complainant (PW 1) had gone to pick a basin in his father's house. The appellant then forcefully pulled her into his bedroom and had sexual intercourse with her.

The complainant did not scream. The appellant then told her not to tell anyone of this incident. If she did, she was going to be killed by the appellant. And for that reason, the complainant was afraid of disclosing the incident. Subsequently, she got sick in her private parts. As a result, she was taken for medical treatment.

Furthermore, the complainant told her mother namely (BC – PW 2). After returning from the hospital, the appellant escaped.

It is clear from the foregoing evidence that the victim is the biological child of the appellant. And for that reason, it was not proper to charge the appellant with defilement. The proper charge should have been incest contrary to section 20 of the Sexual Offences Act.

Ms Opiyo submitted that the Appellant should have been convicted and sentenced to the 10 (ten) years in respect of incest. It was legally impossible for the trial court to do so, because incest is not a minor and cognate offence to the offence of defilement. A court is only permitted to convict an accused person for a minor and cognate offence to the major offence charged, which is not the case in the instant appeal. See **section 179 of the Criminal Procedure Code (Cap 75) Laws of Kenya**. The offence of defilement is a distinct offence from that of incest. It is not a minor and cognate offence. And for that reason I find no merit in the submission of counsel for the appellant in that regard.

In the circumstances, I find that the appellant's appeal has succeeded. I therefore allow his appeal both against conviction and sentence, which are hereby quashed.

The only remaining issue is whether or not the appellant's trial was proper. I find that it was not. It was a nullity.

In the circumstance of this case, I find that the appellant has been in the custody for about 2 years 8 months. The offence of incest carries a minimum sentence of 10 (ten) years imprisonment. I also find that the victim was aged 10 (ten) years old. Finally, I find that an order of re-trial will serve the interest of justice.

The appellant will be tried before another Magistrate other than the one who convicted and sentenced him. The appellant will be taken for plea on 13th August 2019 in court of the Chief Magistrate in Bungoma. In the meantime, he will be remanded in custody.

Judgment signed, dated and delivered at Bungoma this 9th day of August, 2019 in the presence of the appellant and Ms Nyakibia for the Respondent.

J. M. Bwonwong'a.

J U D G E

9th August, 2019.