



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 31 OF 2015

JOOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 123 of 2014 of the Chief Magistrate's Court at Nakuru by Hon. F. Muguongo– Resident Magistrate)

JUDGMENT

1. **JOO**, the appellant herein, was convicted for the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that on the 4th May in **Gilgil District**, of **Nakuru County**, being a male person intentionally and unlawfully inserted his penis into the vagina of **VN**, a girl aged 9 years who was to his knowledge his daughter.
3. The appellant was sentenced to serve life imprisonment. He now appeals against both conviction and sentence.
4. The appellant at the hearing was in person. He raised the following four grounds of appeal:
 - a) The learned trial magistrate erred in law and in fact by convicting where age was not proved.
 - b) The learned trial magistrate erred in law and in fact by failing to appreciate that penetration was not proved.
 - c) The learned trial magistrate erred in law and in fact by disregarding his defence.
 - d) The learned trial magistrate erred in law and in fact by awarding an unlawful sentence.
5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards. He urged the court to find that the sentence meted was lawful.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. When an accused person is charged for the offence of incest under Section 20 (1) of the Sexual offences Act, the prosecution has only one obligation that is to prove that the victim was under the age of 18 years. The proviso thereof states as follows:

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.

In the instant case, there was sufficient evidence to prove that the complainant was under the age of 18 years which was proved by both oral and documentary evidence. TKO (PW 2) the mother of the complainant gave the girl's age as 9 years.

8. The evidence of Doctor Thomas J. Matara (PW5) is that when his colleague Doctor Okonda examined the complainant, he was of the opinion that the girl was between 13 and 14 years of age. It is safe therefore to conclude that the girl was under the age of 18 years.
9. VN (PW1) in her evidence said that the Appellant penetrated her per vaginam. She said at the time he was doing so, they were both on a

bed and he used his penis to penetrate her. She felt pain and cried. Her mother (PW2) entered into the house and caught the appellant in the act. On 20th May 2014, Doctor Linda Nganga examined the complainant and the P3 form was produced in Court by Doctor Emmanuel Wekesa (PW3). The following were the findings, the opening to the vagina was swollen and had some redness due to trauma, the hymen was absent, the labia minora and labia major were hyperemic an indication of sexual intercourse. In my view these evidence taken cumulatively prove beyond any reasonable doubt that the complainant was defiled. The contention by the appellant that penetration was not proved cannot therefore stand.

10. Though the appellant criticized the learned trial magistrate that he did not consider his defence, a perusal of the judgment indicate that the same was considered before it was dismissed. The ground has no basis.

11. Section 20 (1) of the Sexual Offences Act Provides:

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.

The victim of the incest in this case was under the age of 18 years. The life sentence in the proviso to Section 20 (1) of the Sexual Offences Act, is the maximum. It was erroneous therefore, for the learned trial magistrate to proceed as if that was the minimum sentence for the offence. I am therefore persuaded to interfere with the sentence of the learned trial magistrate by setting aside the life sentence and substitute it with an imprisonment term of 20 years.

12. From the foregoing analysis of the evidence on record, I am satisfied that there was sufficient evidence to base conviction on. The appeal is therefore dismissed except for the variation of the sentence that I have indicated hereinabove. To that extent only, does this appeal succeed.

DATED and SIGNED at Nakuru this 5th Day of December, 2019

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KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 19th day of December, 2019

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JOEL NGUGI

JUDGE