



**REPUBLIC OF KENYA**

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

**HCCRA NO. 18 OF 2017**

**J E.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court**

**at Maseno (Hon. Reuben K. Sang) dated the 21<sup>st</sup> December 2016 in Maseno SPMCCRC No. 33/2016]**

**JUDGMENT**

The appellant was imprisoned for life for having carnal knowledge of his niece **F G K** who at the time was ten years old. The offence is alleged to have occurred at around 6PM on 7<sup>th</sup> January 2016 at a place called [particulars withheld] in Vihiga County.

The complainant testified that on that fateful day after going home from school she was putting her little sister to sleep in their grandmother's house when the appellant, who is her mother's brother hence her uncle and who had a room in the same house, came out of his room and closed all the windows and doors then removed his clothes, undressed her and then had sexual intercourse with her. She felt a lot of pain and when she screamed the screams attracted Samuel Episu (**PW2**) who was passing by and he decided to investigate. He peeped into the house through the window and saw the appellant lying on the floor naked and he deduced from this and the complainant's cries that something was going on. He told the appellant to open the door but he refused and threatened the girl with a knife when she rose up. It was only after Samuel (**PW2**) called other neighbours that he opened the door. By then he was only wearing trousers. When her grandmother (**PW3**) returned home she found a crowd of people who insisted on her taking the girl to hospital. She did so but was asked to go back the next day. When she did the girl was examined. **PW3** had already reported the matter to Luanda Police Station. The appellant was subsequently arrested and charged.

I have as I am required to do evaluated the evidence before the trial court, including the defence. It is my finding that the charge against the appellant was proved beyond reasonable doubt. It is not in dispute that the complainant is the appellant's niece. At the material time she was only ten years old. Her narration of what the appellant did to her was so vivid that this court cannot doubt it was true and even were the court looking for corroboration it would be found in the evidence of Samuel (**PW2**) who went to her rescue upon hearing her screams as he passed by the house. The court would also find corroboration in the evidence of the Clinical Officer (**PW5**) who examined her at Emuhaya Health Center and who confirmed there was evidence of defilement. As for identification this offence occurred in broad daylight and as the appellant is her uncle the complainant positively identified him. He was also seen in a compromising position with her by Samuel (**PW2**). I am not convinced that any miscarriage of justice occurred. The proceedings indicate the appellant was given ample opportunity to cross-examine the witnesses, including the complainant and one discerns that he understood very well the charges he was facing. There is evidence that he was also examined at the same facility as the complainant. The court having believed the evidence of the complainant was not required to look for corroboration contrary to the appellant's submission that no connectivity was found in their medical examinations. The proviso to Section 124 of the Evidence Act provides that the court can convict on the evidence of the victim of a sexual offence alone if it is satisfied she is telling the truth.

The record shows that the Trial Magistrate referred the appellant for mental assessment when he pleaded guilty this perhaps because of the gravity of the offence. He was not taken perhaps because the next time he appeared he changed his plea to not guilty. Nonetheless Section 11 of the Penal Code provides that every person is presumed to be of sound mind until the contrary is proved. Insanity is therefore a defence in our law. The appellant did not plead such a defence either in the trial or in this appeal and I have stated the proceedings betray a person who was aware of the charge facing him and how to defend himself. I find no merit in this appeal and as the sentence imposed was lawful it is upheld.

**Signed, dated and delivered at Kisumu this 25<sup>th</sup> day of January 2018**

**E. N. MAINA**

**JUDGE**