



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 154 OF 2016**

**D K G.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 14<sup>th</sup> January, 2016 by Hon. W. Ngumi (Senior Resident Magistrate) Senior Resident Magistrate's Courts at Gatundu in Criminal Case No. 549 of 2011).**

**JUDGMENT**

1. The Appellant D K G was charged with the offence of Incest contrary to Section 20 (1) of the Sexual Offences Act 2006. **The particulars of the offence are that on the 22<sup>nd</sup> day of October 2011 at [particulars withheld] village in Gatundu North within Kiambu country, intentionally caused penetration with his genital organ namely vagina of J W a child aged 11 years a child you knew to be your granddaughter.**
2. In the alternative, the Appellant was charged with the offence of Indecent Act with a female contrary to Section 11(1) of Sexual Offences Act No. 3 of 2006. **The particulars of the offence are that on the 22<sup>nd</sup> day of October, 2011 at [particulars withheld] village in Gatundu North within Kiambu county intentionally and unlawfully committed an indecent act with J W N a child aged 11 years by touching her genital organ namely vagina.**
3. The case for the prosecution was that the complainant, 11 year old J W, her siblings and her single mother lived in the family homestead with the rest of the family members. That at the material time at about 6.00 p.m. the complainant, her brother and cousin were outside playing hide and seek game. That the Appellant who was their grandfather called the complainant and sent her to the shops to buy paraffin. The complainant bought the paraffin and took it to the Appellant inside his house.
4. That while the complainant was leaving the house the Appellant asked her to take the paraffin to his bedroom. That the Appellant then followed the complainant to the bedroom, closed the door and covered her mouth with a shirt. That the Appellant then removed her underwear and placed her on the bed facing upwards. The Appellant then removed his trousers and underpants and lay on top of her and placed his penis inside her vagina and did bad things to her for about five minutes.
5. That the Appellant told her not to tell her mother what had happened and promised to give her money. The complainant who was in a lot of pain and was bleeding from her genitalia put on her clothes and ran home crying. The complainant informed her siblings what had transpired. The complainant's sister started screaming. This attracted neighbours to the compound. The Appellant locked himself in his house.
6. When their mother came home she was informed of the matter. The mother took the complainant to hospital and reported to the nearby Administration Police Post. The Appellant was arrested and escorted to the police station. The Appellant was subsequently arraigned in court.
7. In his defence case the Appellant gave unsworn evidence. He stated that he was surprised when police officers came to his home at night and arrested him without any explanation. That he was taken to the police station where his statement was recorded. The Appellant further stated that he had two wives but the family was not in good terms due to land disputes and allegations of witchcraft. The Appellant stated that the complainant's grandfather is his step brother. The Appellant further stated that on the material date he was from Ongata Rongai and was very drunk. He termed the case as a frame up.
8. The trial magistrate found the Appellant guilty of the offence of incest and convicted him accordingly. The Appellant was sentenced to serve 20 years imprisonment.
9. The Appellant was aggrieved by the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

- (a) That the charge sheet was defective as the offence in the main count fell outside the ingredients of the offence of incest.
- (b) That his rights to a fair trial as provided under Article 50 (2)(e) of the Constitution were violated.
- (c) That the medical report was produced in contravention of Section 77 of the Evidence Act Cap 80 Laws of Kenya.
- (d) That the trial magistrate misapprehended the evidence.
- (e) That the trial magistrate failed to take into account the evidence of bad blood between him and the complainant's family.
- (f) That the prosecution case was contradictory as some exhibits not produced.
- (g) That the prosecution case was not proved.

10. During the hearing of the appeal, the Appellant relied on his written submissions which essentially expound on the grounds of appeal.

11. The learned counsel for the state opposed the appeal and submitted that the offence was proved and the trial magistrate properly assessed the evidence. He further submitted that the issue of a grudge was an afterthought.

12. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno v Republic (1972) EA 32**.

13. The complainant's evidence pointed a finger at the Appellant as the person who defiled her. The Appellant was known to the complainant. Indeed both the prosecution witnesses and the defence acknowledge that the Appellant and the complainant are relatives. The complainant's evidence is that of recognition. The offence took place at about 6.00 p.m. which is during day time. The evidence of PW2 10 years old R K who was playing with the complainant at the material time also points out that the complainant was sent to the shops by the Appellant and that the complainant went into the house of the Appellant where she stayed for a while then came out crying. The evidence of the two children (PW1 & PW2) is that PW2 had tried to follow the complainant (PW1) into the house of the Appellant but was turned away.

14. On the evidence of the defilement, the complainant described in detail what happened while she was in the Appellant's bedroom. The evidence of the complainant left no doubt that the Appellant's penis penetrated her vagina. It is also noteworthy that the trial magistrate carried out a *voire dire* and was satisfied that PW1 and PW2 who were children of tender age for purposes of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya could give sworn evidence. Both PW1 and PW2 were cross-examined at length and maintained their line of evidence.

15. The complainant's mother, PW2 S N K gave the complainant's age at the time of giving evidence in court as 12 years and pointed out that the complainant's immunization card which was produced as an exhibit gave her date of birth as 16<sup>th</sup> March, 2000. The evidence of the mother shows that she examined the complainant who was crying and confirmed the defilement as the complainant's genitals had same a whitish discharge and oozing with blood.

16. The evidence of the doctor, PW4 Wycliffe Omollo Ogutu who examined the complainant and made a medical report confirmed that the complainant was 11 years old at the material time and had been defiled. The doctor's evidence was that the complainant had bruises in her genitals, had a yellowish smelly discharge and the hymen was broken. The doctor produced his medical report together with a P3 form which had been filled by another doctor who could not be traced. The evidence of PW4 (doctor), the content of the P3 form and the medical report were consistent.

17. The Appellant in his submissions stated that the P3 form was improperly admitted as evidence under Section 35 and Section 77 of the Evidence Act Cap 80 laws of Kenya. It is noteworthy that PW4 (the doctor) examined the complainant and made a medical report which he produced as the exhibit. The doctor's evidence that the medical report and the P3 form reflected the same content was unshaken in cross-examination. In any event PW2 being a qualified doctor and having made a medical report after examining the complainant was competent to testify on the results of his examination even without the P3 form.

18. The evidence of PW5 PC Mary Nkirote confirms that the report of defilement was made at the police station and investigations carried out.

19. The Appellant has termed this case as a frame up due to bad blood in the family due to a land dispute and witchcraft allegations. However, there is no way the complainant herein could have stage managed the injuries to her genitals complete with the torn hymen. The issue of the land dispute and witchcraft allegations appears to be an afterthought as the same was not raised when the prosecution witnesses testified. None of the prosecution witnesses was cross-examined on any land dispute or witchcraft allegations although the Appellant cross-examined each of them at length.

20. The complainant's mother (PW3) described the Appellant as her uncle and specifically as a step brother to her father. The charge sheet described the complainant as a granddaughter to the Appellant. The question therefore is whether the relationship between the Appellant and the complainant falls within the definition of incest as provided for under Section 22 of the Sexual Offences Act.

21. Section 22 (1) of the Sexual Offence Act provides as follows:

**“In case of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister**

**and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.”**

22. Although a grandfather or step grandfather is not mentioned in Section 22 Sexual Offences Act they fall within the prohibited degree of consanguinity. As expressed by the court in **BNM v Republic, Mombasa Criminal Appeal No. 232 of 2009 [2011] eKLR:**

**“my own understanding is that ‘half father’ is a term which means exactly the same as ‘step-father’ – it means one who is not a biological father of the child. Therefore by dint of this S 22(1) of the Act the appellant being a step-father of the complainant and one who stood in ‘loquo parentis’ can legally be charged and indeed convicted of the crime of incest with her.”**

23. On the right to a fair trial under Article 50(2) (e) of the Constitution, the Appellant states that there was delay in police custody before he was arraigned in court. This issue was settled in the case of **Julius Kamau Mbugua v Republic Criminal Appeal No.50 of 2008**. The Appellant’s remedy lies in a civil action.

24. The Appellant raised the issue of delay during the trial. It is noted that the case was adjourned severally before the doctor and the investigating officer testified. The court record reflects that a complaint was brought to court on 3<sup>rd</sup> April, 2013 by the complainant’s grandmother who complained that the Appellant was interfering with witnesses and the Appellant was warned by the court. On 9<sup>th</sup> May, 2013 the Appellant was warned again for threatening witnesses. Thereafter the court was told that the investigating officer was transferred and the arresting officer was on leave. The Appellant was reported to have continued insulting witnesses and the court cancelled his bond. On 31<sup>st</sup> December, 2013 the Appellant’s surety withdrew from standing surety for him. The bond of the Appellant was later reviewed and the Appellant obtained another surety. However the Appellant failed to come to court and a warrant of arrest was issued. The trial magistrate was thereafter transferred. Thus the delay was contributed to by both sides.

25. On the ground that the prosecution failed to produce as exhibits the clothes that the complainant had worn on the material date and the failure to subject them to forensic examination, I hold that the same is not a mandatory requirement to prove the prosecution case. The contradictions pointed out on whether the complainant’s pants were thrown into the toilet or not, relates to the manner of disposal of the said exhibits and is not fatal to the prosecution case.

26. The evidence of the arresting officer, PW5 is that she took over investigations from one PC Okello who was transferred to Wajir. PW5 testified that she took over the file and the exhibits. That she perused the file and found that all the other witnesses had testified except the doctor and the investigating officer. PW5 and the doctor then proceeded to testify. Both PW5 and the investigating officer were acting in the course of their official duties. There is no prejudice that has been shown to have been suffered by the Appellant through the failure to have the initial investigating officer testify.

27. Having evaluated the evidence from both the prosecution and the defence, I am satisfied that the prosecution case was proved beyond reasonable doubt in the main count of incest.

28. I find no merits in the appeal and dismiss the same with costs.

**Dated, signed and delivered at Kiambu this 22<sup>nd</sup> day of June, 2018**

**B. THURANIRA JADEN**

**JUDGE**