



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.60 OF 2016

O O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Homa Bay

CM's Court Sexual Offences Act Case No.3 of 2015- Hon. S. Ndegwa,

PM, dated 22nd November, 2016)

JUDGMENT

[1] The appellant, **O O O**, appeared before the Principal Magistrate at Homa Bay charged with incest, contrary to **Section 20(1)** of the **Sexual Offences act**, in that on the 23rd October 2014, at [particulars withheld] village, Homa Bay County, he defiled **P A O** a girl aged fourteen (14) years who was to his knowledge his daughter. Alternatively, he committed an indecent act with the same child, contrary to **Section 11 (1)** of the **Sexual Offences Act**.

[2] After a full trial, the appellant was convicted on the main count and sentenced to life imprisonment.

However, being dissatisfied with the conviction and sentence, he filed the present appeal on the basis of the grounds in his petition of appeal filed herein in the month of December, 2013. He represented himself at the hearing of the appeal and presented written submissions in support of the appeal.

[3] The learned prosecution counsel, **MR. OLUOCH**, appeared for the State/Respondent and opposed the appeal by orally submitting that the charge was not defective as alleged by the appellant since he was the complainant's step father.

That, the complaint on the DNA test was unmerited as the report in respect thereof was produced in court. That, the complainant gave a detailed account of how the appellant defiled and impregnated her. That, the DNA test confirmed that the appellant was the father of the complainant's child.

It was the respondent's contention that this appeal lacks merit and should be dismissed.

[4] Having considered the appeal together with the submissions for and against presented herein in writing and orally by the appellant and the respondent, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

[5] In that regard, this court re-visited the evidence adduced against the appellant by the complainant minor **P A (PW1)**, a government analyst based at the Government Chemist Department Kisumu, **RICHARD KIMUTAI LAGAT (PW2)**, a doctor at Homa Bay District Hospital, **DR. EDITH JUMA OGADA (PW3)**, and the Investigating Officer, **PC RAHAB KALAMA (PW4)**. Also re-considered by this court was the appellant's evidence in defence.

[6] From all that evidence, it was apparent that there was no denial that the complainant was a minor and it was actually defiled on or about the material time by a person who cohabited and lived with her mother as his wife. She (complainant) lived with the couple and indeed referred to the man as her father whom she identified as the appellant.

[7] The appellant did actually imply in his defence that the complainant's mother called H A was his wife. He also implied that they lived with his step children who included the complainant. This meant that he was a step father to the children of his wife borne outside their relationship.

Section 20 (1) of the **Sexual Offences Act** provides that a male person who defiles a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of the offence of incest.

[8] Under **Section 22 (1)** of the said **Act**, a father would include a half father or step father.

It was the complainant's evidence that the sexual assault committed against her resulted in pregnancy. The investigating officer (PW4) confirmed that when she received the material report on 2nd June 2015, the complainant was expectant. She confirmed that she delivered a baby girl on 7th August 2015 and named her "V F." She also confirmed that the father of the child was the appellant.

[9] With that confirmation, no doubt existed that the person responsible for defiling the complainant was the appellant, her step father. Indeed, the DNA report (**P. Exhibit 4**) compiled by the analyst (PW2) after carrying out the necessary DNA analysis confirmed that the appellant was indeed the biological father of the complainant's child born out of an unlawful sexual act against the complainant by the appellant.

[10] The birth certificate produced in court (**P. Exhibit 1**) established that the complainant was born on 28th December 2000, which, then placed her age at 14 years at the time of the unlawful act.

Although the appellant denied the offence and implied that he was maliciously implicated by the complainant's uncle one **J O O**, the prosecution evidence against him was credible and cogent. It clearly established the necessary ingredients of **Section 20 (1)** of the **Sexual Offences Act** against him.

[11] This appeal is therefore unsustainable in terms of his grounds of appeal and submissions in respect thereof.

The failure by the complainant's mother to testify in court did not water down the prosecution case against the appellant. The same position applied to the complainant's brother, one B.

Nothing in the proceedings pointed out to a denial of the appellant's constitutional right under **Article 50** of the **Constitution**.

[12] The fact that the appellant was a step father of the complainant rather than a biological father was sufficient enough to sustain a charge of incest under **Section 20(1)** of the **Sexual Offences Act**.

In sum, this appeal lacks merit and is hereby dismissed on both conviction and sentence.

J.R. KARANJAH

JUDGE

26.07.2018

[Delivered and signed this 26th day of July, 2018]