



**REPUBLIC OF KENYA**

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

**CORAM: MAJANJA J.**

**CRIMINAL APPEAL NO. 80 OF 2017**

**G M B.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. C.R.T Ateya – RM dated 9<sup>th</sup> November 2017 at the Principal Magistrate’s Court at Ogembo in Sexual Offence Case No. 17 of 2017)*

**JUDGMENT**

1. The appellant, G M B, was charged and convicted of the offence of defilement contrary to section 20(1) of the Sexual Offences Act (“the Act”). The particulars of the offence were that during the month of November 2016 at Gucha South Sub-County within Kisii County, being a male person he caused his penis to penetrate the vagina of DKB, a female child who was to his knowledge his daughter.
2. The appellant was also charged and convicted of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code (Chapter 63 of the Laws of Kenya). It was alleged that on 8<sup>th</sup> March 2017 at Gucha South Sub-County within Kisii County he unlawfully assaulted DKB thereby occasioning her actual bodily harm.
3. The appellant was convicted on both counts but sentenced to fifteen (15) years imprisonment on the first count only. He now appeals against conviction and sentence. In his petition of appeal and written submissions he contends that the prosecution did not prove the case beyond reasonable doubt and that the evidence against him was fabricated.
4. As this is a first appeal, I am required to review the evidence before the trial court independently in order to come to a conclusion whether or not I should uphold the conviction making allowance for the fact that I never heard or saw the witnesses testify (*Okeno V Republic [1972] EA 32*).
5. The complainant, PW 1, gave sworn testimony after a voire dire. She testified that the appellant was her father and that she was living with him, her step mother, brother and sisters. Her mother had died in 2012. In her evidence, PW 1 gave three instances where she was sexually assaulted by the appellant. She recalled that after her mother had died and after her burial, the appellant called her to his room, took her by the hand and raped her.
6. The second time was in November 2016. PW 1 narrated what happened as follows:

*[M]y father came and said I give him drinking water. He was in his bedroom. I took water to him. When I wanted to go to sleep he told me to wait. I told him he could take to him in the morning (sic). He then grabbed me by the neck and I could not scream. He then raped me. The following morning when my step mother came I told her what father had been doing to me.*

*When he held me by the throat he removed my clothes .... He put me on the ground. He then put his penis in my vagina.*
7. PW 1 described what happened the third time the appellant sexually assaulted her as follows:

*The third time it was raining. He told me to take out the water container. It was night. When I came back, he was standing by. He dragged me into the room. He then did as I had explained the second time.*
8. It is after the third assault that she went to school and informed the teachers. PW 1 recalled that when she came from school, the appellant assaulted her by beating her using stick until she decided to escape from home. She reported the matter to the Chief. She was taken to the dispensary where she was examined and treated and the matter reported to the police.

9. PW 2, the headteacher of the school which PW 1 attended, testified that on 6<sup>th</sup> March 2017 at around 7.00 am, he found a student waiting for him in civilian clothes. It was PW 1 who told him that she had a problem and she could not go back and put on her uniform because she had been chased away by her father. She explained to him how she had been sexually assaulted and even showed him scratches on her neck. PW 2 informed one of the teachers about the incident and asked him to take her to hospital. On the following day he heard that PW 1 had been severely beaten by her father. He went to visit her at Nyabigege Clinic with other teachers and they took her to Nduru District Hospital at Nyamarambe. They also reported the matter to the police station.

10. PW 3, a medical doctor, examined PW 1 on 9<sup>th</sup> March 2017 at Nduru Hospital. PW 1 disclosed to him how she had been assaulted by PW 1. She had a laceration on the left hand. Her private parts were unremarkable although laboratory tests revealed she was pregnant.

11. The investigating officer, PW 4, testified that on 8<sup>th</sup> March 2017 he was instructed to investigate an incident of defilement. He went to arrest the appellant who was hiding in a sugar cane plantation. He arrested him and took him to Nduru Hospital, Nyamarambe where PW 1 was being treated and she identified him as the father. He recorded statements and caused the appellant to be charged.

12. In his unsworn testimony, the appellant denied the offence. He recalled that on 8<sup>th</sup> March 2017, he was informed that his child had been chased away from school. He took a bag of maize to sell and in the evening as he was going home, he was attacked by two boys who took his money. He was arrested and taken to the police station where he was accused of defiling PW 1.

13. The appellant's 12-year-old daughter, DW 2, testified on oath after a voire dire, that the matter was the result of a grudge caused by a neighbour and that there was a disagreement between PW 1 and the appellant because of one JK, who incited the disagreement. She also stated that the appellant was sleeping in the shop while she slept in the same room as PW 1. The appellant's mother, DW 3, testified that her daughter in law JK was the cause of the case.

14. The appellant was charged with incest contrary to section 20 of the Act which states as follows;

*20.(1) 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. [Emphasis mine]*

15. At this point I wish to point out that under **section 20(1)** of the **Act**, incest is proved by either penetration or indecent act hence penetration alone is not an essential ingredient of the offence. What distinguishes the offence of incest from defilement under **section 8(1)** of the **Act** or committing an indecent act with a child under **section 11(1)** of the **Act** is the relation between the accused and the child.

16. PW 1 and DW 2 confirmed that the appellant was their father which is one of the prohibited relationships under **section 22** of the **Act**. The issue for determination is whether the prosecution proved that the appellant is the one who caused the penetration or indecent act. "Penetration" under **section 2** of the **Act** means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person." "Indecent act" means "any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration"

17. PW 1 gave evidence of how the appellant sexually assaulted her. Under the proviso to **section 124** of the Evidence Act (Chapter 63 of the Laws of Kenya), the trial court could convict the appellant based on the uncorroborated testimony of the victim, if for reasons to be recorded the court believed the victim was telling the truth.

18. In this case, the trial court did not address the credibility of the witness or record the reasons why it believed PW 1 was telling the truth as required by proviso to section 124 of the Evidence Act. It therefore follows that corroboration was required. The prosecution relied on the testimony of PW 2 to whom PW 1 reported immediately after the last incident and further the medical evidence that showed that PW 1 was pregnant. PW 1 also narrated her account to PW 3.

19. The appellant stated that this case was a fabrication and was as a result of a grudge perpetrated by one JK. I find that this defence is an afterthought as nothing about JK was put to PW 1 in cross examination. Further, the police action was triggered by PW 1's report to PW 2. PW 2 was an independent witness who had nothing to gain by reporting the matter. There was no suggestion to PW 2 that he had sent PW 1 away on account of school fees as alleged by the appellant.

20. The medical evidence also reveals that PW 1 was pregnant. The appellant suggested to PW 1 in cross examination that she had a boyfriend but what emerged is that the appellant and other people were trying to stop PW 1 from reporting the matter by implying that PW 1 was impregnated by an unnamed boyfriend.

21. I also find that the testimony of DW 2 and DW 3 did not in any way dent the prosecution case. Although DW 2 stated that the appellant and PW 1 slept in separate rooms, the evidence is that the appellant in fact called PW 1 to his room where he proceeded to sexually assault her. As regards the issue of JK raised by DW 3, nothing of the sort was put to PW 1.

22. The totality of the evidence is that the appellant committed several acts of incest and assaulted PW 1 after she had reported the incident to PW 2. The appellant said nothing of this incident. The fact that the appellant assaulted PW 1 after reporting the incident is inconsistent with his innocence.

23. I have looked at the charge sheet and it refers to acts of penetration caused in the month of November 2016. The evidence shows that the appellant committed acts of penetration in 2016 but the act that triggered the police report was on or about 8<sup>th</sup> March 2017. This is consistent with the date the incident was reported at the police station, the date PW 1 was examined at Nduru Hospital and the date the appellant was arrested.

24. I do not think failure to include the March incident was fatal to the prosecution case as the facts were clearly laid out in the evidence and the appellant had the opportunity to cross examine witnesses and defend himself. Moreover, any error or omission of the dates is curable by section 382 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) as there is no prejudice or miscarriage of justice to the appellant.

25. The appellant also raised the issue of age of PW 1 which was not stated in the charge and that it was not proved. In section 20 of the Act, age is not an essential ingredient of the offence of incest. However, in determining the sentence to impose, the trial court has to have in regard to the age as the offence involving penetration is similar to defilement in section 8 of the Act. In this case, PW 1 testified that she was fourteen (14) years old and the appellant, her father, did not contest it.

26. All in all, I affirm the conviction on both counts. The sentence of fifteen (15) years imprisonment is neither harsh nor excessive to warrant interference. Under section 8(3) of the Act, the minimum mandatory sentence for the offence of defilement where the child is aged between 12 and 15 years old is 20 years imprisonment. The appellant was sentenced to 15 years imprisonment which is affirmed as the respondent did not cross-appeal or issue notice to enhance the sentence.

27. The appellant was not sentenced on the second count of assault. I therefore sentence the appellant to one (1) year imprisonment. Both sentences shall now run concurrently.

28. Save for the sentence, the appeal is dismissed.

**Dated and delivered at Kisii this 28<sup>th</sup> day of September, 2018.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Appellant in person.