



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 69 OF 2015**

**J M O.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. M. Munyendo – RM dated 14<sup>th</sup> August 2015 at the Principal Magistrate’s Court at Kilgoris in Criminal Case No. 1070 of 2014)*

**JUDGMENT**

1. The appellant, J MO, was charged and convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act. The particulars were that on 28<sup>th</sup> July 2014 at [Particulars Withheld] Location of Nyamache District within Kisii County, being a male person he caused his penis to penetrate the vagina of ANM, a female child aged 4 years who was to his knowledge his daughter.
2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence. The thrust of his appeal is that the prosecution did not prove its case beyond reasonable doubt.
3. As this is a first appeal, I am required to analyse the evidence afresh and reach an independent decision while making an allowance for the fact that I neither heard nor saw the witnesses testify.
4. The complainant (PW 1) gave unsworn testimony. She told the court that she was in baby class and she recalled that the appellant did “wrong things to her” after removing her clothes. She said that the incident took place in the appellant’s house.
5. Two Administration Police Officers, PW 4 and PW 5, stationed at Nyamache testified that on 28<sup>th</sup> July 2014 at 4.00pm, a lady came to the station and told them that she had been chased by her husband and that the said husband had sexually assaulted their child. They proceeded to the appellant’s home where they found and arrested him. They took him to Nyangusu Police Station.
6. The investigating officer, PW 3, confirmed that AP officers from Nyamache brought the accused and the child on 1<sup>st</sup> August 2014. She was informed of the sexual assault and that PW 1 had been taken for examination and treatment at Nyamache District Hospital. She nevertheless issued the P3 form, took statements and charged the appellant.
7. PW 5, a clinical officer at Nyamache District Hospital, confirmed that PW 1 was brought to the hospital on 28<sup>th</sup> July 2014 on account of being sexually assaulted. Examination of the labia majora and minora revealed redness, swelling and tears which PW 5 concluded was evidence of penetration.
8. In his sworn defence, the appellant stated that he had a dispute with his wife. He stated that she went away and later returned on her own volition but started complaining about him. He was later arrested.
9. In order to prove its case under section 20 of the Act, the prosecution was required to prove that the appellant was related to the complainant and did an act which amounted to penetration or an indecent act.
10. In this case, the appellant was a person known to PW 1 as they lived in the same house. PW 1 described what took place on the material day and although she did not use the words penetration, the circumstantial and corroborating evidence is that of PW 5, who examined her on the date of the incident, observed tears on the private parts were clear evidence of the act of penetration.
11. I am also alive to the proviso to section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) which entitles the court to act and convict an accused for a sexual offence on the basis of the uncorroborated testimony of the victim, if for reasons to be recorded the court is satisfied that the child is telling the truth. In this case the trial magistrate noted that:

*“PW 1 gave a brief, clear, straightforward and unsullied testimony of her encounter. She did not embellish her story with details that would suggest she had been coached. I even allowed the accused to ask her question and she stuck to her testimony. I believed in her.”*

12. The appellant in his defence said nothing of the child or the events of the material day and concentrated on his dispute with the mother. Although, she was not called as a witness, the prosecution case based on the clearly corroborated testimony of PW 1 which, alone, was sufficient to sustain a conviction. His defence therefore lacks any merit.

13. As regards the relationship between PW 1 and the appellant, the only direct evidence of the child is that they were living together. She did not call or refer to the appellant as her father. No other direct witness gave evidence to this.

14. I therefore quash the conviction on incest and substitute it with one of defilement contrary to section 8(1) of the Sexual Offences Act. Since the child was below the age of eleven (11) years, the life mandatory sentence under section 8(2) of the Act will apply.

15. Save for the conviction on defilement, the appeal is dismissed.

**Dated and delivered at Kisii this 27<sup>th</sup> day of September, 2018.**

**D.S MAJANJA**

**JUDGE**

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

Appellant in person.