



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 36 OF 2015**

**J S K.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. B.Ochieng' – SPM(Ag.) dated 24<sup>th</sup> January 2014 at the Principal Magistrate's Court at Kilgoris in Criminal Case No. 1045 of 2011)*

**JUDGMENT**

1. The appellant was charged with the offence of incest contrary to section 20(1) of the Sexual Offences Act ("the Act"). The particulars of the offence were that on 7<sup>th</sup> December 2011 at around midnight in Trans Mara East District within Narok County, he intentionally and unlawfully caused his penis to penetrate the vagina of NCS, a child aged six years knowing her to be his daughter. He was convicted and sentenced to life imprisonment.
2. The appellant was also charged, pleaded guilty and was convicted of the offence of attempted suicide contrary to section 226 as read with section 36 of the Penal Code (Chapter 63 of the Laws of Kenya). He was sentenced to one year imprisonment.
3. I am constrained to allow the appeal on the ground that after the child (PW 1) had testified, the trial magistrate ordered the appellant to undergo a mental examination and thereafter committed him to Mathari Mental Hospital for treatment on 22<sup>nd</sup> December 2011.
4. The appellant was released from hospital and took a fresh plea on the same offence on 15<sup>th</sup> February 2013. The trial continued but PW 1 was not recalled to testify.
5. The trial magistrate in the judgment relied on the testimony of PW 1 yet the child was never recalled after the fresh trial commenced. I find and hold that having found that the appellant had mental illness, it is doubtful that he understood the previous proceedings hence the proceedings were defective.
6. Counsel for the respondent conceded this appeal on the ground I have outlined.
7. I now allow the appeal and quash the conviction and sentence. Since it is clear from the record that the child and other witnesses could not be located, I decline to order a retrial. The appellant is set free unless otherwise lawfully held.

**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 for the respondent.

Appellant in person.