



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 138 OF 2015**

**NK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case Number 7860 of 2014*

*in the Chief Magistrate's court at Eldoret – Hon. Thripsisa Wanjiku Cherere (CM)*

**JUDGMENT**

1. The appellant herein NK was charged with the main count of incest by male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 7<sup>th</sup> March 2014 in Keiyo South District within Elgeyo Markwet County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of CJ (particulars withheld) a girl child aged 17 years and who was his step-sister

2. The appellant faced the alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that On 7<sup>th</sup> March 2014 in Keiyo South District within Elgeyo Markwet County intentionally and unlawfully caused your genital organ namely penis to come into contact with the genital organ namely vagina of CJ (particulars withheld) a girl child aged 17 years

3. The appellant pleaded not guilty to both the main count and the alternative charge and a trial was conducted in which the prosecution presented the evidence of 5 witnesses. A summary of the prosecution's case was that the complainant (PW1) was the appellant's step sister and that on the fateful day she was running an errand for her mother when while passing near the appellant's house, the appellant called her into his house ostensibly to collect some eggs and that no sooner had she entered the said house than the appellant pounced on her, dragged her into the house, threw her onto the bed, tore her underpants and defiled her. Her attempts to scream for help were thwarted by the accused who threatened to kill her if she made any noise. The appellant then proceeded to defile her repeatedly after which he threw her out of his house. The complainant went back home where she found her sister PW2 who escorted her to Hospital for treatment.

4. PW3, Dr. Jane Yatich produced the P3 form (exhibit 1) which showed that the complainant had been defiled as her hymen was freshly broken and that she had swelling on the face. PW4, the investigating officer, produced the complainants child health card which showed that the complainant was born on 22<sup>nd</sup> February 1998.

5. The appellant tendered an unsworn statement in his defence in which he admitted that the complainant was his step sister but denied committing the offence of incest. He stated that he was not at home on the date that the complainant alleged that she was defiled and added that he had not interacted with the complainant for several years.

6. At the close of the trial, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt after which she convicted and sentenced him to life imprisonment. Aggrieved by both the conviction and the sentence, the appellant filed the instant appeal in which he faulted the trial court for convicting him against the weight of the evidence. The appellant contended that no sufficient evidence was tendered by the prosecution to prove the offence of incest and that the sentence meted out on him was inconsistent with the provisions of Article 25 of the Constitution. The appellant canvassed the appeal by way of written submissions which I have perused.

7. At the hearing of the appeal, the appellant opted to rely entirely on his written submissions while Miss Mumu, learned counsel for the state submitted that the prosecution had proved all the ingredients of the offence of incest beyond reasonable doubt.

8. As the first appellate court, my duty is to reconsider, re-evaluate and re-analyze the evidence tendered before the trial court afresh with a view of making my own independent findings while bearing in mind the fact that I neither heard nor saw the witnesses testify. See **Okeno v Republic [1972] EA 32.**

Section 20(1) of the ***Sexual Offences Act, 2006*** 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 ..... [Emphasis mine]***

***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.***

9. In order to secure a conviction for the offence of incest, the prosecution was required to prove either penetration or an indecent act. The additional element of the relationship between the accused and the child is what makes the offence incest. In the instant case, the appellant did not deny that the complainant was his step sister. He had the following to say in his unsworn testimony:

***“I did not defile my step sister....My family has a grudge with me after it was alleged that I killed father.”***

10. It is therefore clear that the appellant was the step-brother of PW 1 and as such fell into the categories of prohibited relationships in section 22 (1) of the ***Sexual Offences Act.*** which stipulate as follows:

***“In cases 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.”***

11. Under section 20(1) of the ***Sexual Offences Act,*** sentence prescribed for a person found guilty of committing an offence of incest with a female person under the age of 18 years is liable upon conviction to life imprisonment.

12. I have evaluated the evidence and I find that the testimony of PW 1 was clear, precise and consistent as to what had transpired on the fateful day. Her testimony was not shaken on cross-examination. PW 1’s testimony did not require corroboration in light of the proviso of section 124 of the ***Evidence Act*** which states;

***“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

13. Notwithstanding the provisions of section 124 of the ***Evidence Act,*** PW 1’s testimony was readily corroborated by the testimony of PW2 who met the complainant in distress immediately after she was defiled and escorted her to the hospital. The appellant did not contest her testimony in cross-examination. Likewise, the testimony of PW3, the doctor who produced the P3 form, indicated that PW1 had been defiled as it showed that her hymen was freshly torn. It is instructive to note that the P3 form was filled on 13<sup>th</sup> March 2014, barely 6 days after the incident in question. The complainant’s testimony and the medical evidence proved penetration.

14. I find that the appellant’s testimony amounted to mere denial that did not dislodge the prosecution’s case. The age of the complainant is a question of fact to be proved by available evidence. The age of the complainant was proved by the child immunization card that showed her date of birth to be 22<sup>nd</sup> February 1998. PW1 gave testimony that that affirmed that she was 17 years old at the time she was defiled. The appellant did not contest this evidence during cross-examination. Besides, the P3 form (P exhibit 1) also showed that the complainant was 17 years at the time of the incident.

15. The learned trial magistrate imposed a sentence of life imprisonment I find that the sentence is lawful and is indeed the punishment prescribed under Section 20(1) where the female victim of incest is under the age of 18 years, as was the position in the instance case.

16. Having regard to the findings in this judgment, this court upholds both the conviction and sentence. Accordingly I find that the appeal is not merited and it thereby dismissed. Orders accordingly.

**Dated and signed at NAIROBI this 6<sup>th</sup> day of December 2018.**

**W. A. OKWANY**

**JUDGE**

**Dated, signed and delivered in open court at Eldoret this 19<sup>th</sup> day of December 2018.**

**OLGA SEWE**

**JUDGE**

**In the presence of:**

Appellant in person

Ms Mumu for state