REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.285 OF 2011

(An appeal from original conviction and sentence of Keroka SRM'S C Criminal Case No. 426 of 2011 by Hon. J. WERE SeniorResident Magistrate dated 26TH August, 2011)

S J…….. …….....……...…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

1. S J, the appellant herein was charged with the offence of incest contrary to **Section 20 (1) of the Sexual Offences Act No. 3 of 2006**, (hereinafter "the Act').

2. It was alleged that on 31st December 2010 in Kisii County within Nyanza Province, he intentionally and unlawfully caused penetration with his penis to the vagina of M.K. a girl aged 16 years old who he knew as his daughter.

3. The appellant pleaded not guilty to the said charge and a trial ensued in which the prosecution called a total of 6 witnesses. The appellant was thereafter placed on his defence and after a full trial, the subordinate court found him guilty, convicted him and sentenced him to serve 10 years imprisonment.

4. Aggrieved by both the conviction and sentence, the appellant preferred this appeal and set out the following grounds of appeal in his petition of appeal:

> **1. THAT, the trial court failed to observe that PW1 testified that she was taken away by my friends but not me and that she was not arrested at my home.**
>
> **2. THAT the trial court failed to observe that those who allegedly found and arrested PW1 in my house could have been called to prove the same in court of law.**
>
> **3. THAT learned trial magistrate erred in law in failing to appreciate that no investigation was done as per the matter as required by law since the investigating officer did not proceed beyond the crime office. He failed to visit the alleged scene of crime to ascertain the truth.**
>
> **4. THAT the trial court failed to notice that I was not linked in any way to the alleged crime because I was not medically examined as the accused person and that the five months pregnancy PW1 was found with could not be blamed on me since her mother alleged that she got lost form home for two months.**

5. THAT the trial court failed to take into consideration that the prosecution failed to prove the age of PW1 by producing any valid document accepted by law like birth certificate.

6. THAT I pray to be furnished with the certified true copies of lower court proceedings to enable me lodge a submission to this appeal.

5. The appellant was not represented by an advocate at the hearing of the appeal and when the appeal came up for hearing on 29th March 2017, Miss Ouko counsel for the state informed the court that she was conceding to the appeal on the grounds that the relationship between the appellant and the complainant did not fall within the specifically limited relationships under **Section 20 (1) and 22 (1)** and **(2) of the Sexual Offences Act**.

6. According to Miss Ouko, PW2 described the appellant as a cousin to the complainant's father and therefore his relationship with the complainant was criminalized by the Sexual Offences Act.

7. I have carefully considered the record of appeal, the appellant's appeal and the oral submissions made by the learned state counsel on conceding to the appeal.

8. As the first appellate court, I am still under an obligation to re-evaluate and re-analyze the evidence tendered before the lower court afresh with a view to arriving at my own independent findings while bearing in mind the fact that I neither heard nor saw the prosecution witnesses testify. **See Okeno Vs Republic (1972) E.A. 32.**

9. A brief summary of the prosecution's case was that on 31st December 2010, PW1, the complainant herein was sent to the market by her mother (PW2) but that on her way to the market, she was abducted by 2 boys who took her to the house of the appellant who then had sex with her. She stated that the appellant was a cousin to her father. The complainant returned home on 2nd January 2011 and a report of the incident was made to the area chief. PW1 however later disappeared to the home of the appellant till 24th April 2011 when the appellant was apprehended and charged in court.

10. PW2, E N Mconfirmed that the complainant was her daughter and that the appellant was a cousin to her husband. She confirmed the disappearance of the complainant in January 2011 only for her to be found in April 2011 in the house of the appellant. She stated that the complainant was already pregnant by the time she found her with the appellant.

11. PW3 H M M testified that he was the father in law of PW2 and that the appellant's father was his brother. He also received a report about the complainant's disappearance from home.

12. PW4 clinical officer JARED BIRUNDU ONDIMU examined the complainant and filled the P3 form. His findings were that the complainant was aged 15 years and was infected with a sexually transmitted disease (STD).

13. PW5 DAVID OKARO, was the assistant chief who received a report from PW2 about the disappearance of PW1- while PW6 P.C. HENRY KANYI was the investigating officer.

14. When put on his defence, the appellant tendered an unsworn testimony in which he basically denied committing the offence.

15. The only issue which emerges for determination in this appeal is whether the ingredients of the offence of incest were proved.

16. Section 20 (1) of the Sexual Offences Act provides 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."

17. Section 22 of the Sexual Offences Act on the other hand sets down the meaning of specific relationships which fit within the offence of incest as follows:

"22. (1) 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.

(2) In this Act -

(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;

(b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;

(c) "half-brother" means a brother who shares only one parent with another;

(d) "half-sister" means a sister who shares only one parent with another; and

(e) "adoptive brother" means a brother who is related to another through adoption and "adoptive sister" has a corresponding meaning."

18. In the instant case, PW1 testified that the appellant is a cousin to her father. PW3 stated that he was the father in law of PW2 being the father to one M (deceased) who was the complainant's father. PW3 had the following to say on his relationship with the appellant.

"His father is my brother, he is a cousin to my son."

19. From the testimony of PW3, it is clear that the appellant was the cousin to the complainant's father.

20. In its judgment, the trial court found that the PW1 was the appellant's niece, but did not address his mind to the actual relationship between the appellant and the complainant and if the said relationship qualified or fell within the meaning of the relationships that are specifically forbidden and hence criminalized under **Section 20 (1) and 22 (1) and (2) of the Sexual Offences Act**.

21. Under **Section 22 (2) (a) of the Sexual Offences Act**, the complainant would only qualify to be the appellant's niece if he was the brother to the complainant's parent. In the instant case, the appellant was the cousin to the complainant's father and nowhere is the cousin relationship referred to in the Act.

22. It would appear that the trial court extended the list of persons mentioned in **Section 22 of the Act** to include a parent's cousin which was clearly not the intention of the law-makers when enacting the Sexual Offences Act. My humble view is that if the law makers intended parent's cousins to be persons within the forbidden relationships, then nothing could have been easier than for the said class of persons to be included in the list contained at **Section 22 (2) of the Act**.

23. My finding is that the trial court misinterpreted the provisions of **Section 22 (1) and (2) of the Act** as the prosecution failed to prove that the Appellant was related to the complainant within the meaning of

the prohibited relationships. I note that considering the age of the complainant which was reported to be 15 years, perhaps the most appropriate charge should have been that of defilement rather than incest. However, as far as the instant appeal is concerned, I find that the offence of incest was not proved and consequently, I allow the appeal, quash the conviction and set aside the sentence.

24. The appellant shall be set free forthwith unless he is otherwise lawfully held.

Dated, signed and delivered in open court this 25th day of May, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Appellant in person

Omwoyo court clerk