



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CRIMINAL APPEAL CASE NO. 9 OF 2016**

**(Being an appeal arising from Kitale Chief Magistrate's court criminal case No. 3595 of 2016 delivered by P. Biwott Senior principal Magistrate on 2/2/2016)**

T M K .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**J U D G M E N T**

1. T M K 'the appellant' was charged with the offence of **Incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that the appellant on **14th September 2014 in Elgeyo Marakwet County** caused his penis to penetrate the vagina of L C a female who was to his knowledge his daughter.

2. He faced an alternative count of **Committing an Indecent act with a child contrary to section 11(1) of the same Act**.

He pleaded not guilty to both counts and the case proceeded to full hearing as a result of which he was convicted of the principal count and sentenced to life imprisonment.

3. He was aggrieved by the judgment and filed this appeal raising the following grounds:

**i) That the trial magistrate erred in law and in fact to convict the appellant yet the age of PW1 was fatally doubtful and not proved beyond reasonable doubt.**

**ii) That the trial magistrate erred in law and in fact to convict the appellant within grave contradictions and inconsistencies between PW1, PW2, PW3, PW4 and PW6.**

**iii) That the trial magistrate erred in law and in fact to convict the appellant while relying on assumptions and exaggerations while passing judgement.**

**iv) That the trial magistrate erred in law and facts to convict the appellant without recognizing that the investigation officer's evidence was unreliable due to improper investigations about the present case.**

4. When the appeal came for hearing the appellant referred the court to his written submissions which he wholly relied on. He submitted that PW1 was 18 years and not 10 years as alleged. She was the first born and him and his wife (PW2) had been married for 20 years and they had 10 children. He asked the court to find PW2 to be untruthful . That if PW1 was born on 2<sup>nd</sup> February 2002 then she was 12 years in

2014. He challenged the evidence of the dentist on age.

5. He submitted that the sentence under Section 20(1) of Sexual Offences Act is ten (10) years and not life imprisonment. He argued that PW3's evidence contradicted that of PW2 on the time of incident. That PW2's evidence was not corroborated. He stated that the scene of incident is not clear i.e whether it was in the forest or at home.

Finally he says the investigating officer failed to carry out his investigations to the required standard.

6. Mr Kakoi for the state opposed the appeal and submitted that all elements of this offence were proved.

He submitted that age, relationship between PW1 and appellant, penetration and identification were all proved.

He referred to the evidence of PW1, PW2 PW6 and Pw7 and the P3 form.

7. A summary of the case is that PW1 is a daughter to PW2 and the appellant. She was aged ten (10) years when the incident is said to have occurred.

**PW1 (L C)** was taken through the voire dire examination by the learned trial magistrate. She explained that the appellant used to have sex with her whenever her mother (PW2) was away. That he had taken her to the bush sometimes for that purpose, when PW2 was at home, but when she was not present she would do it from the house.

8. On the date in issue PW2 was slaughtering a hen in the kitchen when the appellant took her to his bedroom and had sexual intercourse with her. PW2 found them doing it. She was taken to hospital.

9. **PW2 F N** stated that on 14<sup>th</sup> September 2014 PW1 had come home visiting from where she used to stay with a certain madam. The appellant who is her husband arrived home at 11 pm and asked her to go to the kitchen to slaughter a hen for PW1. PW1 stayed in the main house with her siblings. At some point the witness went to the main house to pick a knife. It's then that she found the appellant sleeping with PW1 on the floor.

10. The appellant had removed his trouser from one of the legs and PW1's skirt had been pulled up. The two faced each other and were covered with a blanket. She uncovered them and found the appellant's leg on PW1. She alerted neighbours, and took PW1 to Kapcherop district hospital, after checking her genitals and finding tears.

11. She was advised to refer the matter to the police. It's then that PW1 told her that the appellant had defiled her on other occasions. She said PW1 was born on 2<sup>nd</sup> February 2002, and was their first born.

12. **PW3 Thomas Kibowen Kiprop** the area chief received a call and visited the scene. The complaint was defilement. He rushed the victim and mother to the hospital on his motor bike. It was confirmed at the hospital that the child had been defiled. He informed the area assistant chief who together with Kenya Police Reservists (KPRs) arrested the appellant.

13. The report of the defilement was made to **PW4 Corporal William Manyonge** on 15/9/2014 at 8 am. He investigated the case and had PW1 and appellant examined at the hospital, and P3 forms filled. Her age was assessed at 10 years. The report given to him was on PW1's defilement in the forest.

14. **PW6 Pharis Silali** examined PW1 for age assessment and found her to be 10 years old.

**PW7 Kimutai Ronoh** the clinical officer examined PW1 for purposes of filling the P3 form. He found bruises on her private parts, broken hymen, the labia was swollen with blood, spermatozoa was present in her vagina. He concluded that there had been sexual penetration (Exhibit 3). He also examined the appellant the same day, and found him to have bruises on his private parts. He filled a p3 in that respect

(Exhibit 2).

15. The appellant gave an unsworn statement in his defence. He confirmed that PW1 is his daughter and he had no problem with her mother who is his wife. He stated that when he took a chicken to slaughter for the children of his first wife PW1's mother (PW2) was not happy. He said he had left on 13<sup>th</sup> September 2014 and returned at 5.30pm when pw2 was not present as she had gone to get PW1. He prepared food for the children present and he slept. At midnight the door was knocked and he was arrested, and charged. Further that during that time PW2 was pregnant and she is always against him when in the condition. He also stated that PW1 was 17 years of age, and not 10 years.

16. This being a first appeal this court is enjoined to reevaluate the evidence and arrive at its own conclusion. It should be borne in mind that it never saw not heard the witnesses.

**See Koech & Another V Republic [2004] 2 KLR 322; Okeno V Republic 1972 EA 32;**

17. I have considered the evidence on record, and the grounds of appeal. I have equally considered the submissions by both parties. What I find to be the issues for determination are;

**i) Whether PW1 and the appellant's relationship falls under Section 20(1) of Sexual Offences Act.**

**ii) Whether age was proved.**

**iii) Whether PW1 was sexually penetrated.**

**iv) If the answer to (iii) is in the affirmative whether the appellant was the culprit.**

**Issue No. (i) Whether PW1 and the appellant's relationship falls Under Section 20(1) of the Sexual Offences Act.**

18. From the evidence of PW1, PW2 and the appellant himself it is clear that PW1 is the daughter of the appellant. So, the appellant is her father, and I find that this relationship falls under Section 20(1) of Sexual Offences Act.

**Issue No. (ii) Whether age was proved**

19. PW1 testified saying she was 10 years old and was a standard 1 pupil at [particulars withheld] Primary School. Her mother said PW1 was 10 years having been born on 2<sup>nd</sup> February 2002. PW6 assessed her age to be 10 years and produced her report (Exhibit 4). In his defence the appellant said PW1 was 17 years and in his submissions he has brought up theories to show that PW1 was 18 years of age during the incident.

20. The court that took the evidence of PW1 found her to be a child of tender years and subjected her to a voire dire examination. It is that court that saw and heard PW1. Besides the appellant's word, there is nothing on record to confirm his allegations. He is the father of PW1 and nothing stopped him from placing material before the court to confirm his allegations.

Even if PW1 was 12 years at the time of the alleged offence she was still under 18 years and covered in the proviso in Section 20(1) of the Sexual Offences Act No. 3 of 2006. I find that age was established and she was a minor.

**Issue No. (iii) - Whether PW1 was sexually penetrated.**

21. In her evidence PW1 explained that the appellant had been having sex with her at the house and in the bush. On the date in issue it was in the house as PW2 was in the kitchen making chicken. PW2 found them in the act under a blanket. Neighbours were alerted, and even the chief came and the child was

rushed to hospital, the same night.

22. PW7 the clinical officer examined PW1 on 15<sup>th</sup> September 2014. These were his findings in the P3 form (Exhibit 3).

- Her private parts had bruises.
- Her hymen was broken
- The labia was swollen and with blood.
- There was spermatozoa in her vagina.

23. The appellant was also examined by PW6 and found to have bruises on his private parts. (Exhibit 12).

The evidence of PW1 and Pw2 on penetration is therefore materially corroborated by the medical evidence by PW7 and the documents Exhibit 3 and 12. My finding therefore is that PW1 was sexually penetrated.

**Issue No. (iv) - If the answer to (iii) is in the affirmative whether the appellant was the culprit.**

23. The evidence of PW1 and PW2 is clear on this. PW1 testified that the appellant had severely defiled her. On this day he sent PW2 to prepare chicken in the kitchen and embarked on his mission. He did not expect her to come back to the house so soon, but there she was.

She found him on the child covered by a blanket.

The quick action by PW2 saved the child as she was medically attended to in record time. My finding is that the appellant was properly identified as the person who defiled the complainant herein who was a minor.

25. I find no merit in the appeal which I dismiss.

The conviction and sentence are confirmed.

Orders accordingly.

Delivered, signed and dated on 29<sup>th</sup> day of August 2017 at Kitale

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**H. ONG'UDI**

**JUDGE**

**In the presence of:**

**Ms Kagai for Mr. Kakoi for State**

**Appellant – present**

**Kirong – Court Assistant**

**Court: Judgment delivered in open court.**

**Right of Appeal explained.**

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**H. ONG'UDI**

**JUDGE**

**29/8/2017**