



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**HIGH COURT CRIMINAL APPEAL NO. 81 OF 2015**

**W O O ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against both the conviction and the sentence DATED 7.8.2014 in Criminal Case No. 296 of 2014 in BONDO Law Court before Hon. M.M. NAFULA –S.R.M.)***

**JUDGMENT**

1. **W O O**, the Appellant herein was charged with an offence of **Incest by Male contrary to Section 20(1) of The Sexual Offences Act No. 3 of 2006**. The Particulars of the offence are that on the 9th day of April 2014 at around 0000 hrs in Rarieda District within Siaya County, did cause his penis to penetrate the vagina of RAO a girl aged 16 years, who was to his knowledge his cousin.

2. That after full trial the court found the Appellant guilty, convicted him and sentenced him to serve ten (10) years imprisonment.

3. Appellant being aggrieved by both the conviction and sentence preferred this appeal setting out five grounds of Appeal, in his supplementary petition of Appeal thus:-

- a) The Learned Magistrate erred in law and in fact in making a finding that the Appellant had defiled the minor when there was no evidence by the minor that she had been defiled.***
- b) The Learned Magistrate erred in law and in fact in making a finding that the Appellant were related within the terms stipulated under Section 20 (1) of the Sexual Offences Act No. 3 of 2006.***
- c) The Learned Magistrate erred in law and in fact in making a finding that the Appellant's statement to the police had probative value when such statements had been made in contravention of Article 49 (1) of the Constitution of Kenya.***
- d) The Learned Magistrate erred in law and in fact in making a finding of defilement as against the minor by the Appellant when the medical evidence adduced did not support such finding.***
- e) The Learned Magistrate erred in law and in fact by convicting the Appellant based on insufficient evidence.***

4. Mr. Odongo Learned Advocate appeared for the Appellant whereas M/s. Mourine Odumba learned Prosecution Counsel appeared for the State.

5. I have carefully considered the Appellant's appeal and the Appellant's Counsel oral submissions as well as rival submissions by the Learned State Counsel in opposition of the appeal.

6. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the Court of Appeal case of **Okeno V. R. (1972) E.A. 32** where the Court set out *the duties of a first appellate court thus:-*

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434”***

7. The facts of the prosecution case are in the record of appeal which form part of the record and I need not reproduce the same case as it is readily available for perusal if need be, however, I shall briefly set out the summary of the prosecution case and the defence in this appeal.

8. On 9.4.2014 at around 3.00 p.m., PW1, RAO, a 16 year old girl, born on 8.6.1998 was at [Particulars Withheld], when the Appellant requested her to accompany him to Ndori and the two boarded a motor bike upto the Appellant's home. At the Appellant's home PW1 prepared a meal for the Appellant, who is her paternal cousin. PW1 was found at the Appellant's house and was taken to hospital and was medically examined. The examination results revealed that PW1 had been defiled P3 form was produced as P exhibit 4 and Birth Certificate as P exhibit 1.

9. Mr. Odongo, Learned Advocate for the Appellant argued ground Nos. 1 and 2 respectively in support of the Appeal and abandoned all other grounds of Appeal. M/s. M. Odumba Learned State Counsel opposed the appeal against both the conviction and sentence, urging the prosecution proved their case to the required standard thus beyond any reasonable doubt.

10. The Appellant's Counsel Mr. Odongo under ground No. 2 of the Appeal contends that the Learned trial Magistrate erred in law and in making a finding that the Appellant and the complainant were related within the terms stipulated under **Section 20 (1) of the Sexual Offences Act No. 3 of 2006.**

**11. Section 20 (1) of The Sexual Offences Act provided:-**

***“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.”***

12. The ingredients of an offence of incest are as follows:- *“relationship, within the meaning of the law and penetration”*

13. **Section 22 of the Sexual Offences Act** sets the test of specific relationships which may be considered for an offence of incest. **Section 22 (1) and (2)** provides:-

*“(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.”*

14. PW1 in her evidence testified that the Appellant was her paternal cousin, whereas PW3 testified that the Appellant was her nephew but did not elaborate whether he was from maternal or paternal side, however from her evidence PW1 and the Appellant are cousins. PW4 the investigating officer testified that PW1 told him that the Appellant was her cousin. The trial court in its judgment found that both PW1 and the Appellant were cousins and therefore relatives. The trial court however, did not address its mind, as to whether the Appellant's relationship and that of the complainant fell within the specifically limited relationship under **Section 20 (1) and 22 (1) (2) of the Sexual Offences Act**. The two Sections are specific as regards the forbidden relationship and specifically refers what relations should be considered when dealing with the offence of incest, and makes it clear that it is not every relationship that should be taken into account in an offence of incest. **Section 20 (2)** should be taken into account in dealing with an offence of incest. **Section 20 (1) and 22 (1) (2) of the Sexual Offences Act** do not mention cousin amongst that list of relatives in an offence of incest. The intention of Parliament in excluding the relationship of a cousin was not accidental but was intentional and with good purpose. This means it is permissible to have sex with a cousin because in some cultures within our country such as Hindus and Muslims, amongst other African Communities, Sexual acts with cousins are not criminalized against such persons. I therefore find that it was an error on part of the trial court to have found that sexual act with a cousin was criminalized under **Section 20 (1) Of The Sexual Offences Act**. My understanding of the said section is that if any sexual act takes place between two cousins, that do not amount to incest within the meaning of the provisions of the **Sexual Offences Act**. The trial Magistrate had no jurisdiction to expand the specified list of persons mentioned in **Sections 20(1) and 22 (1) and (2) of the Sexual Offences Act**, to include cousins. I find that it was an error in law for the trial court to have imported the relationship of a cousin and included it within the provisions of the law when that relationship was not amongst the specified relationship, to be considered in determining a case of incest.

15. Mr. Odongo, Learned Counsel for the Appellant contends in ground No. 1 of Appeal that the learned trial Magistrate erred in law and fact in making a finding that the Appellant had defiled the minor whereas there was no evidence even by the minor to the effect that she had been defiled. PW1 in her evidence was never lead into the evidence on the issue as to whether the Appellant had sexual intercourse with her. PW1 never mentioned having had sexual intercourse with the Appellant. She testified only of having made a meal for the Appellant at his place. The only evidence suggesting that there was penetration of genital organs of PW1 is that of PW2, the Medical Officer, who examined PW1, RAO, on 11.4.2014 at 4.00 p.m. The P3 form indicates PW1 RAO, was defiled by a person known to her. P3 form P exhibit 4 points out that *penetrative coitus* was achieved thus confirming Penetration. PW4, the

investigating officer's evidence is that upon investigation he found that the complainant (PW1) and Appellant had sex. The trial Magistrate in her judgment recorded as follows:-

***“PW1 testified that she had sex with the accused person.”***

16. I have very carefully perused the evidence of PW1 and there is nowhere in her evidence in which she testified that she had sex with the Appellant. PW1, RAO never mentioned of having any sexual encounter on 9.4.2014 with the Appellant as found by the trial court. That in sexual offences the prosecution is obligated to bring forth evidence on identification or recognition of the assailant. It is not enough for the prosecution to state the perpetrator is known but fail to disclose his name and/or his identity. I therefore find the trial court misapprehended PW1's evidence and imported into the proceedings some extraneous matters leading to the court making a finding that is not capable of being supported by evidence on record. I therefore find the prosecution did not adduce evidence connecting the Appellant with the penetration of the genital organs of the Appellant into the genital organs of the complainant.

**17. The Upshot is that the prosecution failed to prove that the Appellant is related to the complainant within the prohibited relationship enumerated under Section 20 (1) and 22 (1) of the Sexual Offences Act, prosecution also failed to prove penetration into genital organs of the complainant by the genital organs of the Appellant and as such I find the conviction was unsafe and should not be allowed to stand. I accordingly quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.**

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 28TH DAY OF JULY, 2016.**

**J. A. MAKAU**

**JUDGE**

**Delivered in Open Court in the Presence of:**

**Appellants in person – present.**

**M/s. M. Odumba for State.**

**C.C. 1. Kevin Odhiambo.**

**2. Mohammed Akideh.**

**J. A. MAKAU**

**JUDGE**