REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.90 OF 2012

(An Appeal arising out of the conviction and sentence of B.A. OWINO- PM delivered on 1st March 2012 in Thika CM. CR. Case No.854 of 2011)

J N K……APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

The Appellant, J N K was charged with the offence of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 16th day of February 2011 at ***[particulars withheld]*** Area in Gatanga District within Muranga County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of P W M, a child aged 12 years who to his knowledge is his niece. He was charged alternatively with the offence of **indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act no. 3 of 2006**. The particulars of the offence were that, on the 16th day of February 2011 at ***[particulars withheld]*** Area in Gatanga District within Muranga County, the Appellant intentionally and unlawfully committed an indecent act with P W M, a child aged 12 years by touching her genital organs. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged on the main count and sentenced to serve fifteen (15) years imprisonment. He was aggrieved by his conviction and sentence. He duly filed an appeal to this court. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence which was not sufficient to sustain his conviction. He faulted the trial magistrate for convicting him yet the prosecution had not proved its case to the required standard of proof beyond reasonable doubt. He was aggrieved that his defence had not been considered before the trial court reached the decision to convict him. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. The Appellant stated that the evidence adduced by the prosecution was full of contradictions. He submitted that he was convicted purely on hearsay evidence which was insufficient to secure a conviction against him. He stated that he was not given a chance to cross examine the complainant. He also complained that a crucial witness was not called to testify. In this regard, the Appellant relied on the case of **Juma Ngundia -Vs- Republic [1982-1988] KLR** at pg. 454 and **Abdalla Bin Wendo -Vs- Republic 1953 (EACA) Vol. 20** at pg. 166. He further stated that the prosecution shifted the burden of proof to the Appellant by requiring him to prove his *alibi* defence. He cited **Republic -Vs- Johnson [1961] 3 ALL ER 969**, **Leonard Aniseta -Vs- Republic [1963] E.A 206** and **Raphael -Vs- Republic [1973] EA 473**. Ms. Kule for the State opposed the appeal. She submitted that the prosecution had established, to the required standard of proof that indeed the Appellant had defiled the complainant. She was of the view that the appeal lacked merit and should be dismissed.

This being a first appeal, it is the duty of this court to re-look afresh the evidence adduced before the trial court and thereafter reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required by law to be mindful of the fact that it neither saw nor

heard the witnesses as they testified and therefore give due allowance in that regard. **(See Okeno -Vs-Republic (1972) E.A 32)**. In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the charge of incest brought against the Appellant.

Before giving reasons for its decision, this court is required to set out the facts of the case. The complainant in this case P W (PW1) was said to have been defiled on 16th February 2011. According to the evidence adduced before court, the complainant was 12 years old at the material time. The complainant recalled that on the material day she was in the house with one K, a minor. According to the complainant, the Appellant who is the complainant's paternal uncle came to the house and ordered the said K to leave the house. The complainant testified that the Appellant then pushed her on the seat and defiled her. She told the court that the Appellant left after she screamed. She reported the incident to K's mother. PW2 E N told the court that on the material day at around 9.00 a.m., her neighbour, one M who is the complainant came to inform her that the complainant had ben defiled by the Appellant. The said neighbour told PW2 that she had found the complainant crying behind their house.

PW2 testified that the complainant told her that **"T"** had defiled her. She told the court that the Appellant is also known as T. PW2 then made a report to Kirwara Police Station. The police advised PW2 to take the complainant to Kirwara Sub-District Hospital for examination. At the hospital, the complainant was medically examined by PW3 Michael Gachanja, a Clinical Officer. The medical examination was done on 16th February 2011. He testified that the complainant came with blood stained underpants and was complaining of pain in the private parts and the groin area. He testified that the complainant had told her that she had been assaulted by her uncle T. PW3 saw that the complainant had a broken hymen. He formed the opinion that indeed the complainant had been defiled. He signed the P3 form and produced the same together with treatment notes as ***Prosecution's Exhibit No. 1***.

PW4 PC David Cheruiyot was the investigating officer in this case. After concluding his investigations, he formed the view that indeed a case had been established for the Appellant to be charged with the current offence. When the Appellant was put on his defence, he denied committing the offence. He told the court that on the material day, he left his house at 5.00 a.m. to go to work at Ndakaini. He testified that when he came back at 5.00 p.m. he learnt from his mother that he had been accused of defiling the complainant. He testified that he then went to the police station and confirmed that a report of the incident had not been made. The following day, the Appellant was arrested while at work and charged with the present offence.

Upon re-evaluation of the facts of this case, it was clear that for the prosecution to prove its case on the charge of incest, there are three elements of the charge the prosecution is required to establish. Under **Section 8(1)** of the **Sexual Offences Act,** the prosecution was required to establish that there was penetration. The penetration was perpetrated on the child. Finally, the prosecution was required to establish the identity of the perpetrator. **Section 2 (1)** of the **Sexual Offences Act** defines penetration as ***"the partial or complete insertion of the genital organs of one person into the genital organs of another person"***. In the present case, the prosecution established that indeed the complainant, the victim of the sexual assault was penetrated. The medical evidence produced by PW3, the Clinical Officer, established to the required standard of proof that indeed the complainant had been penetrated. Her hymen was broken. This fact was not disputed by the Appellant. The prosecution further established that the Appellant was the complainant's Uncle. The Appellant did not dispute this fact.

In the present appeal, the prosecution produced the complainant's baptismal card which established that indeed the complainant was born on 16th July 1998. She was about twelve (12) years old at the time of the sexual assault. As regards the identity of the perpetrator, the complainant testified that it was the Appellant who had sexually assaulted her. The Appellant was known to the complainant as he is the complainant's paternal uncle. There was no doubt that the complainant positively identified the Appellant. The Appellant's alibi defence to the effect that he was away at work on the material date was disapproved by the prosecution. The Appellant's defence did not displace the cogent prosecution's evidence. The Appellant's culpability was established to the required standard of proof beyond reasonable doubt.

The appeal on conviction lacks merit and is hereby dismissed. The appeal on sentence similarly fails. The

sentence was legal. The Appellant placed no material facts before this court to impeach the custodial sentence that was imposed on him. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF JUNE 2015

L. KIMARU

JUDGE