REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRA NO.79 OF 2012

(Appeal arising from the conviction of Hon. N. Shiundu in Malindi CM Cr. No.33 of 2011)

E K M.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with two counts of incest contrary to section 20 (1) of the Sexual Offences Act No.3 of 2006. He was also charged with a third count of unnatural offence contrary to section 162 (a) of the Penal Code. The witnesses in relation to one count of defilement and the count for unnatural offence somehow recanted their evidence. The appellant was convicted of one count of defilement. The particulars of the offence were that the appellant between the year 2008 and 27th May 2011 in Magarini District within Kilifi County being a male person committed an act which caused penetration of your male genital organ into the female genital organ of H F F a girl aged 17 years who to your knowledge is your daughter. There was an alternative count of indecent act with a child contrary to section 11 (a) of the Sexual Offences Act.

The appellant was convicted of the main count and sentenced to serve 20 years imprisonment. The grounds of appeal as per the handwritten grounds are that section 36 of the Sexual Offences Act was not complied with, that the age of the complainant was not proved beyond the reasonable doubt, that this was a made up case, that the charge sheet was defective and that his defence evidence that was reliable was not considered. The appellant filed written submissions and relied on them.

It is contended in the written submissions that the complainant alleged that she became pregnant but no samples were taken for testing to prove that the child was sired by the appellant contrary to the requirement of Section 36 of the Sexual Offences Act. The appellant relies on the Case of **Fredrick Wadia Masanju v Republic, Mombasa CRA No. 204 of 2012.** It is further submitted that PW1 testified to the effect that nothing was done to him. He also informed the court that it was their step mother who had told him what to say. PW1 denied that he had been sodomized. If PW1 informed the court that it was their step mother who had coached them, then the evidence of PW3 can not be relied upon. She was allegedly defiled from 2008 and informed her uncle and grandfather but no family meeting was called. That is contrary to the appellant's large family as such allegations could have been known by the other family members. On the issue of the defect of the charge, it is submitted that the sentence imposed is not in line with the charge. The complainant alleged to have been 17 years old and therefore the proper section of the law ought to have been Section 8 (4) of the Sexual Offences Act.

The State opposed the appeal. Ms Mathangani, state counsel submitted that the complainant was the appellant's daughter who was 17 years. Her age was accessed. She narrated how the appellant started defiling her since 2008 when she was in class 5. The defilement continued up to 2011 when she conceived. She informed her teacher. The medical evidence corroborated the evidence of PW3 as she was pregnant and her hymen was missing. The defence evidence was an after thought. Counsel would like to have the sentence enhanced.

The record of the trial court shows that 7 witnesses testified for the prosecution. **PW1, B.F,** is the appellant's son. He was meant to be the complainant in relation to the count of unnatural act with a child. He informed the court that nothing was done to him although the medical evidence showed that there was likelihood that he was sodomized. PW2, was stood down. She was the complainant in relation to the 2nd count of defilement.

PW3, H F F, testified that she was 18 years by that time. Her evidence was that the appellant is her father. Since 2008 when she was in class 5, the appellant who used to work in Malindi would go home and make love to her. She reported to her grandparents but she was warned not to tell anybody. She thought that the appellant would stop defiling her but it did not stop. In 2010, the appellant asked her to go for christmas gifts in Malindi and the appellant defiled her. She had slept in a different room and the appellant climbed over to the room through the roof and defiled her. It is her evidence that PW1 informed her that the appellant had sodomised him. PW2 was also defiled but she refused to testify because she was threatened. It is the evidence of PW3 that the appellant was sentenced to serve 12 years in prison after he raped a woman. When she was defiled in December 2010, she conceived and delivered on 3rd September 2011. She delivered a baby boy. In 2011, they moved to a children's home. She was appointed to the children parliament and she narrated her story. Her step mother left the appellant and she never told her what to say against the appellant. She reported the matter to her teacher. It is also her further evidence that the appellant repeatedly defiled her.

PW4, K C was the headmaster of [Particulars withheld] Primary School. He got information on 7/4/2011 from the student parliament about the defilement of PW3 and her siblings. He wrote a letter to the District Education Officer reporting the matter. On 25/5/2011, he learnt that PW3 was pregnant. The appellant used to threaten to kill the children if they informed anyone. **PW5 Jaffer Joseph Kiruiya,** is a social worker. He was informed by PW4 about the plight of the children on 25/5/2011. On 27/5/2011, the matter was reported to the police. The children were later taken to a children's home.

PW6, Mwanachengoni Salim, is a police officer who was based at Malindi Police Station. She received the report at the station on 27/5/2011 and contacted the investigations. She referred PW3 for medical examination and she was found to be pregnant. She traced the appellant at the Malindi Prison and PW3 pointed him out to her. The appellant was being held for another offence that was before the court. **PW7, Ibrahim Abdullahi,** was a clinical officer based at Malindi District Hospital. He produced the P3 forms for the three complainants. It is his evidence that PW1 was sodomized. PW2 had her hymen intact. PW3 whose age was assessed at 17 years was pregnant and her hymen had been penetrated.

The appellant was put on his defence and he gave sworn testimony. He denied committing the offence. It is his evidence that his wife passed on. He married a second wife and they had differences. He chased her away and she promised to teach him a lesson. He learnt that she was the one instigating the case.

The appellant's ground of appeal that the complainant was aged 17 years and he ought to have been charged under section 8(4) of the Sexual Ofences Act is misplaced. The appellant was charged with incest uncer section 20 of the Act and not defilement. There are two difference offences. Under section 20, the punishment for incest is life imprisonment if the complainant is below 18 years old.

With reference to the evidence on record, it is clear that PW1 decided to recant his complaint although the medical evidence showed that he was sodomized. The main evidence is that of PW3. She was 17 years old when she conceived. She was categorical that her father used to have sex with her. She did not consent to it and expected the appellant to stop it. Under section 20 of the Sexual Offences Act, it is immaterial even if the complainant had consented to the act of sex. The law prohibits sex between blood

relatives. PW3 is the appellant's father.

The prosecution evidence shows that PW3 conceived and delivered a baby boy. The medical evidence confirms that she was penetrated. The defence evidence is that it is the appellant's second wife who is instigating the case. That line of evidence does not disprove the evidence that PW3 became pregnant. PW3 could vividly recall that at one time the appellant called her in Malindi for Christmas gifts and he defiled her after climbing over the roof.

From the evidence on record, I am satisfied that the appellant committed the offence of incest. He knew very well that PW3 was his daughter. The defence evidence does not disprove the prosecution case. The prosecution did prove its case beyond reasonable doubt. The offence of incest does not require DNA tests for it to be proved. There was no need for DNA test or any form of sample tests. Once it is established that the appellant had sex with his daughter, that evidence is sufficient to convict the appellant. The charge sheet is quite clear and there is no prejudice occasioned to the appellant. The offence was properly stated and the facts clearly stated.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 22nd day of July, 2015.

SAID J. CHITEMBWE

JUDGE