



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 108 OF 2013**

**S M M ..... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction and sentence of Hon. J. Karanja Principal Magistrate delivered on 6/12/2012 in Makueni Principal Magistrate Criminal Case No. 84 of 2012)*

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*(Before Hon. B. Thurairaja Jaden J)*

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

1. The Appellant, **S M M** was charged with the offence of incest by male person contrary to **section 20 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that “on the 25<sup>th</sup> day of February 2012 in **Makueni District** within **Makueni County** intentionally and unlawfully caused penetration of his genital organs to **F M M** who is his sister aged 13 (thirteen) years..”

2. In Count II the Appellant was charged with the offence of indecent assault of a girl contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that “on the 25<sup>th</sup> day of February 2012 in **Makueni District** within **Makueni County** unlawfully and indecently assaulted **F M M** by touching her private parts.”

3. When the Appellant was arraigned before the trial court, he pleaded guilty to the offence in Count I. When the facts were read out to him the Appellant informed the court that he was possessed by demons. This prompted the trial magistrate to refer the Appellant for a mental status evaluation by a psychiatrist. However, the psychiatrist report indicated that the Appellant was not suffering from any mental disorder.
4. The charge in Count I was read out again to the Appellant who pleaded guilty. The facts were read out again to the Appellant. The trial court found the response by the Appellant did not amount to unequivocal plea. The case proceeded to a full trial.
5. The case for the prosecution was that on the material day at about 11.00 p.m., the complainant, PW1 **F M M**, a 13 year old Primary School girl was at home sleeping. The complainant lived with her grandmother and her brother (*the Appellant*). The Appellant went to the complainant’s

- room and asked her for drinking water. The complainant left her room and got the water from the kitchen and gave it to the Appellant. The Appellant who was holding a *panga* grabbed her by the hand and pulled her to the bush.
6. The Appellant told her to sit down then removed her panties. The Appellant threatened to kill the complainant if she screamed. The Appellant then lay on the complainant and had sex with her many times until midnight. The complainant who was left in pain and bleeding private parts went back to her room to sleep. The following day at about 6.00 a.m. the complainant left for her elder sister's home in the same neighbourhood and informed her of the matter.
  7. A report was made to the village elder. A report was made to the police. The accused was arrested and escorted to the hospital together with the complainant for examination. The doctor confirmed that the complainant had been defiled. The Appellant was subsequently charged.
  8. The accused gave unsworn evidence. He stated that on the material day at about 11.00 p.m. he was arrested and asked his sister to serve him with food. He thereafter went to bed. At about 3.00 a.m. he felt thirsty and asked his sister for water. After taking a sip of the water he saw the face of N, his girlfriend who had left him. He then went outside with his girlfriend and they talked about how much they had missed each other and ended up making love. They then went to sleep. When the Appellant woke up at 6.00 a.m., his girlfriend was still there and they made love again. When the Appellant woke up later, the girlfriend was nowhere to be found. The Appellant then went to look for his sister but she was also not there. The complainant was also not there. The Appellant went to his grandmother and asked her where the girlfriend was but she had not seen her.
  9. The Appellant went to the farm to work. However, something did not feel right and he went back home. He passed by his sister's house to see if his girlfriend was there. The Appellant then went to ask his grandmother if she had seen his girlfriend. The Appellant then went to his house.
  10. When the Appellant came out of his house, he found a crowd of people gathered there with sticks and petrol filled jerricans. The Appellant was then handcuffed by the chief and questioned about the events of the previous night. He was then later taken to the hospital together with his sister. The Appellant then ended up in court. He asked the court to forgive him as he had no intention "to do that". He further stated that the family has been having problems of being possessed by evil spirits for a long time. That it was demons that caused his girlfriend to run away. That the demons used to sleep with him and at one time he ran away from home. However, when he returned home the demons came back.
  11. At the conclusion of the trial, the trial magistrate found the Appellant guilty of the offence of incest by male and sentenced him to twenty years imprisonment.
  12. The Appellant was aggrieved by both the conviction and sentence and he appealed to this court on grounds that can be summarized as follows:-
    - a. **That the prosecution evidence was unreliable.**
    - b. **That the charge sheet was defective.**
    - c. **That the Appellant was not accorded the services of an interpreter.**
    - d. **That the conviction was against the weight of the evidence.**
    - e. **That the prosecution case was not proved beyond reasonable doubts.**
    - f. **That the defence case was not considered.**
  13. During the hearing of the appeal, the Appellant relied on written submissions. The submissions essentially expounded the grounds of appeal. The learned counsel for the State opposed the appeal. The State Counsel submitted that the prosecution evidence was reliable; that the Appellant and the complainant are a brother and a sister; that the complainant's evidence is that of recognition and was corroborated by medical evidence. It was further submitted that the defence of temporary insanity was not supported by a medical evidence.
  14. The complainant (PW1) gave her age as thirteen years. On the act constituting the offence, it was the complainant's evidence that the Appellant put "his thing" into the part of her body which she uses to urinate. During cross-examination, the complainant's evidence left no doubt that the Appellant had sex with her.
  15. The complainant's evidence was corroborated by that of her elder sister, PW2 L N. PW2 who is married in the same neighbourhood testified that she saw the complainant's blood stained clothes then went to inform the grandmother, PW6 N K S about the matter. The report was made by the complainant's evidence in court.

16. PW3 **Boniface Mutuku Mwangangi** the village elder, PW4 **Willy Kioko** and PW7 **P.C. Lawrence Kamande** are among those who received the report of the incident and had the Appellant arrested.
17. PW5 **Dr Gerald Ratemo of Makeni District Hospital** gave evidence that confirmed the defilement. According to the doctor, he examined the complainant and found that she had some bruises on her private parts; that the hymen was missing and she was bleeding. The doctor produced a P3 form which gave the complainant's age as thirteen (13) years.
18. The Appellant in his defence appears to have admitted the offence but seems to say that he saw the face of his girlfriend, N. The Appellant then talked about being plagued by demons and asked for the court's forgiveness.
19. The trial magistrate was right in reaching the decision that the admission of the offence was unequivocal. The prosecution proved their case beyond reasonable doubt. The Appellant was evaluated by the psychiatrist and found to have no mental disorder.
20. Having combed through the evidence on record, I have found no reasons to differ with the findings of the trial magistrate who saw the witnesses and observed their demeanour.
21. The trial magistrate believed the complainant. The proviso to **section 124** of the **Evidence Act Cap 80 Laws of Kenya** provides as follows:-

*“Provided that where in a Criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”*

22. On whether the charge sheet is defective, a scrutiny of the same does not reveal which part of the complainant's body was penetrated. **Section 2** of the Sexual Offences Act defines penetration as:-

*“... the partial or complete insertion of the genital organs of a person into the genital organs of another person.”*

The charge reflected as “Count 1” therefore lacked clarity and was ambiguous.

23. However, the Appellant was also charged with the offence of indecent assault. This count was indicated as “Count II” instead of being reflected as an alternative count. However, this labeling is just a want of form and did not occasion any prejudice to the Appellant. The evidence on record proved the offence of indecent assault.
24. On whether there was interpretation of the proceedings carried out in English trial, it is noted that only the doctor (PW5) testified in English on 18/10/2012. On the said date, the court record reflects the presence of a court clerk by the name **Mwengi**. As stated by the court of Appeal in **Said Hassan Nuno v Republic (2010) eKLR:-**

*“We take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused; or a witness to the case.”*

25. With the charge in the main count being defective, the Appellant ought to have been convicted in the alternative count. Consequently, the conviction in the main count is hereby substituted with a conviction in the alternative count. The sentence of twenty (20) years is still within the law. Subject to the above, the appeal is dismissed.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 30<sup>th</sup> day of July 2015**

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**B. THURANIRA JADEN**

**JUDGE**