



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 171 OF 2010

BETWEEN

M K APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Embu Criminal case No. 1283 of 2009 by Hon. L.K. Mutai PM on 16th November, 2010)

JUDGMENT

1. The appellant was charged and convicted of the offence of incest contrary to **section 20(1)** of the ***Sexual Offence Act, No. 3 of 2006***. The particulars of the charge were that in March 2009 at [Particulars Withheld] Estate in Embu District within Eastern Province, the appellant intentionally and unlawfully had sexual intercourse with his daughter aged 12 years. After hearing and evaluating the evidence presented, the trial court convicted him and sentenced him to life imprisonment. He now appeals against the conviction and sentence.
2. The prosecution case was as follows. PW1, a female child, aged 14 years at the time she testified in court, stated in her sworn testimony that the appellant was her father. She told the court that in March, 2009 one early morning after her mother had left for the market, the appellant came in the sitting room where she was asleep with her sister. The appellant placed a knife on the table, removed her pants and biker, pulled up her dress and defiled her. She did not scream as the appellant warned her to remain silent. She also testified that she was 12 years old at the time the act was committed.
3. PW1 stated that she did not disclose to anyone that she had been defiled by her father. It was only about five months later on 30th August 2009 when her mother expressed concern over her bulging belly that she narrated her ordeal. The matter was reported to Embu Police Station. She was later examined at Embu Provincial General Hospital. On 12th October 2009 she gave birth. Her blood sample and that of the baby were extracted. In re-examination, PW1 stated that the appellant had assured her that he would take her to abort the child but in vain.
4. PW2, PW1's mother and wife to the appellant, recounted how on 30th August 2009 at about 9.00am she enquired from the complainant why her belly was large and why she was always dressed in sweaters. She confessed that the appellant had defiled her. She called the appellant and

the neighbours and informed them of these developments. She reported the matter to Embu Police station.

5. PW3, the doctor who examined the PW1, testified that he examined her and found her to be 34 weeks pregnant. He also confirmed that the complainant had sexual intercourse with an adult from about February 2009. He produced a P3 form which summarized his findings.
6. The paternity of the complainant's baby was confirmed by way of DNA analysis. PW4, the government analyst based at the Government Chemist Laboratories Nairobi, gave expert testimony that he analysed blood samples from the appellant, PW1 and the child which had been forwarded by investigating officer, PW5. He produced a report of his analysis in which he concluded as follows:
 1. *That there is 99.99% chances that M K is the biological father.*
 2. *That PMM (the baby) was the appellant's daughter.*
 3. *That MK is excluded as the biological father of MM (the complainant).*
7. PW5, the investigating officer, received the complaint on 30th August 2009 at Embu Police Station. She also escorted the PW1 to the hospital. In cross-examination, she admitted that although she did not witness the ordeal, she did obtain the DNA results and was satisfied that the appellant was the biological father of the child.
8. The appellant gave sworn testimony in which he denied knowledge of the offence. He stated that he had differed with his wife earlier when he found out that she had an affair outside marriage and hence the present charge was brought against him. He also stated that in February 2009 when the sexual act took place he had been involved in a road accident. In cross examination, the appellant testified that PW2 was his wife with whom he had lived for over 10 years and that he was not the PW1's biological father but that she was his step daughter. The appellant submitted that the prosecution had failed to prove its case and that since the offence was not reported timeously, it proved that nothing that happened to PW1. He contended that the prosecution evidence was unreliable.
9. The subordinate court concluded that the prosecution, on the basis of the evidence outlined, had established a case to warrant the conviction of the appellant. The appellant challenges the decision of the trial court on ground that the learned magistrate erred in failing to find that the charge sheet was materially defective. Further that the prosecution's evidence was wrought with inconsistencies, that the trial court did not adequately consider his defence and finally that the sentence was manifestly harsh and excessive. On the other hand, the State supports the conviction and sentence on the ground that the prosecution proved the offence beyond reasonable doubt.
10. *On a first appeal such as this, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing or hearing the witnesses. (See **Odhiambo v Republic Cr. App No. 280 of 2004 [2005] 1 KLR, Kiilu and Another v Republic [2005] KLR 174, Okeno v Republic [1972] EA 32**).*
11. The offence of incest is defined in **section 20** of the **Sexual Offences Act** thus:

20(1) 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 fact of the child being born at the given time by the complainant indicates that there was penetration of her person at about the time she alleges the said offence was committed against her. The DNA tests confirmed that the appellant was the biological father of the child confirming that the appellant had sexual intercourse with PW1. The appellant defence that at the material time he had been involved in a road accident was properly dismissed by the learned magistrate as there is no evidence to show that he was incapable of performing a sexual act as a result of the accident. Moreover, the evidence of paternity of the child inescapably leads to the conclusion that the appellant is the author of the felonious act.

13. The core issue in this appeal is whether the relationship between the appellant and the complainant is one that falls within the prohibited degrees under **section 20** of the **Sexual Offences Act** as read with **section 21**. It is incumbent on the prosecution to prove the existence of a father/daughter relationship between the appellant and PW1. Apart from confirming the paternity of PW1's child, the DNA analysis also confirmed that the appellant was not the biological father of the complainant. The appellant also confirmed in his cross-examination that he was a step father to the complainant. Does this fact absolve the appellant from the offence of incest under the Act? Does the fact that no biological or blood ties exist between the appellant and the complainant negate a charge of incest? **Section 22** of the **Sexual Offences Act** which deals with 'Test of relationship' provides for the test of consanguinity in the following terms;

22(1) In cases of the offences 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 ...

14. The appellant is the admitted step father of PW1, his relationship with PW1 for the present purpose is within the prohibited degrees of consanguinity and a sexual act between such father and daughter falls under the offence of incest as provided for under **section 20(1)** and **22(1)** of the **Sexual Offences Act**. In this regard, I adopt the sentiments expressed by court in **BNM v Republic, Mombasa Criminal Appeal No. 232 of 2009[2011]eKLR** where the court remarked that; *"my own understanding is that 'half father' is a term which means exactly the same as 'step-father' – it means one who is not a biological father of the child. Therefore by dint of this S 22(1) of the Act the appellant being a step-father of the complainant and one who stood in 'loquo parenthis' can legally be charged and indeed convicted of the crime of incest with her."*

15. Upon re-evaluation of all material on record, I am satisfied that the prosecution proved to the offence to the required standard. The appellant's defence cannot stand in view of the overwhelming prosecution evidence demonstrating that his act of sexual intercourse with his daughter resulted in the birth of the child whose pedigree was traced to the appellant as the father.

16. The appellant complains that the sentence meted on him by the trial court was harsh and excessive cannot also stand. Under **section 20** of the **Sexual Offences Act**, the minimum sentence upon conviction is 10 years but if the victim is a child below the age of 18 years, the maximum penalty is that of life imprisonment. I am satisfied that the age of the complainant at the time material was that she was below the age of 18 years.

17. The appellant was a first offender and the fact that he had intercourse with someone who trusted him as a father calls for a stiff sentence. However, the prosecution did not lead evidence of aggravating circumstances that would call for the maximum sentence of life imprisonment to be imposed. In the circumstances the sentence was excessive entitling this court to intervene. I therefore substitute the sentence of life imprisonment with that of 15 years in imprisonment.

18. Consequently the conviction of the appellant is affirmed and the sentence of life imprisonment is

substituted with one of 15 years imprisonment.

DATED, SIGNED and DELIVERED at EMBU this 9th day of January 2014.

D. S. MAJANJA

JUDGE