REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 89 OF 2012

M K.. .APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court Criminal Case No. 120 of 2008 by Hon B. Ochieng, PM on 19/2/2008]

JUDGMENT

1. The appellant was charged with the offence of incest by male contrary to **Section 20(1)** of the **Sexual Offences Act No. 3, 2006.** Particulars of the offence being that on the **17th** day of **February, 2008** at ***[particulars withheld]*** **village, Kiou location** in **Makueni District** within **Eastern Province,** being a male person, had carnal knowledge of **M M** a female person who was to his knowledge his daughter.
2. He was tried, convicted and sentenced to serve **20 years** imprisonment. Being aggrieved by the conviction and sentence, in his Amended Memorandum of Appeal he appeals on the following grounds;-

i. **That** the learned trial magistrate erred in law and fact in relying on a fatally defective charge sheet in convicting him.
ii. **That** the trial learned magistrate erred in law and fact by convicting him having failed to find proof of sexual assault as required by **Section 2(1) paragraph 6** of the **Act.**
iii. **That** the learned trial magistrate erred in law and fact by convicting him having failed to make a finding that allegations raised against him were not proved under Section **107(1)** of the **Evidence Act.**
iv. **That** the trial learned magistrate erred in law and fact when he convicted him having failed to find that the evidence attributed to was inconsistent and contradictory hence unsafe to rely upon to convict.
v. **That** the learned trial magistrate erred in law and fact when he rejected his plausible defence contrary to the provisions of **Section 169(1)** C**riminal Procedure Code.**

3. The appellant relied on written submissions. The appeal was opposed by the State. **Mrs Abuga,** learned State counsel argued that the appellant had carnal knowledge of the complainant, PW1, with full knowledge that she was his daughter aged **14 years** old. She had been left at home with her sibling and the appellant who defiled her while she was fully aware. She screamed and was rescued by her grandmother. Medical evidence adduced confirmed that she had been defiled. She stated that the appellant's defence was a mere denial. She called upon the court to uphold the conviction and sentence.
4. This being the first appellate court, it is my duty to re-evaluate the evidence adduced before the

trial court and come up with my own conclusions and findings bearing in mind that I neither saw or heard witnesses who testified. (see ***Okeno versus Republic [1972] E.A. 32).***

5. To prove the case the prosecution called 5 witnesses. PW1, **M M,** the complainant aged **14 years** stated that on the **17th February, 2008** at **9.00pm,** after they had supper, the appellant's father approached her, covered her mouth and dragged her to a sofa set. Her younger sister was asleep. He stripped her naked and defiled her. She felt a lot of pain in her private parts as he penetrated her. She bled from her private parts as a result. She raised an alarm. When he heard a knock on the door he armed himself with a panga but on realising that it was her grandmother he threw it aside and opened the door. She informed her grandmother what had befallen her. She also ran to report to her class teacher. The appellant followed them to her class-teacher's home. He was arrested by villagers.
6. PW2, **A K M,** the grandmother to the complainant said that at about **9.00pm** on the fateful date she heard screams from her son's house. She rushed there and knocked the door several times. The door was eventually opened and the complainant, her granddaughter told her that she had been defiled by her father, the appellant. Her clothes were blood stained and her blood stained pant was on the floor. She confronted the appellant who denied. PW1 left going to a neighbours and teacher's place. She followed her there. The appellant followed them only to be arrested.
7. PW3, **Dr Peter Ochongo** a medical officer examined the complainant. He found her having blood stained clothes. She had blood stains on her thighs. Her vagina was tender on touch and had a small tear which was bleeding.
8. PW4, **D M M** a teacher at ***[particulars withheld]*** **Primary School** stated that he was at home at *9.30pm* when one of his pupils **M M** entered holding her skirt tightly. She reported to him that her father had defiled her. He assisted by taking her to the Police Station to make a report and thereafter to hospital for treatment.
9. PW5, **S M M** the mother to the complainant was unwell. The appellant took her back to her parents' home on the **17th March, 2008** so that they could take her for treatment. The following morning she received a call from her daughter who informed her that she had been defiled by her father.
10. When put on his defence, the appellant who gave an unsworn statement said that he woke up on **18th February 2000** at **8.00am** only to be arrested by villagers who took him to the police. He denied having defiled his daughter.
11. It is stated that the charge sheet was defective making it fatal to the prosecution's case. he Court of Appeal in ***Yosefa versus Uganda [1969] E.A 236*** and the High ***Court in Sigilani versus Republic [2004] 2 KLR 480*** dealt with the issue when a charge sheet can be dismissed as being defective. It was states thus:

> "***The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person prepare his defence."***

12. The appellant was charged with the offence of incest by male as stipulated by **section 20(1)** of the **Sexual Offences Act.** The provision of the law is very clear. That is what was quoted in the statement of the offence. The offence was therefore known in law. In the particulars of the offence it was stated that he had carnal knowledge of the complainant who was to his knowledge his daughter. According to the provision of **Section 20(1)** of the **Act,** a person becomes guilty of incest by male when he either commits an indecent act or an act that causes penetration with a female person who to his knowledge is his daughter. In particular an act that causes penetration would mean partial or complete insertion of the genital organ of a person into the genital organ of another person (see ***Section 2(1) of*** the ***Sexual Offences Act, 2006***). Carnal knowledge in **Criminal Law** simply means sexual intercourse, a sex act such as having contact between a penis and vagina or alternatively a penile penetration of a female is carnal knowledge.
13. The prosecution in the particulars of the offence clearly disclosed to the appellant that he was being accused of having had carnal knowledge of the complainant, his daughter, which means that he penetrated her. Although the term penetration was not used, the words used were clear enough

to explain to the appellant the allegation levelled against him.

The question to be answered is therefore whether he was prejudiced?

14. A perusal of the proceedings reveals that the accused responded to the charge. Thereafter he actively participated in the trial, duly cross-examined the witnesses and even defended himself. He even argues that his defence was not considered by the trial magistrate. This is evidence that he was not prejudiced. In the premises the charge cannot be dismissed as having been defective.
15. **Section 2(1)** paragraph **6** of the **Sexual Offences Act** defines **DNA** as deoxyribonucleic acid the genetic code unique to every living organism including human being. It is argued by the appellant that he was not subjected to forensic examination to establish the truthfulness of the allegations.

The question to be answered is therefore whether the case should have failed on that ground?

16. In the case of ***Andrew Cauri versus Republic in Criminal Appeal No. 132 of 2008.*** The court of Appeal had his to state:

> ***"We agreed that there are instances in which an accused person ought to be medically examined before a court of Law can positively connect him to commission of an offence but we do not think that this particular case there was dearth of evidence to enable the two (2) courts below reach a conclusion that it was the appellant who defiled the complainant. Even in the absence of a medical examination on the appellant, there was sufficient evidence to enable the trial court reach the finding that it arrived at, we must therefore reject the third ground of appeal***"

17. The question to be answered is therefore whether it would have been a requirement for the appellant to be subjected to a DNA test considering the circumstances in which the offence is said to have been committed. The complainant herein was the appellant's biological daughter, a fact the accused does not dispute. She was inside their house with the appellant. She screamed on being defiled. PW2 her paternal grandmother and mother to the appellant answered her call of distress immediately. When the door was opened she found the complainant with blood stained clothes. Her pants that were blood stained were on the floor. The complainant told her at the instance that she had been defiled by the appellant. The clothes the complainant was wearing were identified in court. They were seen by the trial magistrate who noted that they had stains of blood. PW4 also saw those clothes on the fateful night and observed that they were blood stained. This evidence was not discredited in cross examination. In fact it was not raised at all. Without evidence of another man in the house, this evidence that was cogent was confirmation of the evidence adduced by the complainant that it was the appellant who penetrated her injuring her which made the act unlawful.
18. The law in respect of single victims of sexual offences is also very clear. As long the court is satisfied that the victim is telling the truth, it does receive the evidence and convict on it save that it must record reasons thereof in the proceedings. (see ***section 124 of the Evidence Act***). The trial court expressed its satisfaction by the evidence adduced by the complainant, a **14 years** old girl who did not have any reason to lie as to what had transpired. That ground of appeal cannot stand.
19. **Section 107(1)** of the **Evidence Act** alluded to by the appellant is in regard to the burden of proof. It was argued that failure to produce the blood stained clothes that were identified in court as exhibits meant failure to prove the case. The burden of proof was on the prosecution. It was proved beyond doubt that the complainant was inside the house when she was defiled. Medical evidence adduced confirmed that indeed she sustained a tear. She was still bleeding when she went to hospital. Further there was proof of the relationship between the complainant and the appellant. It was proved that it was within his knowledge that she was his daughter. The case was therefore proved to the required standard. The evidence adduced by the prosecution witnesses whose credibility was not discredited was cogent.
20. In his defence the appellant stated how he woke up, had breakfast and was arrested then charged.

He denied having defiled his daughter. Evidence was adduced how he sent his wife and mother of the complainant to her maiden home to seek treatment then returned home on the fateful night to defile his daughter. This is evidence that he acted intentionally. In the premises, the trial magistrate did not misdirect himself in reaching the conclusion as he did; I therefore dismiss the appeal on conviction. It is confirmed.

21. The sentence meted out was **20 years** imprisonment. The law provides for a sentence of not less than **20 years,** but where the female victim is under the age of **eighteen years** the sentence provided for is **life imprisonment.** This is a case where it is proved that the child was aged 1**4 years** old. In the premises, the sentence meted out by the court was illegal. I therefore set it aside and substitute it with **life imprisonment.**
22. It is so ordered.

DATED, DELIVERED and **SIGNED** this **25TH** day of **MARCH,** 2014**.**

L.N. MUTENDE

JUDGE