REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 36 OF 2013.

J K G :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(Being an appeal from the original conviction and sentence of J.A. Owiti – AG. PM in Criminal Case 753 of 2011 delivered on 2nd April, 2013 at Kitale.)

J U D G M E N T

The appellant, **J K G,** appeared before the Principal Magistrate at Kitale charged with incest, contrary to section 20 (1) of the Sexual Offences Act, in that on 20th March, 2011, in Trans Nzoia County, had sexual intercourse with M W G, who was to his knowledge a half sister aged seven (7) years old.

After a full trial, the appellant was convicted and sentenced to life imprisonment but being dissatisfied with that outcome filed the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 15th April, 2013, by the firm of **Onyancha & Co**. Advocates.

Learned Counsel, **Mr. Onyancha**, appeared for the appellant at the hearing of the appeal while the Learned Prosecution Counsel, **M/s. Limo**, appeared for the state/respondent.

In his submissions through learned counsel, the appellant combined ground one and two of the appeal and argued them together by stating that he was not at the scene of the crime and that it was only PW1 who placed him at the scene and her evidence was not corroborated. That, three other people who were at the scene i.e. E N and two cousins were not called to testify.

On sentence, the appellant submitted that it was excessive as section 20 (1) of the Sexual Offences Act is not mandatory such that the court has discretion to impose a lesser sentence.

The appellant contended that the complainant was a step sister and there was a probation report which was favourable to him. That, he was a first offender and should have been accorded leniency by the trial court.

In opposing the appeal, the Learned Prosecution Counsel submitted that the case proceeded before two magistrates and in both instances the complainant's evidence was strong. That, those who were not called to testify did not witness the offence and that the complainant, a step-sister of the appellant was aged seven (7) years. That, the failure to call some witnesses did not prejudice the prosecution case.

On sentence, the Learned Prosecution Counsel contended that it was lawful and proper as the age of the

complainant was put into consideration.

The Learned Prosecution Counsel called for the dismissal of the appeal.

Having considered the grounds of appeal in the light of the rival submissions by both the appellant and the respondent, the duty of this court is to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, this court has considered the evidence by the four (4) prosecution witness including the clinical officer, **Linus Ligre (PW1),** the complainant's sister, **S G (PW2),** the complainant **MW (PW3)** and the police officer who investigated the case, **P.C. William Andai (PW4).**

The court has also considered the evidence given by the appellant in his defence as supported by that of his witnesses, **M K (DW2)**, and **P M (DW3).**

From the evidence, it is the opinion of this court that there was sufficient evidence from the complainant (PW3) and the clinical officer (PW1) establishing that the complainant was indeed sexually assaulted by being defiled.

There was no dispute that the complainant was a step-sister to the appellant and that she was indeed defiled.

The basic issue for determination was whether the appellant was responsible for defiling his step-sister.

Section 20 (1) of the Sexual offences Act, provides that 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.

Under section 22 of the Sexual Offences Act, the definition “sister” includes a half sister.

The appellant denied responsibility for defiling the complainant and contended that he was implicated by his step mother with whom he had a grudge. He said that he was at his place of work on duty on the material date.

M K (DW2) said that he was in her company before he left for home and P (DW3) said that he (appellant) and himself were on duty after which they left for his (P) house where they spent the night.

Basically, the appellant's defence was an indication that he was not at the scene of the offence when it happened and could not therefore have committed it.

However, the complainant's evidence placed him at the scene on the material date at 4.00 p.m. The complainant stated that on that material date and time, the appellant locked the house in which they were in and inserted a handkerchief on her mouth. He then removed her dress and underpant and lay her on a chair after which he defiled her. She later reported the matter to her mother and was taken to the hospital and to the police station.

The evidence by the complainant was the sole evidence against the appellant. It clearly displaced his “alibi” and showed that he was the person who was responsible for defiling her. She impressed the learned trial magistrate as being a candid and truthful witnesses such that her evidence could be relied upon even in the absence of corroboration. The learned trial magistrate was in a better position than this court to make findings based on the credibility of the witnesses. This court did not have the advantage of seeing and hearing the witnesses and cannot therefore fault the findings of the learned trial magistrate based on credibility of witnesses unless there is good reason to do so. This court finds no such reason and must therefore hold as did the trial court, that the offence of incest was established beyond reasonable doubt against the appellant. His conviction was therefore safe and sound and is hereby upheld. On sentence, section 20 (1) of the Sexual Offences Act, provides for life imprisonment if the victim is under

the age of eighteen (18) years. Herein, the complainant was said to be seven years old but the immunization card (P. Ex. 3) indicated that she was born on 30th August, 2003, thereby placing her age at the time at approximately eight (8) years. She was therefore under eighteen years and so, the sentence imposed upon the appellant by the learned trial magistrate was lawful but since section 20 (1) of the Sexual Offences Act is not framed in mandatory terms in as much as the word “liable” is used, the sentence was rather excessive for a first offender.

The same is hereby set aside and substituted for a sentence of ten (10) years imprisonment.

Otherwise, the appeal on conviction is dismissed.

[Delivered and signed this 19th day of March, 2014.]

J.R. KARANJA.

JUDGE.