



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 242 OF 2011**

**W K K ..... APPELLANT**

**=VERSUS=**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The Appellant, **W K K**, was convicted for the offence of INCEST by a male Contrary to Section 20 (1) of the Sexual Offences Act. He was then sentenced to Life Imprisonment.

In his appeal, he has raised 7 grounds, which can be summarized as follows:-

- i. The medical evidence was of no evidential value as there was no spermatozoa found on the Complainant;
- ii. An essential witness failed to testify. That person is the watchman who assisted the victim's mother to arrest the Appellant;
- iii. The trial Court failed to take into account the bad blood between the Appellant and the Complainant's mother. The 2 had separated and the Appellant believed that the lady was simply getting back at him;
- iv. There was inconsistent and contradictory evidence. Either the watchman was with the mother of the Complainant or she called out to him after encountering the scene of crime. The Appellant invited this Court to hold that those two versions were inconsistent.

Secondly, if the Complainant was taken to hospital soon after being defiled, the Appellant believes that she should have had fresh tears in her private parts. If no such tears were seen, the Appellant says that that was because there was no defilement;

- v. The failure to produce either a Birth Certificate or a Baptism Card is said to have left the age of the victim without proof;
- vi. The Charge Sheet was defective as it cited a date which was different from that about which the witnesses gave evidence;

Secondly, the omission of the words ***“Intentionally and unlawfully caused his penis to penetrate the vagina”*** was said to be a defect in the charge sheet;

- vii. The trial Court failed to consider the fact that the Constitutional rights of the Appellant were violated when he was assaulted by the mother of the Complainant, the watchman and other persons.

The Respondent submitted that the medical evidence proved that the Complainant had been

sexually assaulted.

The medical evidence was adduced by the Clinical Officer, **Mr. Henry Kemboi Chepkonga**. He examined the Complainant on 10th July, 2011, which was the day after the incident.

The Clinical Officer noted tenderness on the girl's pubic region; lacerations on the labia majora; and a broken hymen.

As a result, he concluded that the girl had suffered a traumatic sexual assault.

In the P.3 Form, the Clinical Officer noted that there was no discharge or blood in the girl's genitalia. It is this latter comment which prompted the Appellant to submit that the medical evidence was of no evidential value. In his considered opinion, there should have been spermatozoa and blood stains, if the child had been defiled.

This court wishes to make it clear that there is no legal requirement that before a conviction can be founded, there must be evidence of either bleeding of the victim's private parts or the presence of spermatozoa.

The offence of defilement is complete when there has been penetration, even if such penetration is only partial. The offender need not ejaculate before he can be convicted.

The offender could even choose to use a condom, so that if he ejaculated, there would be no spermatozoa on the victim. That would not insulate him from conviction, if the other ingredients of the offence were proved.

Similarly, for the offence of Incest, the prosecution only needs to prove that the accused person, who is a relative of the Complainant, had caused his penis to penetrate the vagina of the Complainant.

In this case, the Appellant confirmed to the trial Court that the Complainant was his own daughter. Thus the only question that arose was as to whether or not he had carnal knowledge of her.

It is true that the medical doctor who examined the Appellant did direct that the Appellant be referred to the Kabarnet District Hospital for surgical review.

However, it is equally true that the suggested review was not intended to ascertain whether or not there had been any connection between the Complainant and the Appellant. The medical doctor was responding to the Appellant's medical condition, in which he had difficulty in passing urine and abdominal pain when walking.

The Appellant's complaint had been that he had been assaulted by a group of people, who included his wife. As a result of that assault, he had difficulty when passing urine and he also had lower abdominal pain. Therefore, the doctor was attending to his need for treatment. The doctor was not seeking evidence from the Appellant, for use in the trial.

Being the first Appellate Court, I am enjoined to re-evaluate all the evidence on record, and to draw my own conclusions.

P.W.1 is the Complainant. She said that she was 7 years old. She also said that the Appellant was her father.

P.W.1 testified that on the material day, her mother (P.W.2) had taken her brother to Kimalel Health Centre, as P.W.1's brother was unwell. Whilst P.W.2 was still away, the Appellant arrived at the home of P.W.2, where P.W.1 and her other siblings were asleep.

The Appellant is said to have forcibly removed the clothing of P.W.1, leaving her naked. He then

unzipped his trouser, before proceeding to do “**tabia mbaya**” on P.W.1.

P.W.1's testimony was that she felt pain, but she cried softly, as the Appellant had warned her against making noise. The Appellant also told P.W.1 not to tell anyone about what had happened. He then gave P.W.1 kshs 5/=, to buy sweets.

According to P.W.1, her mother arrived at their house prompting the Appellant to try and flee. However, the watchman who was with P.W.2 stopped the Appellant, and tied him up.

During cross-examination of P.W.1, the Appellant suggested to her that it may have been someone else who had done the things complained of. But P.W.1 emphasized that it was the Appellant who had carnal knowledge of her.

P.W.2 is the mother of the Complainant. Her testimony corroborated that of P.W.1. She arrived back at her house and heard her daughter crying. P.W.2 then heard the Appellant's voice, telling P.W.1;

“**Nyamaza najua kile nafanya**”

P.W.1 responded to her father by saying;

“ **Baba unanisumbua. Nasikia uchungu.**”

It is then that P.W.2 kicked open the door, and found the Appellant lying on the bed. His trousers were at his knees.

Meanwhile, P.W.1 was naked. Using the torch which she had, P.W.2 was able to clearly see the penis of the Appellant.

After P.W.1 said that the Appellant had done “tabia mbaya” to her, the mother raised an alarm. Joseph, a watchman, responded to the alarm, by going to the aid of P.W.2. **Joseph** tied up the Appellant, using ropes.

During cross-examination, P.W.2 confirmed that she had separated from the Appellant at the material time. She was living at her own house, and it is there that they found the Appellant.

It is noteworthy that during cross-examination, the Appellant did not suggest to P.W.2 that she was simply trying to get back at him, by framing him with the alleged incest.

**P.W.3, ANDREW LUMENYA**, is the Chief of Kimalel Location. He knew the Appellant and his whole family. Therefore, he knew that the Appellant was the father of P.W.1 and was the husband to P.W.2.

At 7.00 a.m. on the morning after the incident took place, P.W.3 went to P.W.2's house, where he found the Appellant under arrest. P.W.3 testified that the Appellant had been tied with a rope.

**P.W.4 P.C. ELIZABETH ABAI**, was a police officer attached to the Gender and Children Desk, at the Marigat Police Station.

When the Chief escorted the Appellant to the Police Station, P.W.4 received them. Thereafter, P.W.4 escorted both P.W.1 and the Appellant to the hospital for medical examination.

**P.W.5, HENRY KEMBOI CHEPKONGA**, a Clinical Officer, examined both the Complainant and the Appellant. He concluded that the Complainant was a victim of traumatic sexual assault.

Meanwhile, he found that the Appellant had sustained some bruises from the beatings he got from a mob.

P.W.5 was unable to conduct urinalysis on the Appellant because the Appellant had difficulty in passing urine. He therefore referred the Appellant to the Kabarnet District Hospital for surgical review.

After the Appellant was put to his defence, he told the Court that the Complainant was his daughter. However, he denied committing the offence.

The Appellant said that he was not at the scene of crime. He insisted that he was at his home in Kapn'gele.

But he confirmed that he was arrested on the same date as the prosecution witnesses had said.

I find that the Appellant was not at his house at the material time. He was definitely at the house of P.W.2. That is where both P.W.1 (the Complainant) and her mother recognized him. It may have been at night, but his wife and daughter were first able to recognize his voice. Those are people who he had lived with, and who therefore knew his voice well.

Secondly, when the Complainant's mother arrived at home, she had a torch. The light from the torch enabled her and the Complainant to see the Appellant clearly.

Then the watchman tied up the Appellant with a rope. When the Chief arrived at the Complainant's house early the next morning, he found the Appellant when he was still bound with ropes.

There can be no doubt that it is the Appellant who committed the offence.

As regards the age of the Complainant, she testified that she was 7 years old. Her mother also confirmed that fact. And being the mother, there can be no doubt that she knew the age of her daughter.

The doctor who examined the Complainant also testified that she was about 7 years old. That corroborated the evidence of the other 2 witnesses.

In any event, as the Appellant was the father of the Complainant, he too would have known the age of the Complainant. As he did not dispute the evidence tendered by the Complainant, her mother and the doctor, concerning the issue of age, I find that that implies that he did not deem it necessary to cast any doubts on that evidence.

To my mind, the absence of bleeding on the genitalia of the complainant cannot, of itself, lead to the conclusion that the other pieces of evidence, that show that there had been penetration of the Complainant's vagina, were inadmissible.

As regards the watchman who tied up the Appellant, I find that he did so in the presence of both the Complainant and her mother. Indeed, the watchman did so at the prompting of the Complainant's mother. That therefore formed the nexus between the incident and the Appellant.

Had the watchman not arrested the Appellant at the scene, and in the presence of the Complainant and the mother of the said Complainant, it may have become necessary for the watchman to testify. He would then have needed to tell the Court why he arrested the Appellant.

In the circumstances prevailing in this case, I find that the failure by the watchman to give evidence, did not diminish the case against the Appellant. I so find because the evidence adduced was already sufficient to sustain the conviction.

To my mind, there can be way that a male person can lawfully have carnal knowledge of his grand-daughter, daughter, sister or mother. Therefore, the omission of the word "**unlawfully**" cannot render the charge sheet defective.

Finally, the presence of a grudge between the Complainant's mother and the Appellant, even if it

had been proved, could not have been a sufficient defence to the otherwise consistent and corroborative evidence which had proved that the Appellant committed the offence.

The Complainant had real injuries in her private parts. Those were caused by the actions of the Appellant. The Injuries cannot have been caused by the alleged grudge between the Appellant and the mother of the Complainant. The injuries were caused by the deliberate actions of the Appellant. Therefore, the conviction was well-founded.

Accordingly, there is no merit in the appeal. The same is therefore dismissed. I uphold both the conviction and the sentence.

**DATED, SIGNED AND DELIVERED AT ELDORET,**

**THIS 19TH DAY OF MAY, 2014.**

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**FRED A. OCHIENG**

**JUDGE.**