



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 40 OF 2012**

G M N .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**(From the original conviction and sentence in Criminal case No.69 of 2011 of the Chief Magistrate's court at Limuru before M.A. Murage, Chief Magistrate)**

**JUDGMENT**

The appellant G M N was charged with the offence of incest by male person contrary to Section 20 (1) as read with Section 22 (1) of the Sexual Offences Act No. 3 of 2006. In the alternative he was charged with the offence of committing an indecent act with a girl child contrary to Section 11 (1) of the same Act. He denied the offence but after a full trial he was convicted and sentenced to life imprisonment.

The particulars of the charge were that on the night of 20<sup>th</sup> January, 2011 at *[particulars withheld]* Village, Kiambu County he intentionally committed the offence of incest with the complainant who was his daughter aged 12 years old. The record shows that the learned trial magistrate conducted a *voir dire* examination but noticed that the complainant was mentally retarded, she nevertheless could answer some questions. She decided to allow her give unsworn evidence as she did not appreciate the meaning of an oath.

In her evidence, the complainant said that she was asleep with her brother called Kamau when the appellant who is their father went to their bed, removed her pants and defiled her. She called her mother but the appellant held her mouth.

On the following day she went to school and her teachers noticed her walking with some difficulty. The teachers went to their home, met the grandfather who went to school. The teachers questioned the complainant who then revealed what had transpired. Later, she was taken to hospital where she was treated. She identified the appellant as the person who defiled her.

P.W. 2 is the grandfather of the complainant who narrated how the complainant's two teachers went to his home and informed him of the incident. He also told the court how he called some neighbours and PW5 the area Assistant Chief who summoned the appellant. When the appellant arrived the complainant identified him but he denied defiling her. The appellant is his son in law.

P.W. 3 and P.W. 4 are the complainant's teachers who noticed that she was not walking properly and appeared in pain. She revealed to them that she had been defiled and decided to contact the grandfather

who then took up the matter.

The complainant was subsequently examined and treated at Tigoni District Hospital by Dr. Kavese but at the time of the trial she was not in government service. Dr. Kamanga Caroline of the same hospital gave evidence and produced the P3 form filled by Dr. Kavese. She had worked with Dr. Kavese for 9 months and was conversant with her handwriting.

The appellant was arrested with assistance of the Assistant Chief and escorted to Tigoni Police Station where he was received by P.C. Alfred Langat of Lari Patrol Division. In his defence the appellant told the court that she was called by a person he did not know and informed that his mother in law was unwell and that he and his wife should go and see her. On going there they found the mother in law unwell but the father in law was away.

When the father in law arrived the appellant was interrogated about the offence which shocked him. He denied the offence but was tied with a rope and taken to the Police Station where he was later charged.

The learned trial magistrate believed the evidence of the prosecution witnesses and convicted the appellant. In his appeal the appellant has faulted the learned trial magistrate for convicting him yet the case was not proved beyond reasonable doubt in that no DNA test was conducted to disclose the culprit.

It is also his position that medical examination upon him and P.W. 1 did not prove who committed the offence. Further, that he was convicted on suspicion which cannot sustain the conviction. Whereas medical evidence disclosed that P.W. 1 had an infection no investigation was done on him to ascertain whether he was linked to the crime. He also complained that he was not accorded a fair trial and that he was not positively identified by the complainant. Finally, that his defence was not considered.

As the first appellate court, it is my duty to evaluate the entire evidence adduced before the lower court and arrive at independent conclusions. This I have done. The evidence of P.W. 1 the complainant was corroborated by that of P.W. 3 and P.W. 4 who were her teachers and who noticed that she was walking with some difficulty. On questioning the complainant, the truth came out.

The doctor who examined the complainant was not available to give evidence but her colleague produced the P3 form without any objection from the appellant. The examination concluded that the complainant had been sexually assaulted. That evidence reinforced that of the complainant P.W. 1 and that of her teachers P.W. 3 and P.W. 4.

The appellant is the father of the complainant. The complainant pointed him out before PW5 the Assistant Chief and in court as the person who defiled her. The incident took place at home and the appellant was the only male adult in the house. It takes a lot of courage for a young child to testify in such offences and implicate a person of such proximity as the father. I can only conclude that she was telling the truth.

His defence was considered by the learned trial magistrate and found to be a mere denial. The offence was proved beyond any reasonable doubt and the conviction was well founded.

Under Section 20 (1) of the Sexual Offences Act where the female person is under the age of 18 years the accused person shall be liable to imprisonment for life. The complainant is said to have been 12 years old. The penalty provided is not a minimum sentence, but considering the relationship of the appellant as the father of the complainant, the learned trial magistrate was justified to impose life imprisonment so that the two are separated for life. I therefore have no reason to interfere with that sentence. This appeal is dismissed.

**SIGNED DATED and DELIVERED in court this 29<sup>st</sup> day of June 2014.**

**A.MBOGHOLI MSAGHA**

**JUDGE**