



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 185 OF 2011**

S J ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 128 of 2011 of the Senior  
Resident Magistrate's Court at Taveta – **Hon. C.N. Ndegwa - SRM**)

**JUDGMENT**

The Appellant herein above mentioned was Convicted and Sentenced to twenty (20) years imprisonment for the offence of Incest contrary to section 20(1) of the Sexual offences Act No. 3 of 2006.

The particulars being that:-

***“On the 27th day of March, 2011 at 5:00 pm in Taita – Taveta County he intentionally inserted his penis to the Anus and vagina of P.S. who was to his knowledge his sister aged nine (9) years”.***

This matter proceeded to full hearing and determination.

The prosecution called five Witnesses in support of their case and the Appellant opted to give an unsworn statement.

His grounds of appeal are that;

1. The Voire dire examination that was conducted was not proper and procedural.
2. That Section 36 of the Sexual offences Act was not complied with.
3. Section 109 of the Evidence Act was also not complied with.
4. There was no proper age assessment carried out.
5. The Conviction was against the weight of evidence adduced.

Being the first appellate Court it is my duty to re-evaluate and analyze the evidence adduced before the lower Court so as to arrive at my own conclusions bearing in mind that I did not have the opportunity of hearing and observing the demeanour of the Witnesses.

The Complainant in this case gave a sworn statement after a **Voire dire** examination by the learned trial magistrate who observed that she was of sufficient intelligence and understood the nature of an oath. This was vindicated in her evidence in chief and during cross-examination. She gave lucid evidence which stood cross-examination by the Accused.

In her evidence in chief she told the Court that she was aged nine (9) years and was a class 2 pupil at [particulars withheld] School.

Further that on the 27th day of March, 2011 she was at home with her brother G J but at about 5:00 pm her elder brother S J (Appellant) arrived and chased away G J the younger brother to the Accused. The Accused after ensuring that only the two of them were left, took her to their mothers bed, removed her pants and his and proceeded to apply baby care jelly on her private parts and his penis and had Sexual intercourse with her. He also applied some liquid on her anus and proceeded to insert his penis on her anal orifice. She felt a lot of pain and screamed for help when he finished with her he put on his clothes and left. She reported the matter to her mother and brother. The following day the matter was reported to police and she was taken for treatment. She further told the Court that this was not the first time for the Accused to defile her and she had reported the matter to her mother who had not taken any action.

The mother of the complainant (PW 2) did testify of how the matter of her daughters defilement was reported to her on 27th March, 2011 at 6:00 pm and the action she took the following day of reporting the matter to police and taking the complainant to Hospital. She also conceded that it was not the first time the Complainant was reporting being defiled by the Accused, but she had not taken action because she was afraid of the Accused reaction.

The clinical officer (PW 4) who examined the complainant found that the Labia majora was swollen. It was tender and swollen. The hymen was broken. The anus had bruises, and was swollen. There was bacterial infection in the vaginal discharge. There was same bacterial infection in the urine of the Accused.

The Complainants other brother G (PW3) did testify to the effect that on the 27th day of March, 2011 at about 4:00 pm he was at home in the company of the Complainant and the Accused. The Accused chased him away with a club and he went to his grandmothers homestead when he later returned at about 5:00 pm he found the Complainant crying, and when she asked her what was the matter she said that the Accused who is their brother (Appellant) had defiled her. He told the Court that it was the fourth time that their brother (Appellant) had defiled the Complainant.

Section 20(1) of the Sexual offences Act defines the offence of incest in the following manner,

***“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 (10) years”.***

In the present case the Complainant is a biological sister of the Appellant.

In his unsworn statement. He admits that the complainant was his sister and that E W was his mother and G J was his brother but he denied having been involved in the act at all of defilement.

There is overwhelming evidence from the Complainant and the Doctor who examined her to the effect that the appellant had caused his male organ to penetrate the vagina and anus of the Complainant. It was also in evidence that this was not the first time that he had done this.

The Accused was taken for age assessment and he was found to be approximately eighteen (18) years old.

I find the Conviction was safe and the Sentence of twenty (20) years was lawful bearing in mind that the maximum Sentence is life imprisonment.

This appeal has no merit and its disallowed.

Judgment delivered dated and signed this **29th** day of **October, 2014**.

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**M. MUYA**

**JUDGE**

**29TH OCTOBER, 2014**

***In the presence of:-***

Learned Counsel for the prosecution Mr. Jami

Appellant present

Court clerk Musundi