IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 37 OF 2014

BETWEEN

M O O ….....……...…..... APPELLANT

AND

REPUBLIC …...…… RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 101 of 2014 at Principal Magistrate's Court at Ndhiwa, Hon. B. O. Omwansa, Ag. PM dated on 24th June 2014)

JUDGMENT

1. The appellant **M O O** appeals against a conviction and sentence of 10 years imprisonment imposed after he was found guilty of incest contrary to **section 20(1)** of the ***Sexual Offences Act, 2006***. The charge before the court alleged that on 22nd March 2014 at ***[Particulars Withheld]*** in Ndhiwa District he intentionally caused his penis to penetrate the vagina of OAO, a child aged 16 years who was to his knowledge his niece. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.

2. Before I deal with the issues raised in the appeal, it necessary to set out the evidence marshalled by the prosecution. PW 1, OAO, the complainant, recalled that on 22nd March 2014, the appellant, who is her uncle, had sexual intercourse with her in her brother's house. After the incident, her brother and mother caught them and reported the matter to the chief who arrested both of them. She testified that she was aged 16 years old and in standard 7 and that she had previously had sexual intercourse with the appellant three times. She was taken to hospital where she was examined and a P3 form prepared and filled.

3. PW 2, the complainant's mother, testified how she received a call on 22nd March 2013 at 3.00pm when she was in church that her daughter had been caught having sexual intercourse with the appellant her uncle. She went home and found the appellant and PW 1 tied together. She called the area chief who came. She later reported the matter to the police station and was issued with a P3 form. She took her daughter to hospital for examination and treatment. She testified that the appellant had previously tried to defile the complainant and the family sat together and forgave him.

4. PW 3, a cousin to PW 1, is the person who saw the appellant enter PW 1's brother's house through the window. He went to the house, looked in and saw the appellant and PW 1 having sexual intercourse. As they were locked in the house, he called them to open the door which they did and he tied them and called PW 2. He confirmed that the chief came and escorted them to the

police station.

5. PW 4, the area chief, recalled that on 22nd March 2014 at about 4.00 pm he received a call from PW 2 informing him that the appellant and PW 1 were found having sexual intercourse. He went to PW 2's home where he found the appellant and PW 1 had been tied by PW 3. He instructed the PW 3 to untie them whereupon he escorted them to the Police Station.

6. PW 5, the brother of PW3, testified that he was on 22nd March 2014 he was with PW 3 when they saw the appellant and PW 1 go through the window of his late brother's house. He was with the PW 3 when PW 1 and the appellant were caught and tied.

7. PW 6, the clinical officer at Ndhiwa Sub-District Hospital, examined the complainant on 23rd March 2014 at about 3.00 pm. He examined the genitalia and noted that there were no bruises or tears, vaginal discharge or spermatozoa seen. Although the complainant was pregnant and he concluded that there was no penetration achieved. He examined the complainant and based on the dental formula he concluded she was 16 years old. He also examined the appellant and using the dental formula he concluded he was 19 years old.

8. PW 7, the investigating officers, testified that the report of the offence was made on 22nd March 2014 at about 5.00 pm when he received the area chief, PW 4 accompanied by PW 1, PW 2 and the appellant. He booked the report, recorded statements from witnesses and decided to charge the appellant.

9. The appellant elected to give sworn testimony when he was put on his defence. He testified that on 22nd March 2014, he was feeling sick so he stayed in PW 1's brother's house while the rest of the family had gone to church. He stated that PW 5 came home and they talked for some time until people returned from church. Later on the complainant came with some books. The appellant claims that PW 3 and PW 5 assaulted him and PW 1 without any reason. PW 3 undressed PW 1 and accused them of having sexual intercourse. He called PW 2 and PW 4 whereupon they were taken to the police station.

10. Being dissatisfied with the conviction and sentence, the appellant lodged this appeal and in the further amended petition of appeal dated 11th August 2011 set forth grounds of appeal which can be summarised as follows; that the element of penetration was not proved as an essential ingredient of **section 8(1)** of the ***Sexual Offence Act***; that the court erred by relying on the medical evidence of the clinical officer; the court failed to find that the evidence of the complainant required corroboration; the court failed to consider the evidence of the clinical officer that a DNA test was required to ascertain paternity of the child; the court erred in not considering that the accused was a minor at the time before the trial commenced and that the sentence was excessive in the circumstances.

11. Ms Kuke counsel for the appellant reiterated the grounds in her oral submissions. Mr Oluoch, counsel for the State, opposed the appeal on the ground that testimony of the complainant was clear and did not require corroboration under **section 124** of the ***Evidence Act***. Furthermore, he contended that the offence could be proved without recourse to medical evidence and that the clinical officer was a competent person in terms of the ***Medical Practitioners and Dentists Act (Chapter 253 of the Laws of Kenya)***. He stated the offence in question was incest and there was not need to prove paternity by way of DNA.

12. In considering the grounds of appeal outlined above this court is enjoined to follow the principle established in ***Okeno v Republic*** [**1972] EA 32** where the Court of Appeal held that the first appellate court is enjoined to conduct an independent evaluation of all the evidence and reach an independent conclusion taking into account that it neither heard nor saw the witnesses testify.

13. The appellant was charged with incest under **section 20(1)** of ***the Sexual Offences Act,***

2006 states as follows:

> *20.* (*1) 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 years ……* [Emphasis mine]

14. An *"indecent act"* under **section 2(1)** of the ***Act*** is defined as an unlawful intentional act which causes, *"(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration."*

15. The prosecution must prove either an indecent act or penetration. Thus to establish the fact that an indecent act occurred, the evidence of the clinical officer was not necessary and DNA test would be valueless in establishing that there was contact between PW 1 and the complainant amounting to an indecent act.

16. The prosecution case depended on the complaint's testimony and that of other prosecution witnesses. In this case PW 1 testimony was clear as to what had happened on the material day. She confessed she had sexual intercourse with the appellant before. Her testimony did not require any corroboration as long as there was a basis for believing that she was telling the truth. According to proviso to **section 124** of the ***Evidence Act***,

> *Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

17. If any corroboration were required, then it is to be found in the testimony of PW 4 and PW 5 who caught the appellant and PW 1 in the compromising situation. The consistency of their testimony is given further weight by the fact that the chain of events leading to the time the two were caught until their arrest remained unbroken. The issue of the identity of the appellant does not arise and the defence of the appellant does not hold any water on light of the prosecution evidence. In his defence, the appellant stated that he was with PW 5 in the house that morning and that he was present when he was undressed and assaulted by PW 3. However, he did not put any question to PW 5 to suggest he was being framed or that the prosecution version was untrue.

18. The nature of the relationship between the appellant and the accused is an essential part of the definition of the offence of incest. The complainant and prosecution witnesses established that the appellant was an uncle to PW 1.

19. The age of the complainant was proved by the age assessment conducted by PW 2 who confirmed that she was 16 years old. The appellant did not contest this in cross-examination. Likewise, the appellant's age was assessed and the clinical officer proved that he was an adult. The appellant did not contest this issue by either putting questions to the clinical officer or calling or proving his age in his defence.

20. Although the appellant contested the professional capacity of the clinical officer to conduct examinations of this nature, the issue is settled by **section 11** of the ***Medical Practitioners and Dentists Act (Chapter 253 of the Laws of Kenya)*** which entitles the Board to recognize person holding certain qualifications as medical practitioners. The ***Act*** does not exclude a qualified clinical officer from conducting a medical examination.

21. Under **section 20(1)** of the ***Sexual Offences Act***, the minimum sentence is 10 years imprisonment and the maximum sentence is life imprisonment. As the minimum sentence was imposed, the sentence was neither harsh nor excessive.

22. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 24th day of November 2014.

D.S. MAJANJA

JUDGE

Ms Kuke, instructed Everlyne Kuke and Company Advocates for by the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.