



Having considered the submissions by both sides, the role of this court is to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

In summary, the prosecution case was that the complainant, **Ubah Abdillahi Mohamed (PW1)**, aged 13 years at the time was a pupil at a primary school in K on the material date. She was at home asleep when at about 5.00 a.m. She was awakened by a feeling of pain in her sexual organ. She then saw the appellant as the room was lightened. The appellant moved away from her bed into the bed of her mother. Later, her mother examined her after she informed her (mother) of what had happened. The appellant was told to leave the house while the complainant was taken to hospital. Thereafter, the matter was reported to the police.

The complainant's mother **Dulla Omar Abdi (PW2)**, indicated that the appellant was her husband and on the material date at about 5.30 a.m. He woke up and proceeded to the mosque for prayers. He returned later and continued to sleep. Thereafter, she (PW2) was called by the complainant and informed that the appellant had had sexual intercourse with her (complainant). She (PW2) examined the complainant and took her to hospital. Thereafter, she reported the matter to the police at K police station.

**P.C. Francis Mathenge (PW3)**, arrested the appellant while **P.C. Gene Aila (PW4)**, investigated the case and later preferred the present charge against the appellant.

**Dr. Rebecca Wangusi (PW5)**, examined the complainant on the 1st of November, 2010 and completed the necessary medical report (P3) form while **Dr. Clare Nyambati (PW6)** carried out an age assessment on the complainant and formed the opinion that she was aged 13 years.

In his defence, the appellant alleged that he was framed up by the complainant and her mother yet he did not commit the offence. He said that he was arrested at his place of work and taken to Kakuma police station before being taken to court at Lodwar.

From all the foregoing evidence, it was proven on facts that the complainant (PW1) and the appellant were related by his assumed marriage to the complainant's mother (PW2). However, there was no proof of a legal marriage. It could be that the appellant and the complainant's mother (PW2) were living together as man and wife or as mere friends. Whatever the case, they had a relationship which somehow connected the appellant to the complainant.

The complainant's evidence indicated that she was sexually molested on that material date. Her mother (PW2) did not witness the incident but was alerted about it by the complainant. She (PW2) confirmed that the incident had occurred after she physically examined the complainant's genital area.

At the material time, the appellant was living with the complainant and her mother. He was implicated by the complainant. She said that she saw him in her bed when she woke up after feeling pain in her sexual organ. She said that there was light in the room but did not describe the nature and intensity of the light.

Nonetheless, her evidence was found to be credible by the learned trial magistrate. On matters of credibility, a trial court is placed at an advantaged position since it saw and heard the witness.

Therefore, a trial court's finding on credibility may not be interfered with by an appellate court subject of course to certain given conditions (**see, Republic vs. Oyier (1985) KLR 353**).

Herein, the learned trial magistrate believed the complainant's evidence coupled with that of her mother (PW2) and found that the appellant was responsible for sexually molesting the complainant. This court has no reason to interfere with that finding which was based on the credibility of the witness. In that regard, it is also a factual finding of this court that the complainant was on the material date sexually assaulted by the appellant despite the appellant's contention that he was framed up. His defence was discredited by the complainant's evidence. However, on points of law, it was not proved beyond reasonable doubt that the complainant was indeed a step daughter of the appellant. The nature of the

relationship between the complainant's mother and the appellant was not fully established such that it could be said without doubt that the complainant was indeed a step daughter of the appellant. In any event, section 20 (1) of the Sexual offences Act does not specify a step daughter and section 22 (1) and (2) of the same Act does not define a step-daughter or step son.

It is therefore the opinion of this court that the appellant was wrongly convicted for the offence of incest by male which was herein the main count instead of indecent act with a child which was the alternative count or even defilement.

Consequently, the conviction on the main count is hereby quashed and substituted with conviction on the alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

Invariably, the sentence of thirty (30) years imprisonment is set aside and substituted for a sentence of ten (10) years imprisonment.

Save for the aforementioned alterations, the appeal is dismissed.

**[Delivered & signed this 20th day of February, 2013.]**

**J.R. KARANJA.**

**JUDGE.**