



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 55 OF 2012**

**J S N ..... APPELLANT VERSUS**

**REPUBLIC ..... RESPONDENT**

*(APPEAL ARISING FROM THE DECISION OF HON. J. OWITI, SRM IN KITALE CHIEF  
MAGISTRATE'S COURT IN CRIMINAL CASE NO. 2794 OF 2011)*

**J U D G M E N T**

The appellant, **J S N**, appeared before the Senior Resident Magistrate at Kitale charged with incest contrary to Section 20 (1) of the Sexual Offences Act, in that on diverse dates between 8th and 18th November 2011 at *[particulars withheld]* Village, Trans-Nzoia County by use of his genital organ penetrated the genital organ of V N S, a girl aged five (5) years who was to his knowledge his daughter

After a full trial, the appellant was convicted and sentenced to life imprisonment. He felt aggrieved by the conviction and sentence and filed the present appeal on the basis of the grounds in the petition of appeal filed herein on the 19th April 2012.

At the hearing of the appeal, the appellant represented himself and relied on his written submissions contained additional or amended grounds of appeal. He generally complains that he was convicted on the basis of evidence which was insufficient and contradictory and that the Trial Court rejected his defence without giving cogent and meritable reasons.

The Learned Prosecution Counsel, **Mr. Chelashaw**, appeared for the state Respondent and opposed the appeal by generally submitting that the appellant was rightly convicted as the evidence of the complainant (Pw 1) was not only firm but was also corroborated by that of the doctor (Pw 6). That, the incident occurred while the complainant's mother was away leaving the complainant and other children with the appellant.

The Learned Prosecution Counsel urged this Court to dismiss the appeal while contending that the sentence imposed was lawful.

After considering the submissions by both sides, it is the duty of this Court to re-visit the evidence and draw its own conclusions bearing in mind that the Trial Court had the benefit of seeing and hearing the witness.

Briefly, the case for the Prosecution was that the complainant, **V N S (Pw 1)**, was at the material time aged five (5) years and pupil at *[particulars withheld]* Academy. She lived with her parents.

**L N (Pw 5)**, was her mother and the appellant was her father . At the material time, her mother went away from her home to undertake casual labour at a place called Natwana. She left home on 8th

November 2011 and returned on 19th November 2011 during which period the appellant allegedly defiled the complainant. Upon her return home, the complainant's mother (Pw 5) noted that she (complainant) had difficulties walking. She asked the complainant what was wrong with her and the answer given was that the appellant had been defiling her (complainant). She (Pw 5) examined the complainant's private parts and thereafter reported the matter to the Area Chief thereby leading to the arrest of the appellant by **P.C. Mohamed Omar (Pw 2)**, of Maili Saba Police Patrol Base who also noted that the complainant was walking in pain and difficulties. He referred her for treatment at Kitale District Hospital.

**Dr. Kiprop Jonathan (Pw 3)**, examined the complainant to determine her age and concluded that she was approximately five (5) years old and a Clinical Officer, **Linus Ligare (Pw 4)**, examined her genitalia and concluded that she had been defiled.

**P.C. Wanjiru Kemori (Pw 6)**, investigated the case and thereafter preferred the present charge against the appellant who denied it and stated in his defence in Court that on the 30th October 2011, he instructed the complainant's mother (Pw 5) to proceed to their home at Moi's Bridge to harvest maize and on the 11th November 2011, he sent the children to Natwana to join her. The children returned home on the 12th November 2011 and informed him that their mother would be returning on 19th November 2011 on which date he left home and returned at 4.30 pm only to see the complainant's mother and others emerge from a thicket near their house. He reached home where he was beaten up by those people. He asked them to escort him to Maili Saba Police Post and they obliged. He was later arraigned in Court but denied the charge.

From the foregoing evidence, it is clear to this Court that no dispute arose with regard to the father and daughter relationship existing between complainant(Pw 1) and the appellant. There was also no dispute that the complainant was aged five (5) years at the material time and that she was subjected to indecent acts amounting to defilement while in custody and protection of her parents. She indicated that the acts were committed against her while her mother (Pw 5) was away from home.

The basic issue for determination was therefore whether the appellant was that person responsible for subjecting the complainant to the indecent acts. The appellant denied the offence and indicated that he was implicated and charged in Court without good cause. However, the evidence which implicated him was that the complainant who firmly stated that she was defiled by her own father while her mother was away from home. This evidence was found credible by the Learned Trial Magistrate after she concluded that the complainant was a truthful witness.

This Court does not see any reason to disagree with the findings of the Learned Trial Magistrate based on the credibility of witnesses. After all, the Learned Trial Magistrate had the advantage of seeing and hearing the witnesses. She was better placed than this Court to determine the credibility of the witnesses. Consequently, this Court must also find as a true fact that the person responsible for sexually molesting the complainant was the appellant. His defence was thus discredited and rendered an afterthought. His conviction by the Learned Trial Magistrate was proper and safe and is hereby upheld by this Court.

With regard to the sentence, Section 20 (1) of the Sexual Offences Act provides for a maximum but not necessarily mandatory sentence of life imprisonment for a person who commits incest with a female person aged below eighteen (18) years.

Herein, the complainant was five (5) years old. The sentence imposed against the appellant was thus lawful but rather excessive for a first offender.

Although the offence is a serious one and calls for a deterrent sentence considering the circumstances it was committed and the age of the complainant, this Court considers a twenty (20) years imprisonment term to be reasonable and adequate rather than life imprisonment.

Consequently, the sentence of life imprisonment imposed upon the appellant by the Learned Trial Magistrate is hereby set aside and substituted for a sentence of twenty (20) years imprisonment.

Otherwise, the appeal is dismissed.

Ordered accordingly.

**(Delivered and signed this 13th day of November, 2013)**

**J. R. KARANJA**

**JUDGE**