



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 9 OF 2013**

**M N .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case Number 298 of 2011 in the Principal Magistrate's court at Mwingi – H M Nyaberi (PM) on 8<sup>th</sup> March, 2012)*

**JUDGEMENT**

The Appellant, M N, was charged with incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006 in Mwingi Senior Resident Magistrate Court's Criminal Case No. 298 of 2011. Through the particulars of the charge it was alleged that the Appellant, on diverse dates between 1<sup>st</sup> March, 2011 and 12<sup>th</sup> April, 2011 at [particulars withheld] Location in Migwani District within Kitui County, being a male person committed an act that caused his penis to penetrate the vagina of M M a child aged eight years who was to his knowledge his daughter.

At the conclusion of the trial the Appellant was convicted and sentenced to life imprisonment. Being aggrieved by both the conviction and sentence, he appeals to this Court.

In summary, the evidence adduced by the prosecution is that the complainant (PW2) is the daughter of the Appellant and PW1 F M M. On 28<sup>th</sup> February, 2011 PW1 ran away from her matrimonial home after the Appellant allegedly assaulted her. She left behind her three children who included the complainant. She went to stay with her mother up-to 15<sup>th</sup> May, 2011 when one V M called her and told her to report urgently at Mwingi District Hospital. On arrival, she met PW3 B K and her daughter (the complainant). It was then that V informed her that her daughter had been defiled by the Appellant. She examined the child's genitalia but she did not notice anything abnormal.

The complainant told the Court that on a night she could not remember her mother was away when the Appellant went and carried her to his bed and defiled her. The following day she went and reported the matter to her grandmother who took her to one M M. She was taken to [particulars withheld] Hospital from where she was referred to Mwingi District Hospital.

PW3 the grandmother of the complainant told the Court that on 12<sup>th</sup> April, 2011 at around 8.00 p.m. the complainant went to her house crying. She informed her that she had been beaten by her father. The complainant slept in her house on that night. The next day she went and asked one N N the grandmother of the Appellant if she knew why the Appellant had beaten the complainant. N N told her she did not know why the complainant had been beaten by her father. She then told the complainant to remain behind but she started crying. It was then that the child told her that her father had defiled her the

previous night. She went and reported the matter to the Assistant Chief Anthony Mongeli who referred them to [particulars withheld] Hospital from where they were referred to Mwingi District Hospital. She subsequently reported the matter to the police.

PW4 Dr. Allan Barongo examined the complainant and found the hymen broken. He formed the opinion that there was penetration. He told the Court that the complainant had been first seen at [particulars withheld] Hospital on 5<sup>th</sup> May, 2011.

PW5 Police Constable James Mathenge testified that the incident was reported by the grandmother of the complainant at Migwani Police Station on 10<sup>th</sup> May, 2011. That is when the matter was referred to Migwani District Hospital.

In his defence, the Appellant who testified as DW1 denied committing the offence with which he was charged. He told the Court that the complainant left his house on 8<sup>th</sup> April, 2011 and refused to come back. On 5<sup>th</sup> May, 2011 he was arrested and accused of defiling the complainant.

I have looked at the Appellant's amended petition filed on 20<sup>th</sup> May, 2013 and in essence the Appellant is saying that the case against him was not proved to the required standards i.e. beyond reasonable doubt.

Mr. Mulama for the state opposed the appeal and contended that the prosecution's case had been proved and the magistrate correctly found the Appellant guilty as charged. He submitted that the Appellant's defence was considered and rejected by the trial Court.

This being the first appeal, I have a duty to reconsider and evaluate the evidence afresh before arriving at my own independent conclusion. In doing so, I am guided by the fact that I never saw or heard the witnesses testify. I am alive to the fact that in sexual offences, the evidence of the victim alone can be used to convict an accused person – see the proviso to **Section 124 of the Evidence Act**.

The question is whether the evidence adduced by the prosecution in the trial can be believed. On the face of it, the evidence of the complainant appears credible. The trial magistrate indeed believed her evidence. The evidence of the other witnesses, however, contradicted the evidence of the complainant. PW3 stated that the child went and reported the incident to her at 8.00 p.m. The complainant told the Court that she reported the incident to her grandmother (PW3) in the morning. There is no explanation in the proceedings why PW3 took almost one month from 12<sup>th</sup> April, 2011 to 5<sup>th</sup> May, 2011 before reporting the matter to the police and taking the complainant for treatment. PW3 did not even report the incident to the mother of the child up-to 15<sup>th</sup> May, 2011. The mother of the child told the Court that she received the report on 15<sup>th</sup> May, 2011. The evidence of the medical officer only confirms that there was penetration because the hymen was broken. Everything else was normal. The mother of the complainant testified that she did not see anything untoward in the complainant's private parts.

An overview of the evidence does not lead one to conclude that the Appellant had sex with the complainant. The benefit of doubt should have been given to the Appellant. My finding is that this appeal has merit. The same is allowed and the Appellant is set free forthwith unless otherwise lawfully held. Orders will issue accordingly.

Prepared, Dated and signed this 27<sup>th</sup> November 2013

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

Dated and delivered on 3rd day of December, 2013

**S.N.MUTUKU**

**JUDGE OF THE HIGH COURT**