IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.366 OF 2010

S.N.N……..…….....……..……..APPELLANT

VERSUS

REPUBLIC…….....…….……RESPONDENT

[An Appeal from original conviction and sentence in Nyahururu P.M.A.CR.C.NO.1916 of 2010 (K) by Hon A. B. Mongare, Snr. Resident Magistrate dated 24th November, 2010]

JUDGMENT

The appellant was charged in count 1 with **incest** contrary to **Section 20(1)** as read with **Section 20(3)** of the **Sexual Offences Act,** in the alternative with **indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act** and in count II with **making a child to be in need of care and protection** contrary to **Section 127(1) (b)** of the **Children Act.**

The appellant is alleged have committed these offences against his daughter, M.W aged 9 years in the months of June and July, 2010. The chief of the location where the appellant lived with the complainant told the trial court that the appellant lived alone with the complainant after his wife died. The chief received disturbing information that the appellant had turned the complainant to be his wife, despite her age and being his daughter.

The chief laid an ambush on 7th July, 2010 when he went to the appellant's house at 5am and remained outside. He heard the appellant asking the complainant to wake up in order to light the fire. At this stage, the chief pushed the door open and found the appellant lying in bed naked while the complainant was lighting the fire. The chief took the complainant to a Health Centre where she was examined and the matter reported to the police.

Later, the complainant was further examined by Dr. Waiti Kariuki of Nyahururu District Hospital who noted healing lacerations on the labia minora and a torn hymen ring. With that observation, he concluded that there was penetration of the complainant's genital organs. He also examined the appellant and found no injuries or seclusion or fluids on the genitalia. The appellant was arrested.

The appellant offered no defence. The learned trial magistrate (A.B. Mongare) in her judgment delivered on 24th November, 2010 found that the complainant was a truthful witness and that her evidence was corroborated by the evidence of the area chief and that of the doctor.

Upon convicting the appellant on the two main charges, the learned magistrate sentenced him to fourty (40) years in count 1 and five (5) years in count ll. The sentences were ordered to run consecutively. The appellant was also declared a dangerous sexual offender in terms of **Section 39** of the **Sexual Offences Act**. Both the conviction and sentences aggrieved the appellant who brought the instant appeal on the grounds that:

i) the conviction was based on the evidence of a single witness;

ii) the evidence of the guardian of the complainant was not considered;

iii) no member of the public who complained to the chief testified;

iv) the learned trial magistrate did not consider the doctor's evidence to the effect that the complainant was not defiled.

In addition to the above grounds, the appellant raised the following additional grounds in his written submissions;

i) that he was not adequately informed of the charges, and;

ii) that the charges were defective for mentioning two separate places where the offences are alleged to have been committed.

Learned counsel for the respondent supported the conviction and sentence. He submitted that the case against the appellant was proved by the evidence that he lived with the complainant after the death of her mother; that the complainant gave consistent and credible evidence and that there was medical evidence of defilement.

It is the duty of this court as the first appellate court to re-evaluate the recorded evidence in order to arrive at an independent conclusion always bearing in mind that the witnesses did not testify before it but before the trial court.

It is not in dispute that the complainant is the appellant's daughter. Her age according to the charge sheet, she was 9 years in July, 2010, although she gave her age to be twelve (12) years – having been born in 1998. It is also common ground that the complainant's mother (the appellant's wife) died and that the two – the appellant and the complainant lived alone.

The learned trial magistrate conducted a *voire dire* examination and concluded that the complainant understood the nature of an oath. She thereafter testified after being affirmed. The complainant explained how she shared a one room structure with the appellant, who repeatedly defiled her over a period of time.

Like the trial court, I find this evidence credible and consistent. The learned magistrate before whom the complainant testified found her truthful. Although corroboration was not necessary but the doctor's finding that the hymen was broken and the existing healing laceration on the labia minora supported the complainant's evidence.

In terms of **Section 20(1)** of the **Sexual Offences Act**, the offence, of incest by male is committed where a male does an act which causes penetration with a female person who to his knowledge is his daughter, granddaughter, sister, mother, niece, aunt or grandmother. There cannot be any doubt that the appellant knew that the complainant was his daughter. The medical evidence has confirmed that there was penetration hence the offence charged in count 1 was proved to the required standard.

Count II is proved if evidence is led to show that a parent by any act or omission, knowingly or willfully causes a child to become, or contributes to a child becoming in need of care and protection. By his conduct, the appellant has made it dangerous to have him caring for the complainant in view of the fact that the complainant's mother is deceased. That count has similarly been proved.

But because the two counts arose from the same transaction, the sentences should have been ordered to run concurrently. It should also be observed that it was improper to admit the evidence of the appellant's previous record during the trial. I find, however, that no prejudice to the appellant was occasioned.

On sentence, in accordance with proviso to **Section 20(1)** aforesaid, the sentence for incest with a female

under the age of 18 years is life.

The appeal on conviction and sentence is dismissed. The sentence is ordered to run concurrently.

Dated, Signed and Delivered at Nakuru this 23rd day of February, 2012.

W. OUKO
JUDGE