



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 23 OF 2008**

**(From original conviction and sentence in Criminal Case No. 462 of 2006 of the Chief Magistrate's court at Nakuru – T. MATHEKA, SRM)**

**M.G.K.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

M.G.K was charged before the Nakuru Children's Court in Criminal Case No. 462 of 2006, with the offence of incest by male person, contrary to **Section 20(1)** of the **Sexual Offences Act 2006**. The particulars of the charge are that on 5/10/2006, in Nakuru District, caused the penetration of his genital organs into those of E.W. G, a girl aged 13 years old. In the alternative, the appellant was charged with the offence of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act 2006**. It is alleged that he unlawfully and indecently assaulted E.W by touching her private parts.

E.W.G, PW3, the complainant herein, told the court that she is 14 years old and a student at K Primary School in Std.7. She recalled having remained home with her father on 5/10/06. Her mother, PW2, M.W.N had gone to work on their farm in Kiambogo. PW3 testified that her father came back home with some food, summoned her into his bedroom, grabbed her put her on the bed, lay on top of her, pinned her down with both knees, removed his pants and began to do "**tabia mbaya**" to her, she felt pain and cried. When she tried to leave, he insisted that she spends the night in his bed till morning. She slept and next morning she found him gone. She fond herself in a pool of blood and so was the bed sheet. She felt sick, vomited. She looked for the neighbour "**auntie**" and her uncle, W.J.W (PW5) to take her to hospital and they did. When she tried to tell the doctor that the father defiled her, her uncle told her to shut up. Her

father and grandmother also took her to hospital in the evening and again when she wanted to explain to the doctor, the appellant told her to keep quiet and even when she went for injection the father followed and so she kept quiet. Two days later when she was in bed, at 8.00 p.m., the appellant entered her room through the window, entered her bed, removed his pants and again did “**tabia mbaya**” to her. He left and the next day, she told another lady to take her to hospital but her husband came and she could not. The father barred her going to church. The next week the father refused to pay her fees claiming she had refused with his goods and on Saturday she went to her aunt who called her mother at Kiabogo and she was taken to the hospital at Naivasha. In cross examination by the appellant she denied having been coached to give evidence against him.

The complainant’s mother, PW2, M.W, told the court that on 10/10/2006 she had gone to her farm in Kiambogo to check on their maize leaving the complainant and her father, the appellant, at home. She was called on phone and asked to return home because E had been defiled by the father. She came back and found PW3 very sick. She reported at Ndundori Police Station and later took PW3 to Nyahururu Provincial General Hospital for treatment. She denied having conspired with neighbours to frame the appellant or that she had disagreed with the appellant before she went to Kiambogo.

PW3 was examined by Dr. Philip Kamau, PW1, at Nakuru Provincial General Hospital on 13/10/2006. He found that she was 13 years old and had a history of defilement. He said that she had tenderness on her upper thighs, had a broken hymen, lacerated margins and healing bruises. He observed that the complainant had not been involved in a sexual activity before this incident and produced the P3 as PEx.1. He was of the view that the complainant had been defiled.

Grace Wangui Gichuki, PW4, recalled that on 5/10/06 when at Dundori trading centre, she met Mama M looking for the appellant. She informed her that she was looking for the appellant to take the complainant to hospital. She called J.W.K (PW5), an uncle to the complainant who took the complainant to hospital. PW5 said that when they went to the doctor’s clinic, she explained to the doctor and he gave her medicine. PW5 did not tell the court what the complainant was found to be suffering from. PC Alfred Nyanumba arrested the appellant on 11/10/06 after the complainant and her mother reported that the father had defiled her. He later arrested the appellant.

The appellant testified on oath and called his mother E.W (DW2) as a witness. He denied committing the offence. He said that on 5/10/2006, E was at home with her cousin N, a daughter of the aunt. On 24/9/06, he came home and found Eunice sick, complaining of headache. He informed M, PW3’s elder sister. She went to school but on 7<sup>th</sup>, he learnt from M that E’s sister came and collected E from school.

DW2, E.W, the appellant’s mother recalled that a woman informed her that the complainant was sick, and they had taken her to hospital with a headache. She went to the appellant’s house and the complainant claimed to have a headache and never told her that she had any other problem. That evening the complainant claimed to have a severe headache and the appellant and DW2 took her to the doctor again and later she learned that the complainant’s sister had taken her away.

The grounds upon which the appeal was preferred are as follows:-

- 1. That some vital witnesses and evidence were not called;**

2. **That the prosecution evidence was full of discrepancies and contradictions;**
  
3. **That the court failed to consider that there was a grudge between the appellant and some of the witnesses;**
  
4. **The sentence was too harsh.**

Ms Idagwa learned counsel for the State opposed the appeal for reasons that the appellant is the complainant's father, she gave a detailed account of what happened and the trial court believed her. Learned state counsel urged the court to enhance the sentence to life imprisonment.

As the first appellate court, it is my duty to analyse and evaluate the evidence afresh and arrive at my own independent conclusion of course bearing in mind that this court did not have the opportunity to see the witnesses and assess their demeanor.

The appellant does not deny that PW3 is his daughter. That fact has been confirmed by DW2, his mother, PW2, PW4 and PW5.

It is also not in dispute that about the time of the incident, the appellant was left alone at home when his wife went to Kiambogo to work on the farm.

The evidence tendered by PW1 (the doctor) does corroborate PW3's evidence that she was defiled. PW1 found that she had tender thighs, a broken hymen, lacerated margins, healing bruises and she was depressed. He found that there had been penetration. PW3 had not taken part in a sexual activity before, (see P3 form). The only question is who defiled PW3. PW3 is the one lone witness to the incident. The evidence on record is that she was left alone with the appellant when PW3 went to their other farm to do some work there. PW3 vividly explained in detail what happened to her on the two occasions that the appellant allegedly defiled her. On the first occasion, he pulled her into his bed and defiled her and on the next occasion, he went to her bed and defiled her from there. PW3 explained the reason why she was not able to tell the doctor what had happened to her, because her father stopped her from disclosing. DW2, the appellant's mother and grandmother to the complainant did confirm that when they took the complainant to the doctor, both her and the appellant remained in the room where the doctor was attending to the complainant. DW2's evidence confirms that if PW2 the father was present, that is why she could not disclose what he had done to her.

It is the appellant's contention that the prosecution evidence was contradictory because PW2 talked of having gone to Kiambogo on 10/10/2006, yet the incident is supposed to have occurred on 5/10/06. She then claimed to having been at police station on 5<sup>th</sup>. However, PW2 admitted in cross examination that

she could not recall the dates. PW4 talked of having been asked by Mama M on 5/10/06 to look for the appellant and she is the one who told W (PW5) that E was sick. PW5, however talked of 1/10/06 as the date he was called to take PW2 to hospital. Despite the discrepancy in the dates, the bottom line is that on 5/10/06, the complainant was taken to hospital after PW3 complained of being sick. The appellant admitted that by 5/10/06, his wife had left for Kiambogo and he was left at home with the complainant (PW2). The other fact is that the incident occurred between the time PW2 left home for Kiambogo and 10/10/06 when she returned. This is because it is on 11/10/06 that a report was made to PW6 PC Nyanumba while PW1 (the doctor) examined the complainant on 13/10/06 with injuries which were about 8 days old. The doctor was also informed by PW2 that she had been defiled on 5<sup>th</sup> October 2006.

I do not find any serious contradictions in the prosecution case that could vitiate their case.

The appellant alleged that some vital witnesses had not been called but he did not state who they are.

In his defence, the appellant claimed to have disagreed with the complainant's mother, PW2, before she left for Kiambogo. In cross examination of PW2, the appellant alleged that PW2 sent a child to poison him, that PW2 tried to stab a woman with a knife and that she had called Baba Kafue and Baba Wanjiku. PW2 denied all these. However in his defence he never explained what the people he had referred to did or what role they played. Those people he referred to could only be called if he laid the basis for them to be called as witnesses. Although the appellant made the said allegations, during cross examination of PW2, he never explained in his defence how he was framed or how they disagreed with PW2. The appellant also alleged that PW2 planned with the neighbours to frame him. None of the neighbours gave evidence linking the appellant to the offence. That allegation lacks any basis. His defence totally departed from his allegations in cross examination of PW2. He was not truthful and I too reject his defence.

In the end I find the appellant was properly convicted and I hereby confirm the conviction.

The appellant was convicted of the offence of incest contrary to **Section 20(1)** of the **Sexual Offences Act, 2006**. The **Section** provides that if the victim is less than 18 years then the accused person shall be liable to imprisonment for life. If the victim is over 18, the accused would be sentenced to not less than 10 years. The appellant was sentenced to serve 20 years. The victim was his 13 year old daughter. She was seriously injured, was admitted for injuries suffered and was even found to be depressed at the time of examination. He did not defile her once but twice. I find that the court was too lenient and will sentence him to a term of 35 years imprisonment. Appeal is hereby dismissed.

**DATED and DELIVERED this 28<sup>th</sup> day of March, 2012.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

The appellant – in person

Mr. Omwenga for the State

Kennedy – Court Clerk