REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.39 OF 2011

J.K.G……………………………………..…..……...............................…………APPELLANT

VERSUS

REPUBLIC……………………………..………..…..……...........................………..RESPONDENT

(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.1134 of 2008 by Hon C. K. Obara, Resident Magistrate, dated 9th June, 2010)

JUDGMENT

The appellant was charged in the court below with the offence of **incest by male person** contrary to **Section 20(1)** of the **Sexual Offences Act** No.3 of 2006 and in the alternative with **indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act** No.3 of 2006.

It was alleged in the charge sheet that on 18th September, 2009 in Laikipia West District within Rift Valley Province, the appellant unlawfully and intentionally did cause penetration of his penis in the vagina of B. W. aged ten (10) years who to his knowledge is his daughter or in the alternative, that on the same day he unlawfully and intentionally did cause his penis to touch the vagina of B. W. a child aged ten (10) years.

The prosecution called six (6) witnesses while the appellant testified under oath. The learned trial magistrate, C. K. Obara, Resident Magistrate considered the evidence presented by both sides before her and found that it established beyond reasonable doubt the charge of **incest by male person** contrary to **Section 20(1**) of the **Sexual Offences Act** although she correctly noted that the charge was erroneously brought under **Section 10(1)** dealing with the offence of **gang rape**. No prejudice, in my view was occasioned to the appellant and that question has not been raised in this appeal. Upon conviction, the appellant was sentenced to life imprisonment.

That aggrieved the appellant who has brought the present appeal on several grounds. Original petition was filed by the appellant in person and further grounds filed by counsel. Those grounds may be condensed as follows:

i) that the trial court relied on uncorroborated evidence to convict the appellant;

ii) that the prosecution failed to call key witnesses;

iii) the complainant's evidence was inconsistent;

iv) that the trial court shifted the burden of proof to the appellant;

v) that the conviction was against the weight of evidence;

vi) that the evidence of the village elder and the fact that there was evidence that the complainant had been defiled on an earlier occasion by one Njaramba were ignored;

vii) that the medical report was inconclusive;

viii) that the appellant's constitutional rights were violated.

Learned counsel for the respondent opposed the appeal and submitted that the appellant and B.W. lived in a one-roomed house as he was separated from his wife which condition availed an opportunity for him to commit the offence; that B.W. reported the incident and the previous ones to various people. Counsel further stated that by dint of **Section 124** of the **Evidence Act**, B.W.'s evidence was sufficient so long as the trial magistrate was satisfied that she was truthful.

In considering this appeal, this court being the first appalate court must re-evaluate the evidence on record in order to make its own independent conclusion but bearing in mind the fact that it neither saw nor heard the witnesses. **Okeno** V. **Republic** (1972) EA 32.

B.W.'s age was given as eight (8) years. She told the trial court that on 18th September, 2009 at night while with her elder brother, M.J, the appellant asked her to undress and thereafter to hold the cooking stones. The appellant then inserted his male organ into hers. She felt a lot of pain.

With Mama Shiro, B.W. went to the police station and later to the hospital. M.J. and Mama Shiro did not testify. But it would appear from the evidence that four (4) days later Gideon Ngatia Macharia, the village elder received the report that B.W. had been assaulted by the appellant. In turn, the village elder brought the incident to the attention of Peter Mwangi and Hellen Wamuyu Munene, Children Officers.. The combined effect of the evidence of the village elder and the two Children Officers is that B.W. was clearly abused. She had obvious injuries to the face, shoulder and legs. The injuries appeared to have been caused by physical assault and burning using iron rod. It was also their evidence that the appellant lived with B.W. in a one-roomed house as the appellant had separated from his wife, B.W.'s mother; that B.W. informed them that the appellant had repeatedly defiled her in the past. The appellant's friend by the name Njaramba also lived with the two.

Dr. Karimi Joseph Kinyua examined B.W. on 28th September, 2009, some ten days after the alleged defilement. He observed the injuries of B.W. But apart from that he also noted that B.W.'s outer genitalia was normal but vaginal wall had bruises and hymen perforated.

In terms of **Section 20(1)** of the **Sexual Offences Act**, the offence of incest by a male person is proved when a male person commits an indecent act or an act which cause penetration with a female person who to his knowledge is his daughter, granddaughter, sister, mother, niece, aunt or grandmother. And so the question the trial court was to determine was whether:

i) B.W. is the appellant's daughter;

ii) the appellant knew of that relationship and;

iii) the appellant did any indecent act or an act which caused penetration with B.W.

I reiterate that there is evidence on record that B.W. had repeatedly been sexually assaulted. But the proverbial straw that broke the camel's back came on 18th September, 2009.

Although the offence of 18th September, 2009 is alleged to have been committed in the presence of M.J., B.W.'s elder brother, he was not called to testify. Similarly there was Mama Shiro who took B.W. to the police station and subsequently to the hospital, she too did not testify. But the learned trial magistrate

after conduction a *voir dire* examination found B.W. to be intelligent.

In her judgment, she also believed that B.W. was a truthful witness and believed her version of the events. The learned trial magistrate of course had the advantage of seeing B.W. and cannot be faulted by an appellate court at her assessment of the witness' demeanour and disposition. To all the witnesses, B.W. narrated her ordeal to confirm her consistency that the appellant repeatedly defiled her. That evidence received support from Dr. Karimi who concluded that B.W. suffered bruises to the vaginal wall and her hymen was broken.

It must be noted at this stage that B.W.'s evidence did not require corroboration once the trial magistrate found as she did in the trial, that the witness was truthful. See proviso to **Section 124** of the **Evidence Act** introduced by **Criminal Law (Amendment) Act 2003** in LN No.5 of 2003. What was the role of Njaramba in this matter? It has been argued by learned counsel for the appellant that Njaramba had also defiled B.W. It is not clear to me where that conclusion emanated from because B.W. herself did not at all mention Njaramba. Njaramba's name came up in the evidence of the two Children's Officers but in the context of him (Njaramba) and the appellant physically as opposed to sexually assaulting B.W. As a perusal of the record will reveal, Njaramba was charged with assault and at some stage, there was an attempt to consolidate his case and this one.

It has also been argued that B.W.'s evidence as to where the offence was committed was not consistent; that it was not clear whether it was when she had been asked to hold the cooking stones or on the chair or in bed. It will help to understand her evidence in this respect to reproduce it. She explained:

" On 18th September, 2009 at night I was with my elder brother M.J in the kitchen. My father told me to undress and told me to hold the cooking stones. Before Baba Mumbi came, my father inserted his penis into my vagina (child pointing to her vagina). I felt a lot of pain. My father was sitting on a chair. He inserted his penis in my vagina while I was in bed."

The apparent contradiction must be understood in perspective and no better explanation is available than that of Peter Mwangi, one of the Children's Officers. He recalled that B.W. told him that the appellant *"defiled her several times at night."* I understand that to mean that she was defiled at the fire place, on the chair and in bed. It must also be borne in mind that the appellant's house was a single room with a kitchen and his bed.

The appellant's defence that B.W. was not in his custody during the period in question cannot be true in view of the overwhelming evidence by independent witnesses that B.W. lived with him. That defence was successfully displaced by the prosecution evidence.

I note, however, that the learned magistrate made remarks in her judgment that were not necessary. For example it was not necessary for her to say that the appellant ought to have called his witness who he alleged had the custody of B.W. during this period. It was also misdirection on her part to insist that the appellant did not pay keen attention to B.W. Those comments, however, did not amount to shifting the burden of proof, neither were they prejudicial in light of the evidence presented.

I have stated earlier but there is no harm stating again that Mama Shiro and M.J. were not called. In terms of **Section 143** of the **Evidence Act**, no specific number of witnesses is required to prove a fact. The evidence presented was sufficient. The appellant has not challenged the sentence except to state in his "*home made"* grounds of appeal that he was 72 years old.

It is clear to me, however, that the learned trial magistrate based the sentence to life imprisonment on the age of B.W., pursuant to proviso to **Section 20(1)** which stipulates that:

"…………………………………………………………..Provided that, if it is alleged in the information or charge and proved that the female person is under the age of 18 years the accused

person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

B.W.’s age was given at the trial as eight (8) years. She was therefore below eighteen (18) years hence the sentence was mandatory and proper explaining why it is not an issue in this appeal.

Like the learned trial magistrate, I find that the evidence on record proved beyond reasonable doubt the offence of incest by a male person.

In the result this appeal fails and is dismissed.

Dated, Signed and Delivered at Nakuru this 21st day of March, 2012.

W. OUKO
JUDGE