REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CRIMINAL APPEAL 26 OF 2010

G.M.K……..……..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT

The appellant was charged with the offence of incest by a male person contrary to Section 20(1) of the Sexual Offences Act 2006, *(No. 3 of 2006).* The Appellant pleaded not guilty but was on the evidence found guilty and convicted of the lesser offence of attempted incest, and was sentenced to ten (10) years imprisonment. Aggrieved with his conviction and sentence, the appellant appealed to this court initially on four grounds but substituted those grounds under Section 350(1)(c)(v) of the Criminal Procedure Code *(Cap. 75, Laws of Kenya)* with seven grounds, in his Amended Grounds of Appeal handed to the court at the hearing of the appeal on 6/02/2012. The grounds are -

(1) That the learned magistrate erred in law and fact while convicting the appellant and the key witness of this case the grandmother of the child did not come to court to testify how she spent the whole day and the whole night with the child.

(2) that the learned magistrate erred in law and fact while convicting the appellant relying on the evidence of PW3 J.W mother of the child that she left the child to her grandmother and the child spent the whole day and night and yet her grandmother did not come to court to testify how she spent the day and the night with the child. Although they claim that she was sick there is no report to show she did not come to court because she was sick.

(3) that the learned magistrate erred in law and fact by convicting the appellant relying on the evidence of PW3 who only took her child to her grandmother\'s house and did not say whether the appellant was there that morning when she took her child there.

(4) that the learned magistrate erred in law and fact by relying on the evidence of PW3 and yet she testified that she was with a neighbour who noticed the child had trouble walking and she did not come to court to testify.

(5) that the learned magistrate erred in law and fact when convicting the appellant relying on the

evidence of PW4 and yet PW4 was only called by the grandfather of the child to help her daughter to take her child to hospital.

(6) that the learned magistrate erred in law and fact when convicting the appellant relying on the evidence of PW5 J.M a child of tender age and failing to consider if the child was defiled by the appellant on that very day when she could have told her grandmother.

(7) that the learned magistrate erred in law and fact when convicting the appellant by relying on the evidence of PW5 and he mislead himself by saying that PW5 used the word ("Tabia Mbaya") and she meant she was sexually assaulted by the appellant.

The Appellant also made written submissions wherein he argued that he did not defile the child or commit the offence of incest.

The offence of incest is defined by Section 20(1) of the Sexual Offences Act, and attempted incest by Section 20(2) of the said Act.

Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years *(S. 20(1))*.

An where the female is less than eighteen years, the person is liable to imprisonment for life, and it is immaterial whether the act which caused the penetration was consensual.

However where any male person **attempts** to commit the offence of incest, he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

The essential element in the offence of incest is an **"indecent act"** which means and unlawful **intentional** act which causes -

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will.

The other test is whether child or victim was a niece of the appellant. Section 22(2) defines a **"niece"** in relation to the definition of a **"nephew",** which means **"the child of a person\'s brother or sister",** and **"niece"** has a corresponding meaning.

The two questions here *(which are really the two sides of the same issue)* is **firstly** whether the child was a niece of the appellant, and **secondly** whether he committed an indecent act with or to her.

The State through the State Counsel opposed the appeal and submitted the trial court found the accused properly guilty of the offence of attempted incest. The complainant knew the appellant who was her uncle. He did **"tabia mbaya"** to her. She told PW4 and PW7 what had happened to her and found labia majora swollen. PW7 who examined her formed an opinion that there was an attempt to have carnal knowledge of the child. There were bruises on the labia majora and described the injuries as **"harm".** The court considered the prosecution evidence as well as the Appellant\'s evidence and found the appellant guilty of the lesser offence of attempted incest.

I have considered both the appellant\'s as well as State Counsel\'s submissions. It is my statutory duty as the first appellate court to examine and re-evaluate the evidence and make my own findings, and draw my own conclusions.

Recalling the first test of the offence of incest, did the appellant intentionally commit an indecent act to the applicant?

It was the evidence of PW3 that *(the mother of the victim)* that she had left the child on 30.05.2007 with her mother and went about the business of her mother, and did not go back to collect the child. The child stayed at the mother\'s home slept there but returned to her home on her own on the morning of 31.05.2007, when Mama Ben (PW4) noticed that the child was walking with difficulty. PW3 and PW4 asked the child what was wrong and she told them - her uncle M had pressed on her private parts with his private part. PW3 testified that her **"Uncle M"** is her (PW3\'s) cousin, his mother and my mother are sisters. He used to live with my grandmother that time.

That evidence established that the appellant was indeed uncle to the child, or put differently, the victim was his niece, and consequently qualifies for the offence of incest.

PW4 who was with PW3, examined the child\'s private parts, and found them **"swollen".** The alleged defiler was the appellant.

PW5 was the victim herself. For a child of tender years, *(being four years)* and therefore below ten years as defined under the Children\'s Act 2001, *(No. 8 of 2001),* her evidence though unsworn, given after a *voire dire*, was remarkable for its clarity, and bravery.

The child stated that she is in Class I at *(particulars withheld)* Primary School. She was able to name both her mother, her uncle, her tormentor. She remembered that she was at her grandmother\'s house. She was sick and was in bed. M, the appellant found her playing outside the house. **"He took me to the bathroom. He did to me** *"tabia mbaya" (bad thing or bad manners).* **He wiped me with a jacket and he threw it away and told me not to tell anyone. He gave me some oranges. I told my mother the following day."**

It is remarkable that the appellant did not ask the child any questions.

"Tabia Mbaya" is a common expression which courts need to take judicial notice of in sexual offences concerning minors, and more particularly in children of tender age who have no experience and are not expected to know or understand at that age, matters of sex, but have a general understanding that male adults or adolescents are not supposed to touch them in their private parts, and if they do so, they are **"guilty"** of "tabia mbaya" behaving badly or **"having bad manners."**

The evidence of PW1, the Clinical Officer who examined the child found that the child had uncontrolled flow of urine. The genitalia examination revealed that she had bruises on the labia majora, and the formed the opinion that there was an attempt to have carnal knowledge with the child and he assessed the degree of injury as **"harm".**

PW1 confirmed his findings of bruises on the labia majora when cross-examined by the appellant. The urine did not reveal any infection.

When put to his defence, the appellant denied the charge and narrated a yarn which can only be described, when compared to the child\'s description of what he did to her, as most improbable, and if it were probable, did not displace at all, the evidence of the child. That evidence does not require corroboration under the proviso to Section 124 of the Evidence Act *(Cap. 80, Laws of Kenya),* being the evidence of a child in an offence under the Sexual Offences Act, which is the case in point here.

Taking the evidence of PW1, the Clinical Officer, the learned trial magistrate came to a correct decision in finding the appellant guilty of an attempted act of incest, within the provisions of Section 20(2) of the Sexual Offences Act, and convicted the appellant under the provisions of Section 180 of the Criminal Procedure Code *(Cap. 75, Laws of Kenya).* Section 180 provides that when a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt. The medical evidence of PW1, showed that the appellant had attempted to commit the offence of attempted incest, *(as per Section 20(2) of the Sexual Offences Act)* although he was not charged, with that offence. The court properly found him guilty, convicted, and sentenced him to the minimum period of ten years for the offence.

I therefore find no merit in the Appellant's appeal and dismiss it. I confirm the conviction and sentence.

It is so ordered.

Dated, signed and delivered at Nakuru this 20th day of April, 2012

M. J. ANYARA EMUKULE
JUDGE