



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITALE**  
**CRIMINAL APPEAL 46 OF 2010**

**F.W.P ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*{Being an original conviction and sentence of T. A. Odera – SRM in Criminal Case No. 3537 of 2009 delivered on 24<sup>th</sup> April, 2010 at Kitale.}*

**J U D G M E N T**

This appeal is against conviction and sentence of the appellant; **F.W.P**, by the Senior Resident Magistrate at Kitale for the offence of incest by male person contrary to Section 20 (1) of the Sexual Offences Act. It was alleged that the appellant caused penetration of his genital organ into the genital organ of S.W, a child aged nineteen (19) months who to his knowledge was his daughter.

There was an alternative count of indecent act contrary to Section 11 (1) of the Sexual Offences Act.

The appellant pleaded not guilty to both counts. He was tried, convicted on the main count and sentenced to life imprisonment. Being dissatisfied with the conviction and sentence, the appellant filed this appeal on the basis of the grounds contained in his petition of appeal dated 27<sup>th</sup> April, 2010. He argued the appeal by way of written submissions.

The learned Prosecution Counsel, **M/S Bartoo**, opposed the appeal on behalf of the respondent and submitted that penetration was proved by PW2 and that the appellant was the only person present in the house with the child victim who is his daughter. The child's mother arrived later and found that the child had been defiled.

The learned Prosecution Counsel contended that the appellant's conviction was sound and the sentence imposed lawful.

This is a first appeal, the duty of this Court is to revisit the evidence and arrive at its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

In summary, the Prosecution case was that the child victim, **S.W**, a daughter of the appellant and **B.W (PW1)** was at the material time aged one year and nine (9) months and on the material date at 5.00pm

was left at home with her father as her mother proceeded to nearby shops to purchase vegetables. On her return, the mother found the child on the ground and the husband seated outside the house. He later proceeded to the shopping centre to purchase cooking fat.

The child's mother (PW 1) noted that the child cried on being lifted up and had breathing difficulty. The child had no panties. The mother noted bruises on the child's vagina. Her left leg appeared dislocated or fractured. She (PW 1) took the child to hospital and learnt from the doctor that the child had been defiled.

The matter was reported to the police and the appellant was arrested.

A clinical officer, **Kirwa Labat (Pw 2)**, examined the child and confirmed that she had been defiled. He produced the necessary P3 form.

**P.C. Amos Musau (Pw 3)** received the necessary report and arrested the appellant after being brought to the police base by members of the public. He (Pw 3) conducted investigations and later preferred the present charge against the appellant.

In his defence, the appellant indicated that he was a boda boda (motor cycle) taxi operator and had no defence.

The learned trial Magistrate considered the appellant's defence alongside the evidence adduced against him by the Prosecution and arrived at the conclusion that the charge against the appellant had been proved by the Prosecution. The appellant was therefore convicted and sentenced accordingly.

This Court has considered the same evidence in the light of the grounds of appeal and the submissions by both sides in respect thereof.

It is the opinion of this Court that there was no dispute that the child victim was indeed defiled. Therefore, the only issue for determination was whether the appellant was responsible for the offence.

The appellant while under cross-examination admitted that the child is his daughter and that B (Pw 2) was its mother and his wife. He also admitted that he was living with his wife at the material time and that he was the only male in the house at the time.

Although there was no direct evidence against the appellant, the circumstances existing strongly indicated that the child was defiled by the appellant. He was left alone with the child as his wife proceeded to buy vegetables. No sooner had she returned, she found the appellant outside the house and the child on the ground. She examined the child and noticed injuries on her body. She rushed her to hospital only to be told that the child had been defiled.

Since the appellant was the only person left with the child and since the child had no problem when she was left with him by her mother, it was most probable that the child was defiled by the appellant, her own father. The circumstantial evidence against him was watertight. His conviction by the learned trial Magistrate was sound and proper. The sentence imposed against him was lawful but rather excessive for a first offender. The proviso to Section 20 (1) of the Sexual Offences Act indicates that if the victim is under the age of eighteen years, the offender shall be liable to imprisonment for life. This does not create minimum sentence of life imprisonment but creates a maximum sentence of life imprisonment.

Consequently, the sentence imposed against the appellant is hereby set aside and substituted for thirty (30) years imprisonment. Otherwise, the appeal is dismissed.

Ordered accordingly.

**[Delivered and signed this 28<sup>th</sup> day of July, 2012]**

**J. R. KARANJA**  
**JUDGE**