



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL APPEAL 113 OF 2010**

S.S.....APPELLANT

VS

REPUBLIC.....RESPONDENT

**JUDGEMENT**

1. The appellant was charged before the learned Chief Magistrate in Malindi with the offence of Incest by a male contrary to section 20(1) of the Sexual Offences Act, it being alleged that on diverse dates between September and October, 2009 at Bomani area Malindi District, he defiled his daughter D.S.S a girl aged 15½ years whom he knew to be his daughter.

2. The appellant denied the charged but following a full trial, he was found guilty, convicted and sentenced to life imprisonment on 10/9/10.

He has now appealed to this court against both conviction and sentence. He raised 6 amended grounds which can be summarised as follows;-

**1. *The charge sheet was defective.***

**2. *The weight of the Prosecution evidence did not support the conviction.***

3. The appellant filed written submissions in support of his appeal. The State opposed the appeal by reiterating the prosecution evidence and asserting the propriety of the charges preferred. The first appeal court is obligated to take a fresh look at the trial evidence and to make its own findings(**See OKENO VS R 1972 EA**).

4. The Prosecution case was follows;-

DS is the daughter of the appellant by a woman who died or abandoned her when she was an infant. In the material period she lived with her father. She was aged about 15 years. She was a pupil at B Primary School. Prior to September, 2009, the appellant had on several occasions had sexual intercourse with DS.

5. Matters came to a head on 2/10/09 when DS resisted yet another assault by the appellant. It was 6.00am. Her screams attracted family members including KAZUNGU SHINDO (Pw 3) and neighbours whom the appellant chased away. DS confirmed to them what had been rumoured in the village all

along: her father had been abusing her. DS also reported to the local community policing group (known as sungusungu), her teacher, LH (Pw 2) and she was subsequently placed in a safe house. The matter was eventually reported to the police on 12.10.09. DS was treated at Malindi hospital and P3 form completed. The appellant was arrested and arraigned before the court to answer the charges.

6. In his defence the appellant dismissed the charges against him as trumped up;- that he has a land disputed with a Pastor over a church built on his land. The dispute had been placed before the chief who ordered he be compensated but the Pastor sent the vigilante group against him and he was arrested and released over the same issue on 25/9/09.

7. When he was re-arrested on 14/10/09 it was because of the plot dispute as he is unaware of the other offence. He claimed that he has a bad relationship with his brother KS (Pw 3), and Pw 4 (wrongly identified as Pw 2) because the latter owes the appellant money for stones delivered to him.

8. The issue of penetration is beyond disputing as DS was found to have a broken hymen but had no injuries, confirming her evidence that she had been severely assaulted in the past. Regarding the identity of the assailant, the evidence of DS is forthright. It was consistent and not shaken in cross-examination. The trial magistrate who had opportunity to hear and see her concluded that she was a credible witness and believed her evidence dismissing the fabrication theory advanced by the appellant as unconvincing.

9. By conducting a fairly thorough voir dire examination prior to receiving the evidence of DS and later giving reasons for her towards the said evidence, the trial magistrate showed that she was alive to section 19 of the oaths and statutory Declarations Act even section 124 of the Evidence Act. She however went further and sought to assure herself by searching for corroboration, which she rightly found in the medical evidence. In addition she cited DS' teacher (Pw 2), the appellant's brother (Pw 3), neighbours Pw 4 and 5 as well as the area chief. DS had divulged to these persons what she had encountered at the appellants hands and indeed Pw 2 witnessed one of those incidents on 2.10.09.

10. The appellant appears to suggest that all these persons had something against him and framed him. That is ludicrous. It is not even clear who was the pastor with whom he alleged a land dispute as that issue was also advanced against the neighbours, Pw 3 and Pw 4 and even the chief (Pw 6). It is not possible that he had a land dispute with all these persons. Besides as the trial magistrate observed, DS had nothing to do with the dispute. As regards the stone debt alleged against Pw 4 it did not involve DS. The evidence of Pw 3 and 4 was not shaken in cross-examination. It supplies strong material corroboration regarding the attack on DS on the morning of 2.10.09, even though the trial court was entitled to act on her evidence alone if satisfied she was telling the truth.

11. However, there is the small matter regarding Pw 5 who was treated as a hostile witness, perhaps the reason for the appellant's complaint that the prosecution evidence was contradictory. It is unfortunate that the trial magistrate did not deal with that aspect and in fact cited the evidence of Pw 5 in her judgement to support her findings.

12. The evidence of a hostile witness is worthless. But in this case, other neighbours Pw 3 & 4 gave cogent evidence of the events of 2/10/09 and there is no lacuna caused by the recalcitrant witness. No prejudice has been occasioned upon the appellant. Even if the testimony of Pw 5 is disregarded, and indeed the evidence of all the neighbours, the trial court could still have acted upon the testimony of DS once convinced she was a truthful witness. The prosecution evidence was overwhelming and totally dislodged the appellant's contrived defence. The same was properly dismissed.

13. The appellant's objection to the charge sheet has no legal basis either. Section 20(1) of the Sexual Offences Act under which the charge was brought does not contain the element of unlawfulness as suggested by the appellant. During the trial the minor's age was given by Pw 8 as 15½ years on assessment. This is recorded in the P3 form. The appellant did not challenge the evidence of Pw 8 on that score and it is too late in the day for the appellant to do so now as well as object to the framing of the charge (see section 382 of the Criminal Penal Code). The charge as drawn satisfies the requirements of

section 134 of the Criminal Procedure Code. The appellant clearly understood the charges he faced and has therefore not suffered any prejudice.

14. The sentence imposed on the appellant was lawful as per the proviso to section 20(1) of the Sexual Offences Act. For the foregoing reasons, it is the view of the court that the appeal before it has no merit and is dismissed. The conviction is upheld and sentence confirmed.

**Delivered and signed at Malindi this 20<sup>th</sup> day of June, 2012 in the presence of Mr Naulikha – State, Appellant present,c/c-Evans/Leah.**

**C.W.MEOLI  
JUDGE**