



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**Criminal Appeal 64 of 2011**

**E. A. .... APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

***(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Kilgoris, Hon. B. Ochieng in Criminal Case No. 593 of 2009 dated 18<sup>th</sup> March, 2011)***

The appellant, **E. A.** was charged with the offence of incest contrary to section 20 (i) of **The Sexual Offences Act 2006**. He was said to have had sexual intercourse with his daughter one **W. K.** then aged 10 years. He was convicted and sentenced to life imprisonment by the SRM's court at Kilgoris.

Briefly the facts of the case were that on the material day the appellant called his daughter into the house, made her remove her clothes and defiled her on her mother's bed. Her mother, PW3 had gone to the posho mill. Her minor bother **H. M.** PW2 is said to have witnessed the incident. On arrival back home around 1.00p.m, the complainant's mother was told what had happened by the two minors. She reported the incident and the appellant was subsequently arrested and charged.

The appellant has now appealed against both conviction and sentence. His grounds of appeal are that he was framed; that the trial court acted on speculative evidence; that the court refused to consider his defence; that the sentence was harsh, excessive and illegal; and that his constitutional rights were violated by the police who held him for 3 days.

As a first appellate court, I am under duty to subject the evidence in the trial court to a fresh evaluation so as to determine whether the conclusion reached by the trial court can stand. This duty was succinctly explained in the case of **Okeno –vs- Republic (1973) E.A 32**.

The appeal came up for hearing before me on 27<sup>th</sup> March 2012. During the hearing the appellant handed to the court written submissions while the state made oral submissions. The appellant's submissions introduced new grounds of appeal.

I shall proceed to consider the respective submissions along with the grounds of appeal as far as can be gleaned from the appellant's submissions. I consider them as hereunder:-

**1.Implication and frame up.**

The appellant states that he was framed as he was not on good terms with the complainant. It is not clear whether the alleged frame up was by the complainant (PW1) or the mother (PW2). All the same I find no evidence that supports this allegation. As the state counsel submitted which I agree with, no differences were demonstrated to have existed between the appellant and his daughter. In fact in his testimony before the trial court, the appellant did state *“I had no differences with W. K 10 years old. I am the biological father to the girl. This was issue covering mother”*.

With regard to the alleged differences with the mother, the trial court dismissed the same having found that the offence was proved. I agree with the finding of the court. What is material is that the offence was committed and that it was proved that the appellant did commit the offence. I therefore dismiss this ground.

## **2.Speculative and contradictory evidence**

The appellant has submitted that the evidence was contradictory. I have carefully perused the record. PW1 testified that her father did *“bad manners”* to her. PW2, her sibling testified that he saw their father *“doing bad manners to W. on my mother’s bed”*. PW3 the complainant’s mother reported the incident at the D.O’s office at Enosaen from where she was directed to take her to hospital. They later went to the police station. A clinical officer one **Cheruiyot** testified as PW4 and produced the P3 report in court. He had examined the complainant and found her to have been defiled. The hymen was obliterated and she had a foul smelling discharge and an infection. Having so perused the record, I find nothing inconsistent or contradictory in the prosecution’s witnesses’ testimony. Medical evidence in any case cannot be said to be speculative. This ground therefore fails.

## **3.Ingredients of the offence**

The appellant has submitted that the complainant was not his biological daughter and further that no penetration was proved. The state counsel on the other hand submitted that the appellant was the complainant’s father. Evidence on record from the appellant show that he told the court under cross examination by the prosecutor that the complainant was his daughter. In his submissions before this court he has indicated that the complainant was not his biological daughter. He has stated that *“When I married J. G. in the year 2000, she came with W. K whom she had born out of wedlock and who looked approximately three (3) years old”*.

The appellant contends that a DNA test ought to have been done to establish their relationship. I disagree with this line of submission. In law whether the appellant was the biological father or step father of the complainant, both relationships are within the prohibited degrees of consanguinity and a sexual act between such father and daughter falls under the offences of incest as provided for under section 20 (i) and 22(i) of the Act. This ground of appeal must therefore fail for the aforestated reason.

## **4.Sentence.**

The appellant has in both his grounds of appeal and his submissions stated that the sentence is too harsh and that the same is unlawful. The appellant was sentenced under section 20(i) of the **Act** which provides a sentence of ten years (10) for incest and life imprisonment where the complainant is under 18 years of age. The sentence pronounced by the trial court was therefore the only sentence provided by law and cannot be said to be unlawful.

Taking all the evidence in totality and analysing the same, as I have carefully done, I find that the prosecution proved its case beyond reasonable doubt. I find that the conviction was safe and the sentence lawful. I have no reason not to uphold the conviction and sentence of the trial court.

In sum, and for all the foregoing reasons, I find the appeal has no merit and accordingly dismiss it.

The appellant has a further right of appeal to the Court of Appeal.

**Judgment dated, signed and delivered at Kisii this 27<sup>th</sup> day of September, 2012.**

**R. LAGAT-KORIR  
JUDGE**

**In the presence of:**

Erick Aranda :appellant (present/absent)

..... :Counsel for respondent (present/absent)

Edwin Mongare :court clerk

**R. LAGAT-KORIR  
JUDGE**