REPUBLIC OF KENYA

High Court at Bungoma

Criminal Appeal 12 of 2011

SN.....APPELLANT

~VERSUS~

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the conviction and sentence by the Principal Magistrate Hon. E. C. Cherono in Webuye court in cr. case no.944 of 2009)

JUDGMENT

The Appellant was convicted of incest by male person contrary to section 20 (1) of the Sexual Offences Act no.3 of 2006 whose particulars were that on diverse dates between 18/1/2009 and May 2009 at Bokoli Location of Bungoma East District in Western Province he unlawfully and intentionally had carnal knowledge of DK aged 16 who was his niece to his knowledge. He was sentenced to serve 20 years in jail. He was aggrieved by the conviction and sentence and preferred this appeal. The State through Mrs Leting conceded the appeal.

DK(PW1) is the daughter of the elder brother of the Appellant called IKM (PW2). In 2009 she was aged 16 and in class six. She was staying with her paternal grandmother. Her evidence was that on 18/1/2009 she was alone at home with the Appellant. He came to the house where she was, took her to the bed, removed her clothes and slept with her. He had slept with her before and she had started to miss her periods. In school the teachers realized she was expectant. The Appellant had warned that he would beat her if she disclosed that she had slept with him. He asked her to say it was Wafula who had slept with her and made her pregnant if she was asked. The teachers informed her father, mother and grandparents. PW1 was moved to stay with her grandmother in Mumias. She became ill and on 9/8/2009 she was admitted to Hospital and the pregnancy aborted.

The Appellant gave unsworn statement in defence and denied sleeping with the complainant. He did not call witnesses.

The State Counsel conceded the appeal because there was no DNA evidence to support the prosecution case, now that it was alleged that the Appellant had slept with the complainant and made her pregnant. The Appellant was represented by Mr. Onyando who took the same position. The question that one would ask is this: is it not possible that had the DNA test been done it would have shown that the Appellant was not the father of the aborted child? Considering that the prosecution has the duty to prove the quilt of the accused beyond doubt, I find that the Appellant was convicted on inconclusive evidence.

In the final analysis, I allow the appeal, quash the conviction and set aside the sentence. The Appellant is ordered to be set at liberty forthwith unless he is otherwise lawfully held.

Dated, signed and delivered at Bungoma this 17th day of October, 2012.

A. O. MUCHELULE
JUDGE