**REPUBLIC OF KENYA**

**High Court at Machakos**

**Criminal Appeal 87 of 2011**

**C M N……..……..……..…...… APPELLANT**

**VERSUS**

**REPUBLIC ……...…….....……. RESPONDENT**

***(Being an appeal from the judgment of the Principal Magistrate J. Karanja SRM delivered on 18/4/2011 in Makueni Criminal Case No. 347 of 2010)***

***(Before George Dulu J)***

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

The appellant was charged in the subordinate court with incest by a male contrary to **section 20(1)** of the **Sexual Offences Act – 2006**. The particulars of charge were that on 19th July 2010 at **Ukia** Location, **Kaiti** Division, **Makueni** District within **Eastern** Province being a male person intentionally and unlawfully had carnal knowledge of **MM** a female person who was his daughter aged 15 years.

In the alternative, he was charged with indecent assault on a girl (female) contrary to **section 11 (1)** of the **Sexual Offences Act 2006**. The particulars of charge were that on the same day and place unlawfully and indecently assaulted **MM** a girl aged 15 years by touching her private parts.

He pleaded not guilty. After a full trial, he was convicted of the main count of incest. He was sentenced to serve **ten (10)** years imprisonment. Being aggrieved by the decision of the trial court, he has appealed to this court. In his amended petition of appeal, he has raised the following four grounds:-

**1. The learned trial magistrate erred in law and facts in accepting PW1's testimony which had not been corroborated in any material evidence.**

**2. The learned trial magistrate erred in law and facts in accepting PW2's testimony whereas it was hearsay thus being incredibly insufficient to support PW1.**

**3. The learned trial magistrate erred in law and facts by not considering the contradictions of prosecution testimonies eg. On page 18 line 25, that the police constable PW4 had different information and page 16 PW3 and page 19 PW5 in which the dates are different from PW1 and PW5.**

**4. That the learned trial magistrate erred in law and facts in failing to take into consideration his defence without giving reasons for so disregarding the defence.**

At the hearing of the appeal, the appellant tendered written submissions, and relied on the same. I have

perused the said submissions.

The learned State Counsel **Ms. Kwamboka** opposed the appeal. Counsel submitted that the complainant was the daughter of the appellant. She was at home with three other children when the appellant came home, called her and forced her to sleep with him. This incident made the complainant go and sleep at a neighbour's house. The next day, the complainant reported the incident to the duty teacher. A P3 form was filled at **Makueni** Hospital. It was found that the hymen was broken. This, according to counsel was evidence of penetration. PW4 who was the **Investigating Officer** testified that the appellant tried to escape. Counsel emphasized that the appellant stated in his defence that he had sent the complainant for water, but that she did not bring him the water. It was counsel's view that the magistrate considered the evidence both for the prosecution and the defence before convicting.

In brief, the facts of the prosecution case are as follows.

The appellant and the complainant are a father and a daughter. The complainant is aged about 15 years.

On 19/07/2010 at 11 p.m., the complainant was with three other children at home. The mother had gone to **Nairobi**. The appellant, who is the father, came back home from drinking. He called her to go and give him water. When she gave him the water he held her hand and told her that he wanted to sleep with her. He grabbed her and gagged her mouth with a cloth and raped her. She had had sex with someone else before. After the ordeal, the complainant (PW1) called a neighbour **TMM** (PW2) who accommodated her for the night. When she went to school the next day, she reported the incident to the Deputy teacher, after the neighbour PW2 **TMM** took her there. The matter was then reported to the police. The appellant was sought by PW4 **PC Pius Makau Mutuu**. The appellant, however, had boarded a vehicle, but which was later stopped by traffic police and he was arrested on the same 20/7/2010.

The complainant was taken for treatment. A P3 form was filled at **Makueni District Hospital**. No injuries were found, as the complainant had previous sexual relations and the hymen had thus been broken.

The appellant was then charged with the offence.

In his defence, the appellant elected to give sworn testimony. It was his testimony that his wife had sworn to fix him. That on the day in question, at 6 p.m., he was tending vegetables when the complainant, who was one of his 7 children came. He sent her for water, but she did not come back. The other 3 children who were present waited for her, but she did not come back. It was his testimony that the neighbour (PW2) was a friend of his wife. The next day, he went and paid nursery school fees for one of the children, and boarded a matatu to travel to **Wote**. On the way, the matatu was stopped by traffic police and he was forced to alight. Then the chief's vehicle arrived and he was arrested, taken to the police station at 11 a.m. and was later charged.

Faced with this evidence, the learned magistrate found the complainant a credible witness. He dismissed the accused's defence as untrue and convicted him.

This being a first appeal, I am duty bound to re-evaluate the evidence on record afresh and come to my own conclusions and inferences – *See* **Okeno –vs – Republic (1972) EA 32**.

I have re-evaluated the evidence afresh. The conviction of the appellant was based on the credibility of the evidence of the complainant PW1. It is her story against that of the appellant. She had previous sexual intercourse with someone else. No signs of injuries or penetration were noticed in her private parts. No spermatozoa were noticed. There is no evidence that she screamed. She is the one who informed the neighbour PW2 that she had been defiled by the father. The two of them went and reported the incident to the teacher at the school on the next day, who took the matter up and a report was made to the police.

The burden is always on the prosecution to prove an accused person guilty beyond reasonable doubt. Such burden must be discharged by availing by the prosecution of evidence that will prove an

accused person guilty of the commission of the offence beyond any reasonable doubt – *See* **Sawe –vs- Republic (2003) KLR 364**.

The uncontroverted evidence, of both the complainant and the appellant is that there were other three children in the house where the incident is said to have occurred. The appellant stated that he sent the complainant to bring him water at 6.30 p.m. and she did not come back. The complainant said that she was sent for water at 11 p.m., and went into the appellant's room and was thereby defiled. These three children in my view were important witnesses for the prosecution to prove their case against the appellant beyond reasonable doubt. No reason was given for the failure of the prosecution to call any of these witnesses.

In **Bukenya & Others –vs- Uganda (1972) EA 549, at page 550**, the Court of Appeal for **East Africa** stated:-

"**It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."**

It is my humble view that the reasoning in the above case applies to the present appeal. The truth or otherwise of the complainant's story could only be confirmed by calling at least one of the children who were present with the complainant and the appellant in the house. The failure to call any of these witnesses by the prosecution with no explanation, leads me to the conclusion that their evidence would have been adverse to the prosecution case. In the result, the benefit of doubt has to be given to the appellant, and I do so. This means that the prosecution failed to prove the appellant guilty beyond reasonable doubt. He therefore has to be acquitted.

Consequently, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Machakos this **19th** day of **December** 2012.

**George Dulu**
**Judge**
**In presence of:-**
Appellant present in person
N/A for State
Mutinda – Court clerk