



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 4 OF 2010**

**(From original conviction and sentence in Criminal Case No.1084 of 2008 of the Principal Magistrate's court at Nyahururu – C.K. OBARA, RM)**

**J K G.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This appeal was filed by John Kamau Gatogo who was convicted of the offences of incest by male person, contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006** and in the alternative he faced a charge of indecent assault contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The magistrate convicted the appellant of both the offences of incest and indecent assault and was sentenced to life imprisonment and 10 years imprisonment respectively. He is aggrieved by both the convictions and sentences and preferred this appeal. His grounds of appeal are that he was convicted on insufficient evidence as there was no medical evidence adduced. He also filed submissions in which he adduced further grounds, that there were inconsistencies in PW1's evidence; that the court erred in convicting the appellant on the evidence of a single witness which was not corroborated.

Ms Nyagol, Counsel for the State opposed the appeal and submitted that it is not in dispute that the appellant is a step father to the complainant who is a minor of about 2½ years old. The mother of the complainant, PW1, N.W was woken up by the screams of the child at about 5.00 a.m. On lighting the candle she saw her husband, the appellant on the children's bed and he was wearing his trouser. Ms Nyagol urged that the appellant was the only grown up man in the house the other being a child of 4 years and therefore the evidence points at none but the appellant. That on the child being examined by PW3, Dr. Charles Muisyo, it was found fresh blood clots and abrasions on the body of the vagina, spermatozoa were found in the vaginal swab taken from the child (PW2) and the doctor formed the opinion that she was defiled. Ms Nyagol urged the court to uphold the sentence of life imprisonment but hat the finding on the alternative charge is an error.

Briefly, the facts of this case are that PW1 N W is the wife of the appellant. PW1 testified that she has two children; the complainant herein being the 2<sup>nd</sup> born aged about 2½ years at the time. They were asleep at about 27/5/2008 at 5.00 a.m. when she was awoken up by the screams of E M(PW2). She lit a candle and saw her husband on the children's bed and he was wearing his trouser. The appellant then took his bicycle (boda boda) and left. When PW1 checked the child, she found her bleeding from her vagina. She waited for the appellant to come back at about 11.00 a.m. who on being asked what he had done he denied doing anything, and she took the child to Ngomongo Ap Camp. APs went to arrest the

appellant. The child was admitted at Nyahururu Hospital for 1½ weeks. PW1 identified PW2's blood stained cloths, the blanket she had slept on and the appellant's underwear . PW2, E.M was seen by the trial court which noted that she was not able to testify due to her tender age.

PW3, Dr. Muisyo who examined the child found lacerations on the vaginal wall, fresh blood clot, and a high vaginal swab disclosed present of spermatozoa. He produced the P3 form as Ex.5. PW4 Ag. Inspector Susan Mosai is the one who received the report at the Police Station, took possession of the exhibits and issued the complainant with a P3 form and referred them to the Nyahururu District Hospital. PW5, PC John Leneina who rearrested the appellant from members of public.

In his sworn defence the appellant said he only learnt of the child's defilement while at the police station but denied committing the act. He claimed to have been on bed with the wife and used to argue.

There is overwhelming evidence on record that the child, E.M, was defiled. I do agree with the lower court's finding that the presence of spermatozoa in the vaginal swab taken from the child and the injuries to the vaginal wall are evidence of penetration. She was defiled. The only question is who did it.

There is no dispute that PW1 and the appellant were living in the same house at the time of this incident. The complainant is a child of tender age of 2½ years who could not be able to say what happened to her. PW1 testified as to how she was woken up by the screams of the child and found the appellant in the children's bed instead of his own bed. It is upon checking the child that she found the child bleeding and injured in her private parts. The appellant is said to have been the only grown up man in the house at the time. That has not been disputed. The only other male in the house was a child of 4 years. I find that the appellant had the opportunity to defile the girl and this court finds that the evidence points at only him. His alleged disagreement with the wife does not hold water. In cross examination of PW1, and even in his defence, he did not disclose the nature of the disagreement that could lead to the wife framing him for such a serious offence. It is true the police did not avail the results of the sample taken from the appellant for comparison. The magistrate believed PW1 and this court has no reason to doubt her testimony. There is no requirement in law that a conviction cannot be founded on the uncorroborated evidence of a single witness. Whether or not a court will rely on evidence of one witness depends on the circumstances of each case. The appellant, PW1 and the child had slept in one house. There is no evidence that the complainant and appellant quarreled the night before and I will dismiss the defence as a sham. I would therefore uphold the trial court's finding that the appellant did defile PW2, his daughter and is guilty of the offence of incest as charged and is sentenced to the only prescribed sentence, that is life imprisonment.

Having been convicted of the main charge the magistrate should not have made any finding on the alternative charge. The conviction on the alternative charge was made in error and I quash that conviction on count II and set aside the sentence of 10 years imprisonment.

In sum, I find no reason to interfere with the conviction on the main charge and the sentence of life imprisonment. The appeal is hereby dismissed.

**DATED and DELIVERED this 4<sup>th</sup> day of February, 2011.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

The appellant – in person.

Mr. Nyakundi for the State.

Kennedy – Court Clerk.