



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**CRIMINAL APPEAL CASE NO. 76 OF 2009**

*(From original sentence and conviction in Criminal Case No. 1043 of 2008 the Senior Resident Magistrate's Court at Kilifi Before Hon. P.M. Kiama - SRM)*

**H.A.M..... ACCUSED**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

Hassan Ali Mohamed (appellant) was convicted on a charge of incest by male persons contrary to section 20(1) of the Sexual Offences Act. He was sentenced to serve life imprisonment. The charge against him stated that on 29<sup>th</sup> December 2008 in Kilifi District, he penetrated A.B, his biological daughter who is a child aged 13 years.

A.B (PW1) told the trial court that on 29<sup>th</sup> November 2008 at 7.30am, her mother who had separated from the appellant and gone back to her parents' home, sent her to go and collect clothes from the appellant's home. PW1 got to the home and while in the process of collecting the clothes, appellant held her, removed her pants, put her on her mother's bed and defiled her. He held a panga at her when she tried to scream, warning her that he would kill her. While appellant was holding her, one A.R arrived and saw what was going on. PW1 also informed her uncle K. R. Her mother then reported to the chief and she was taken to hospital. She was also issued with a P3 form. She further stated in her evidence-in-chief: ***"He is not my biological father. He is a foster father."***

PW2 A.R testified that on 29<sup>th</sup> November 2008 at 7.30am she saw appellant and A.B in bed where they were having sex. She went into the house and saw them having sex – so she ran away and informed PW1's mother. According to her; ***"the father forced her..."***

Dr. Mutinda PW4, who produced the P3 form on behalf of Dr. Gachuri stated that the findings indicated no lacerations or bruises noted. There was a whitish discharge from the vagina. Pregnancy test was negative. No infection was found on testing. No spermatozoa was noted.

Pc Mwamuye said his investigations showed that appellant was the complainant's foster father. On cross-examination he stated:

***"There was evidence that you did it. The girl has some injuries consistent with defilement"***

In his unsworn defence appellant confirmed that he had been married to the complainant's mother but they disagreed and parted ways, his wife left with their six (6) children. By 29<sup>th</sup> November 2008, he was not at Kazamoyo area and he produced bus tickets to show that on 11<sup>th</sup> November 2008 he was in

Kurama and on 17<sup>th</sup> November 2008 he was in Kaloleni, then on 9<sup>th</sup> December 2008 police just went and put him in their motor vehicle, took him to the police station and he was charged.

The trial magistrate believed the evidence of PW1 and PW2, saying they had no reason to lie and their evidence corroborated each other.

The trial magistrate also held that because appellant was married to PW1's mother, then it was presumed that he knew and intended to be the father of the complainant, so whether he was the biological or step father was immaterial.

He sought to rely on provisions of section 25(2) of the Children Act No. 8 of 2001 that:  
***“2 where a child's father and mother were not married at the time of birth, but have subsequent to such birth, cohabited for periods that amount to not less than 12 months of where he father has acknowledged paternity or has maintained the child, he shall have acquired parental responsibility.”***

The trial magistrate held that appellant knew the girl was his daughter and the sexual activity he got involved in, with her amounted to incest.

The appellant's defence was considered and rejected on grounds that they were “cooked up” for convenience, and that for such short distances usually buses do not issue tickets, and in any event there was no motor vehicle registration recorded in the tickets.

The appellant challenged the findings on the following amended grounds:

1. The charge sheet was fatally defective.
2. The evidence of PW1 and PW2 was fabricated due to the dispute between him and the girl's mother.
3. He was not subjected to any medical examination as provided under section 36(1) of the Sexual Offences Act.
4. His alibi defence was rejected without any cogent reason being given yet the complainant's mother, uncle and chief were not called as witnesses.

The appellant filed written submissions in which he stated that the charge sheet was defective because it was not signed by the OCS and that the evidence does not support the particulars of the charge.

On this limb, in opposing the appeal, Mr. Naulikha submitted that failure to sign the charge sheet by the OCS does not render it defective. Indeed this may have been a procedural omission by the OCS but it did not touch on the material contents of the charge sheet. I find that it was an omission which did not lead to any miscarriage of justice.

The second limb of his submission is that he was not taken for any medical examination and that even the medical evidence presented to the trial court did not suggest any sexual involvement by the complainant and wonders what formed the trial magistrate's conclusion that he had had sex with his daughter.

The P3 form had no significant findings to suggest that PW1 had been involved in any act of sex, no abnormality noted in her genitalia, no cut wound or bleeding, in fact the doctor didn't even record his opinion as to what his findings disclosed. Of course in a sexual encounter, one may well indulge without getting bruises, lacerations or even having presence of spermatozoa, because the male partner may elect not to ejaculate. However for an act of defilement to be committed, then there must be evidence of penetration. The doctor did not mention evidence of penetration being noted.

What appellant is alleged to have done is an act which were it not for the alleged relations it would be termed as defilement. Under section 8(1) of the Sexual Offences Act, a person who commits an act of

which causes penetration with a child is guilty of an offence termed as defilement. Penetration under section 2 of the Sexual Offences Act is defined to mean “*the partial or complete insertion of the genital organs of a person into the genital organs of another person*”

Surely, from the medical evidence, there was no evidence whatsoever of penetration or insertion of any nature.

Appellant also submits that several persons were mentioned yet no called as witnesses. He conceded that even though a case is not proved by the number of witnesses called to testify, at least it was necessary to call those who had received the initial report citing the case of **Oliva v R (1965)EACA pg 144** which held that:

***“Whenever the name of a person appears and .....then such person should be called as a witness”***

However, Mr. Naulikha’s response to this is that the mother was only informed about the incident as was the chief and they would not have add any value to the testimony. While that may be so, I also recognize that he mother could have been useful in confirming that she had sent PW1 to her matrimonial house, and also described her state when she returned from the errand.

Is PW2 a credible witness? I wonder. Here is a man who decides to defile his daughter on their matrimonial bed, yet he leaves the door ajar for any passerby to see?

There was no evidence to explain Pw2’s presence in the house – is she a neighbor, a child to the appellant? Had appellant left the door wide open for any person by to just see his rompous actions on his matrimonial bed with his daughter? These questions were not answered, and although I certainly did not have the benefit of seeing PW2’s demeanor, from the scenario given, I doubt the veracity of PW2’s testimony.

There were far too many unanswered and unresolved issues, which rendered basing a conviction on the available rather unsafe. Consequently, my finding is that the conviction was unsafe and is quashed.

The sentence is set aside and appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **9<sup>th</sup>** day of **March 2011** at Malindi.

**H. A. OMONDI**  
**JUDGE**

Mr. Kemo for State  
Appellant in person