REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 42 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 242 of 2009 of the Principal Magistrate's Court at Kwale: A.M. Obura (Mrs.) – R.M.)

H.S ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant **H.S** has filed this appeal to challenge his conviction on a charge of **INCEST BY MALE PERSON CONTRARY TO SECTION 20(1) OF SEXUAL OFFENCES ACT 3 OF 2006**. The particulars of the case were that:

"On the 24th day of January 2009 in Kwale District within the Coast Province being a male person caused penetration with a female who is to his knowledge is [sic] his daughter aged 14 years, namely M.H"

The Appellant entered a plea of '***not guilty'*** and his trial commenced on 2nd April 2009 at which trial the prosecution led by **INSPECTOR SIBUDA** called a total of four (4) witnesses in support of their case. The complainant **M.R** told the court that she lives with her father (the Appellant). On 25th January 2009 the complainant went to bed. While she was asleep in her bed the Appellant came into her room armed with a panga. He removed her clothes and defiled her twice. The next morning the complainant left the house and went to school as usual. After school she collected her clothes and went to the home of her uncle **H** to whom she reported the incident. The matter was then reported to the authorities who arrested the Appellant. The complainant was taken to Kwale District Hospital for medical examination. Upon completion of police investigations the Appellant was arraigned in court and charged with this offence of Incest by a Male Person.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave a sworn defence in which he vehemently denied having ever defiled his daughter. On 29th January 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant as charged and after listening to his mitigation sentenced him to serve a term of life imprisonment. Being aggrieved with both his conviction and sentence the Appellant filed this present appeal.

The Appellant who appeared in person at the hearing of the appeal opted to rely entirely upon his written submissions which had been duly filed with the leave of the court. **MR. ONSERIO** learned State Counsel who appeared for the Respondent State made oral submissions by which he opposed the appeal and urged the court to uphold both the conviction and sentence of the lower court.

I have carefully perused the record of the proceedings from the trial court. Similarly I have given careful consideration to the written submissions filed by the Appellant as well as to the oral submissions made by the learned State Counsel. It is not in any dispute that the complainant was the biological daughter of the Appellant. Indeed the Appellant admits as much in his statement in defence. Likewise there is no dispute of the fact that the complainant's mother having earlier left her matrimonial home, the complainant lived alone in the home with her father (the Appellant). The Appellant was a minor. She herself gives her age as 14 years whereas the P3 form produced in evidence gives her approximate age as 15 years. Though no documents were produced to prove her age the fact that she was a class 4 pupil in a local primary school means that she was between 12 – 15 years of age – suffice to say the complainant was definitely below the age of 18 years. The law requires that where a minor is called upon to testify the trial court must conduct a ***'voire dire'*** examination on such a minor to determine whether or not he understands the nature of an oath. The record indicates that the learned trial magistrate did conduct such a 'voire dire' examination on the complainant. Her conclusion given at page 4 line 17 was as follows:

"Court: I am satisfied that the witness is a 14 year old girl. She does not understand the nature of an oath but appreciates that it is wrong to lie and undertakes to speak the truth. She possesses sufficient intelligence to answer questions put to her. She may give sworn evidence"

It is a contradiction to have found that the complainant was not able to understand the nature of an oath and then proceed to swear her. There is no point in subjecting to an oath a person whom the court has established did not understand the nature of the oath. In answer to questions put to her earlier about her understanding of the difference between telling the truth and lying in court, the complainant responded:

"I do not know. I do not attend madrassas. We are not taught religious education in school"

With answers like this and following the conclusion made on the ability of the witness to comprehend the nature of an oath, the trial magistrate erred in proceeding to direct that the complainant give sworn testimony. In the circumstances the trial court ought to have directed that the complainant give unsworn evidence. However this error alone may not lead to the nullification of the subsequent proceedings as in my view no prejudice was suffered by the Appellant. He was still able to cross-examine the complainant on the evidence she gave whether sworn or not.

In her evidence the complainant told the court that after the incident she left her home and went to the home of her uncle called **H. C**, to whom she narrated what had befallen her. Surprisingly this ***'H. C'*** was not called as a prosecution witness despite his being a crucial witness to corroborate the complainant's story as he was the first person she made her report to. This ***'Uncle'*** was also a key witness in that he would have been able to provide details of the state the complainant was in when she came to his home. Was she crying or calm? Was her clothing disheveled? Did she have any wounds or bruises on her person? All these are key observations which the said '***H.C'*** must have made and would have been able to share with the trial court. Failure to call such a crucial witness, greatly weakens the prosecution case.

Lastly the medical evidence is in my view ambiguous and leaves a lot of questions unanswered. **PW3 WARUGU JOHN** a clinical officer attached to Kwale District Hospital testified that he examined the complainant on 4th February 2009. He filled and signed her P3 form which he produces in court as an exhibit **Pexb1**. The relevant finding as stated on page 10 line 7 were:

"There were no physical injuries in the genitalia Hymen was broken and examination fingers entered with ease …."

Granted this medical examination was conducted about 2 weeks after the alleged defilement, but the

absence of any bruises or lacerations on the genitalia belies the allegation of forcible penetration. Where an adult man defiles a young child, at the very least there would be tears and/or lacerations on the vagina or genitalia. **PW3** proceeds to state at page 10 line 9:

"There was possibility of frequent sexual penetration due to the fingers entering with a lot of ease"

The doctor is here admitting that his investigation led to the possible conclusion that the complainant had engaged in frequent sexual encounters. This contradicts her evidence that she was defiled only twice by her father. Indeed the more likely finding ought to have been tenderness and/or pain in the vaginal opening. This was not noted at all by the doctor. The medical evidence adduced does not in my view corroborate the testimony of the complainant that she had been defiled. It only reveals that she had had frequent sexual intercourse. The complainant only alleged that the Appellant defiled her twice not on numerous occasions.

Taken as a whole I find the prosecution evidence to be weak. The case against the Appellant has not been proved beyond a reasonable doubt as not all the necessary witnesses were called. Several doubts abound which doubts must legally be resolved in favour of the Appellant. I find that the conviction rendered by the trial court was unsafe and do hereby quash the same. The attendant term of life imprisonment is also set aside. This appeal succeeds. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 8th day of April 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Onserio for State
Appellant in person