



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 232 OF 2009

(From the original Conviction and Sentence in the Criminal Case No. 523 of 2007 of the Resident Magistrate’s Court

at Wundanyi: F.K. Munyi – R.M.)

B.N.M.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant **B.N.M** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Wundanyi Law Courts. The appellant was arraigned before the trial court on 17th October 2007 charged with the offence of **INCEST BY MALE CONTRARY TO SECTION 20(1) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that:

“On the 15th day of October 2007 Taita-Taveta District within Coast Province, being a male person had unlawful carnal knowledge of N. M a female girl aged 3 years who was to his knowledge his daughter”

In addition the appellant also faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**. The appellant entered a plea of ‘not guilty’ to both charges. His trial commenced on 22nd July 2008, at which trial the prosecution led by **INSPECTOR OMBOGO** called a total of six (6) witnesses in support of their case. The complainant a child of 3 years told the court that she lived with her mother **E.L [PW1]** and the accused whom she referred to as ‘Daddy’. She told the court that on the material day her mother had gone to hospital when the accused inserted a ‘finger’ into her private parts. **PW3 A. S** a neighbour noticed that the complainant crying and questioned her. The child informed **PW3** that her father had poked her in her

private parts. **PW3** examined the child and noted that her underpant was blood-stained. She reported the matter to **PW1** who was the child's mother. **PW1** took the complainant to hospital for treatment. The matter was reported to police and the appellant was later arrested and charged.

At the close of the prosecution case the appellant was ruled to have a case to answer and was placed on his defence. He opted to make an unsworn defence in which he totally denied defiling the complainant. On 23rd December 2008 the learned trial magistrate delivered her judgement in which she convicted the appellant on the alternative charge of Indecent Assault and thereafter sentenced him to serve twenty (20) years in prison. Being dissatisfied with both this conviction and sentence the appellant filed this appeal.

The appellant who was unrepresented by counsel at the hearing of this appeal chose to rely entirely upon his written submissions which had been duly filed in court. **MR. ONSERIO** learned State Counsel who appeared for the respondent State opposed the appeal and urged the court to confirm both the conviction and sentence of the trial court.

The complainant in this matter was a child of tender years. She was actually a toddler aged 3 years. At her first appearance in court the trial magistrate conducted a *voire dire* examination and upon finding that the child did not understand the meaning of an oath concluded as follows page 7 line 44:

“COURT: The child does not understand the meaning of telling the truth. She is not a competent witness”

This is a very puzzling finding indeed. If a trial court forms an opinion that a child does not understand the meaning of an oath that does not make such a child an incompetent witness and therefore ineligible to testify. The trial court will in such circumstances merely direct that the child give unsworn testimony. Happily the trial magistrate did herself correct this error and on 22nd July 2008 after conducting a second '*vire dire*' examination ruled that the complainant would give unsworn evidence. This is the correct position in law.

The offence of Incest is defined in S. 20 of the Sexual Offences Act thus:

“20(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years”

It is therefore imperative that the prosecution prove the existence of a father/daughter relationship between the appellant and the complainant. The complainant herself identified the appellant as a man whom she referred to as '*Daddy*'. **PW1** the complainant's mother shed more light on the relationship when she told the court that she was married to the appellant and she further testifies that the appellant agreed to accept her child. The implication therefore is that the appellant was not the biological father of the child, but having married the child's mother, he was in actual fact her '*step-father*'. Does this fact that no biological or blood ties exist between the two negate a charge of Incest? The answer is to be found in section 22 of the Sexual Offences Act which deals with '*Test of relationship*'. S. 22(1) provides as follows:

“22(1) In cases of the offences of Incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not ...”

My own understanding is that '*half father*' is a term which means exactly the same as '*step-father*' – it

means one who is not a biological father of the child. Therefore by dint of this S 22(1) of the Act the appellant being a step-father of the complainant and one who stood in 'loquo parenthesis' can legally be charged and indeed convicted of the crime of Incest with her.

In her evidence the complainant made a brief statement in which she said that her 'daddy' whom she positively identified in court put his finger into her vagina. The complainant being a young child may have lacked adequate vocabulary to say the word 'penis'. She did however point out her own private parts to the court, the area where she says she was poked. The incident occurred in broad daylight. The appellant was a man well known to the child as they lived together. There would have been no likelihood of a mistaken identity. Further when **PW3** questioned the child, on that same day, the complainant told **PW3** that it was her father who lay her on the bed and poked her vagina. The complainant's story remains consistent, she does not deviate from what she told the court. The child maintains the same story even as she reported the incident to her mother. Clearly this was not a fabricated story. I find that there was a clear and positive identification of the appellant by the complainant.

The complainant's testimony of what the appellant did to her is properly corroborated by **PW3**. This was a neighbour who met the child crying. She examined the child and noted that her pant was blood-stained. **PW3** then reported to **PW1** the child's mother. **PW1** also examined the child and noted that her underpant was blood-stained. This pant was produced in court and identified by all the three witnesses. The fact that the pant of a three year old girl is blood-stained is an indicator that she had been sexually molested. A child so young would not be menstruating and would it not be normal for there to be blood on her panties. The complainant though young gave clear evidence and she remained unshaken under cross-examination by the accused. The veracity of her statement cannot be in any doubt.

Further medical corroboration is provided by the testimony of **PW4 MORRINE MORAA RATEMO**, a clinical officer based at Wundanyi Health Centre. She told the court that she examined the complainant on 16th October 2007. Her findings noted on page 11 line 3 were as follows:

“On examination there were bloodstains on the thighs, on labia majora and minora. There was a perianal tear which was bleeding”

Further upon cross-examination by the accused **PW4** states at page 11 line 13:

“On my examination there was evidence that the child had been sexually assaulted. There was a sign of penetration but I could not tell what had been used. She had sustained a tear.”

Nothing could be clearer than this. The evidence of **PW4** provides expert medical evidence proving that the complainant was indeed sexually assaulted and corroborates the complainant's testimony. I am satisfied that the complainant was indeed sexually assaulted as she alleged.

The learned trial magistrate in his judgement found that the evidence fell short of proving defilement and he proceeded to convict the appellant on the alternative charge of Indecent Assault. It is true that the complainant did not state categorically that the appellant penetrated her vagina with his penis. She merely referred to a 'finger'. However the trial magistrate misdirected himself. A clear look at S. 20(1) which defines Incest provides that "any male person who commits an indecent act **or** an act which causes penetration with a female person". This definition covers both the act of defilement **as well as** an indecent assault. Therefore where an indecent sexual assault is found to be proved as has been done in this case, then the offence of incest has been proved. Indeed to charge a man with alternative charge of Indecent Assault in a case of Incest is in my view superfluous since the definition of Incest includes an

indecent assault. For that reason I find that the charge of Incest is proved and I accordingly quash the conviction on the alternative charge and instead convict the appellant on the main charge of Incest which I find to have been satisfactorily proven.

The appellant was accorded an opportunity to mitigate after which the trial court observed at page J9 line 9:

“I have considered the mitigation of the offender and the fact that he was a first offender. However, the offence committed on a minor aged 3 years whom the offender was expected to ensure her safety is beastly and serious. A deterrent sentence is called for”

I am in total agreement with these sentiments. The appellant an adult man molested and savaged a toddler one whom as a father he owed a duty to protect. The 20 year sentence in my view is both lawful and appropriate and I hereby confirm the same. In a nutshell this appeal fails. The conviction and sentence rendered by the trial court are hereby confirmed and upheld.

Dated and Delivered in Mombasa this 15th day of July 2011.

M. ODERO

JUDGE

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