



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL CASE NO. 141 OF 2008

J.K.M.....APPELLANT
VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by R. A. A. Otieno Senior Resident Magistrate, in the Nyeri Chief Magistrate's Criminal Case No.64 of 2008 delivered on 10th June 2008 at Nyeri)

JUDGMENT

JACKSON KARIUKI MUIGA, the appellant herein was tried on a charge of Incest by male contrary to *Section 20(1)* of the Sexual Offences Act No. 3 of 2006. He also faced an alternative charge of indecent act with a child contrary to *Section 11(1)* of the Sexual Offences Act No. 3 of 2006. He was convicted on the main charge and sentenced to life imprisonment. The Appellant was dissatisfied hence this Appeal.

On appeal, the Appellant put forward the following grounds in his Petition of Appeal:

1. *That I had pleaded not guilty to the charge.*
2. *The at the learned trial magistrate erred in both point of law and facts in finding a life imprisonment without separating and awarding the prevailing doubt on the part of I the appellant.*
3. *That the learned trial magistrate erred in both points of law and facts in accepting the prosecution case as proved whereas the necessary ingredient that appertains this offence were not advanced by the prosecution.*
4. *That the learned trial magistrate erred in both points of law and facts in finding the prosecution charge as proved whereas the evidence tendered was of past history not present occurrence.*
5. *That the learned trial magistrate erred in both points of law and facts in shifting the burden of proof and thus became forced to reject my defence which remain true.*

Before delving deeper into the merits or otherwise of the appeal, let me set out in brief the case that was before the trial court. The prosecution's case was supported by the evidence of five (5) witnesses. **E.W** (P.W.1), the Complainant in this appeal told the trial court that on the material day, the Appellant who is her step-father took her for shopping at K Trading Centre. On their way back home, P.W. 1 alleged that the Appellant dragged her into the bush where he forcefully had her pants removed before defiling her despite her constant protests and cries. P.W.1 said she did not tell her mother what the Appellant did to her for fear of reprisals from the Appellant who had issued threats of dire consequences if she ever told anybody. The Complainant was able to reveal to her what had happened when the Appellant chased them from his house. P.W.1's mother took her to hospital where she was examined and found to

be pregnant. **L.W** (P.W.2) stated that the Appellant was her husband and that he used to take P.W.1 for shopping at K. P.W. 2 stated that she suspected P.W. 1 to be pregnant when she stopped buying sanitary towels and when she became selective on the type of food she ate. P.W.2 requested E.W, P.W.1's grandmother to interrogate her grandchild and that is when she discovered that the Appellant has been defiling the complainant. It is then that P.W.2 took the complainant for pregnancy test at Nyeri provincial General Hospital. **Dr. Lemy Oginga** (P.W.4), examined P.W. 1 on 7th January 2008 and found her to be 26 weeks pregnant. P.W. 4 stated that he did not examine the Appellant. **P.C. Regina Kameri** (P.W. 5) stated that she arrested the Appellant and charged him with the offence of incest after recording statements from witnesses.

When placed on his defence, the Appellant gave sworn testimony in which he denied the allegations. He claimed that the Complainant's mother (P.W.2) had differed with him and was forced to go back to her parents. He alleged that he fabricated the case to punish him as a revenge for their relationship which went sour.

I have carefully re-evaluated the evidence. It is clear from the evidence that the Complainant was pregnant at the time the complaint was made. What is not clear is whether the Appellant was the person who made her pregnant. This doubt kept on lingering in my mind because there was no medical examination done on the appellant to link him with the offence. In the circumstances of this case, it was necessary to carry out the medical test to create the nexus. The other issue which has also made me entertain some doubt is the fact that the Complainant revealed to her mother that the Appellant had defiled her after she and her mother were chased away from the Appellant's home. The Complainant's mother was married to the Appellant. The duo appear to have had a domestic quarrel hence it was a possible that the Appellant was framed up by his wife on a revenge mission.

Having given the brief history and re-evaluated the case before the trial court, let me now turn my attention to the grounds of appeal. I have already enumerated the grounds the Appellant gave. The Appellant was permitted to rely on written submissions. Mr. Makura, learned Senior State Counsel, opposed the appeal. He argued that there was overwhelming evidence to sustain a conviction. He also dismissed the notion that there was a grudge between P.W.2 and the Appellant. Though the Appellant listed five grounds of appeal, I think two of those grounds of appeal are outstanding. First, it is argued that there is no cogent medical evidence to link the appellant with the offence. With respect, I agree with the Appellant's submission that there was need to carry out a D.N.A. test in this case. The fact that the Complainant's hymen was broken did not in itself implicate the Appellant. The second ground argued on appeal is that the trial court disregarded the Appellant's defence. The record shows that the trial magistrate considered the Appellant's defence and found it to be evasive and that the Appellant failed to displace the evidence of P.W.1 and P.W.2. After a critical re-examination of the Appellant's defence, I have formed the opinion that the same was not given due consideration by the learned Senior resident Magistrate thus it was improperly rejected. There is no doubt that the Appellant and P.W.2 are husband and wife. It is also not in dispute that the appellant chased the Complainant and her mother (P.W.2) from his house. It cannot be said that P.W.1 and P.W.2 were happy to be away from home having been kicked out by the Appellant. It should be noted that the Complainant only made a complaint after she and her mother were thrown out by the Appellant. Though P.W.2 denied the allegation that she had a grudge against the Appellant, I think this court is entitled to make an inference from the evidence that such a grudge existed due to the domestic quarrel. It is therefore possible that the complaint was made to settle a score.

On the basis of the above grounds, I am satisfied that the appeal must succeed. It is allowed. The conviction is quashed and the life sentence is set aside. The appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 15th day of July 2011.

J. K. SERGON
JUDGE

In open court in the presence of the Appellant and Miss Ngalyuka for the State.