



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 93 OF 2008**

(From Original Conviction and Sentence in Criminal Case No. 768 of 2007 of the Senior Resident Magistrate's Court at Kwale: A. M. Obura – R.M.)

**HAMADI ALI KADINGO APPELLANT
VERSUS
REPUBLIC RESPONDENT**

JUDGEMENT

The Appellant **HAMADI ALI KADINGO**, has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts for two counts of **INCEST BY MALE CONTRARY TO SECTION 20(1) OF THE SEXUAL OFFENCES ACT 2006**. The Appellant was arraigned before the lower court on the two counts of Incest by Male as stated above. He entered a plea of **'not guilty'** on each count. His trial commenced on 9th July 2007 at which the prosecution led by **INSPECTOR GITONGA** called a total of six (6) witnesses in support of their case. The two complainants **PW1 M H K** and **PW2 M H K**, both minors are the daughters of the Appellant who lived with him and their mother **M R PW4** in the family home at W Location in Kwale District. Both **PW1** and **PW2** told the court that on various different dates when their mother traveled away from the family home, the Appellant would call each child to his room and proceed to defile them one after the other. This went on until 19th April 2007 when **PW3 M R D** an aunt to the children noticed that something was amiss with **PW2**. She examined her and noticed signs indicating that the girl was pregnant. **PW3** alerted **PW4** of her suspicions. Both girls were called and questioned. They revealed that the Appellant had been defiling them in the absence of their mother. The matter was reported to Diani Police Station. Both girls were taken to Tiwi Hospital for medical examination. It was confirmed that **PW2** was indeed five months pregnant. The Appellant was then brought to court 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 gave an unsworn defence in which he denied both the charges. On 11th January 2008 the learned trial magistrate delivered his judgement in which he convicted the Appellant on both counts of Incest and sentenced him to serve fifteen (15) years imprisonment on each count. The court further ordered that the sentences run concurrently. The Appellant being dissatisfied with both the convictions and sentences filed this present appeal.

Being a court of first appeal I am mindful of my obligation to re-examine and re-evaluate the evidence adduced before the lower court and to draw my own conclusions on the same. The Appellant who was not represented at the hearing chose to rely on his written submissions which with the leave of the court had been duly filed. **MR. MUTETI**, learned State Counsel who appeared for the Respondent State made oral submissions in which he urged the court to confirm both convictions and sentences of the lower court. I have carefully perused the written submissions filed by the Appellant.

The first ground of appeal raised by the Appellant was that his constitutional rights as guaranteed by S. 72(3) were violated by the 3 day delay in arraigning him before the lower court. I have no doubt that here the Appellant means to refer to the old Constitution which was in force at the time of his trial. S. 72(3) thereof provides that a suspect arrested and detained on a non-capital charge shall be brought to court within 24 hours of such arrest and detention. I have looked at the record which indicates that having been arrested on 24th April 2007 the Appellant was not taken to court until 27th April 2007 a full three (3) days later. The question is whether as the Appellant submits such a delay entitles him to an automatic acquittal. The short answer is No. The mere fact of a delay in arraigning a suspect before a court will not entitle such a suspect to an automatic acquittal [see **ELUID NJERU NYAGA –VS- REPUBLIC [2006] KLR pg. 2**]. The test is whether such delay was inordinate. It is my view that a three (3) day delay can in no way be said to be inordinate and cannot nullify a subsequent trial. I therefore dismiss this ground.

Secondly the Appellant submits that the charge sheet presented to the lower court was defective as it was not signed by the Officer Commanding Diani Police Station. This submission is not only misleading but is also factually incorrect. I have looked at the original charge sheet. It bears both the stamp and signature of the O.C.S. Diani Police Station. I therefore likewise dismiss this ground of appeal.

I will now proceed to consider the weight of evidence adduced before the lower court. The Appellant was charged with Incest by Male. Incest is the act of sexual intercourse with a person who falls within the prohibited confines of kinship. S. 20(1) of the Sexual Offences Act makes sexual intercourse with one's daughter an offence. Both **PW1** and **PW2** tell the court that the Appellant was their father. This relationship is confirmed by **PW4** their mother as well as by their aunt **PW3**. In his defence the Appellant concedes that the two are his daughters as he refers to them as **"our children"**.

The two girls tell the court that whenever their mother traveled away from the home the Appellant would call them in turn to his bedroom and defile them in turn. **PW1** states as page 4 line 5

"whenever my mother went to visit her parents she would leave us [with] my father. He would come to where we sleep at night and take me to his room. He used to tell me to sleep on his bed and he would undress me completely and then rape me. I would lie down and he

sleeps on top of me and then rape me. He would insert his penis in me and have sex with me”

On her part **PW2** in describing her ordeal states at page 5 line 9

“Whenever our mother Mwashidi went to her parents in Tiwi, our father would come to our room. He would first take Mejumaa [PW1] and after sleeping with her, he would bring her back and take me to his bed ... On his bed he would undress me and rape me. He would lay me on the bed, he would insert his penis in me.”

Both children gave the court a clear and detailed account of what transpired. They both slept in the same room and each saw the other being called to go to their father’s room. They each corroborate the others evidence and both remained unshaken under cross-examination by the Appellant. I find it highly unlikely that the complainants would dream up such a story.

It may be wondered why neither child reported the incident to either their mother or to any person in authority. Both state that they kept quiet because the Appellant had threatened to kill them if they revealed what was going on. These were very young children who could be easily intimidated into silence. It is not surprising that in the face of such threats they both chose to keep mum although as **PW2** told the court they **“would discuss it between us”**.

PW3 the children’s aunt suspected that **PW2** was pregnant. She called both children before her, their mother **PW4** and their grandmother and questioned them. Both **PW1** and **PW2** then revealed that the Appellant had been defiling them. Their evidence is consistent in this respect.

Finally on this point **PW6 ESTHER PENDO KARISA**, a clinical officer at Tiwi Rural Health Centre told the court that she did examine both girls. She found that **PW2** was five (5) months pregnant. With respect to **PW1** she found that her hymen had been broken. **PW6** filled and signed the P3 form in respect of each girl and these were produced in court **Pexb1** and **Pexb2**. This is incontrovertible medical and professional evidence that the two had indeed been defiled.

Both **PW1** and **PW2** have identified the Appellant as the man who raped them. The Appellant was their father with whom they lived and was well known to them. The instances of sexual abuse occurred over a period of months thus they had ample time and opportunity to see and identify him. The two girls told both **PW3** and **PW4** that it was Appellant who defiled them. They did not waver on this. Each confirms the identification of the other as each saw Appellant call her sibling to his room. Why would the Appellant an adult man call his minor daughters into his room in turn and only when their mother was away? His motive in so doing cannot have been honourable. This is evidence of recognition by the two girls which evidence has been held by the Court of Appeal to be **“more reliable”** and **“more satisfactory”** than mere visual identification alone [see **ANJONONI –VS- REPUBLIC [1980] KLR**]. In his judgement at page 16 line 20 the trial magistrate stated as follows

“At their tender ages, I find that both PW1 and PW2 were truthful by confessing that it was accused who was the man responsible. Both PW3 the aunty and PW4 the girl’s mother have confirmed how readily both of them mentioned the accused”

These were the observations of the trial magistrate who had the benefit of actually seeing and hearing the witnesses testify. I have no reason to fault this finding.

The learned trial magistrate did give due consideration to the Appellant’s defence in which he alleged that the charges were fabricated by his wife **PW4** due to her opposition to his intention to marry a second wife. At page 17 line 1 the trial magistrate observed

“And the accused’s defence was only on alleged disagreements with his wife PW4. These issues however were never raised with PW4 when she testified and must have been an after thought. And as to the charge he is facing, accused only maintained a mere denial which cannot stand. I find no merit in accused’s defence and I dismiss it.”

I do agree with the above dismissal of the defence raised. I further find that the defence did not case any doubt upon nor dislodge the prosecution evidence. All in all I am satisfied that the evidence against the Appellant was overwhelming. His conviction on both counts was merited and I do hereby confirm these convictions.

The Appellant was accorded an opportunity to mitigate after which the court sentenced him to serve fifteen (15) years on each count, the two sentences to be served concurrently. These sentences were both lawful and appropriate. The Appellant abused his position as a father and protector of his children and instead turned into a beast and preyed on their innocence and trust in a most heinous manner. I uphold the sentences imposed by the lower court. Finally this appeal fails in its entirety. The convictions and sentences of the lower court are hereby confirmed and upheld.

Dated and Delivered in Mombasa this 14th day of October 2010.

**M. ODERO
JUDGE**

Read in open court in the presence of:-
Appellant in person
Mr. Onserio for State

**M. ODERO
JUDGE
14/10/2010**