REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 314 OF 2006

(From Original Conviction and Sentence in Criminal Case No. 153 of 2006 of the Senior Resident Magistrate's Court

at Taveta: J.M. Githaiga – S.R.M.)

M.J.M.....
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant **M.J.M**, has filed this appeal to challenge his conviction and sentence on a charge of **INCEST BY MALE CONTRARY TO SECTION 166(1) OF THE PENAL CODE** by the learned Senior Resident Magistrate sitting at Taveta Law Courts. The particulars of the charge were that

"On the 11th day of March, 2006 at around 6.00 p.m. in Taita Taveta District, within Coast Province, being a male person, had carnal knowledge of L.T.J a female person who was to his knowledge his sister aged 10 years."

In addition the Appellant faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE**. The Appellant entered a plea of 'not guilty' to both charges and his trial commenced on 30th March 2006 and the prosecution led by **INSPECTOR MUASYA** called a total of nine (9) witnesses in support of their case.

The basic facts of the case were narrated by the complainant **L.T.J**, a minor aged ten (10) years. She told the court that on 11th March 2006 at about 6.00 p.m. she was going to attend a funeral of an uncle. The Appellant who was her step-brother was carrying her on his bicycle. Before getting to their destination the Appellant stopped the bicycle and led **PW1** into the bushes. He then proceeded to defile her. After the incident the complainant went back home where she told her sisters what had happened. The matter was reported to authorities and the complainant was taken to Taveta District Hospital for treatment. The Appellant was later arrested and arraigned in court.

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 the charges calling them a total fabrication. On 20th June 2006 the learned trial magistrate delivered his judgement in which he convicted the Appellant on the main charge of Incest by Male and after listening to his mitigation sentenced the Appellant to serve twenty (20) years imprisonment. Being aggrieved by both his conviction and sentence the Appellant filed this present appeal.

The Appellant was unrepresented at the hearing of his appeal and chose to rely entirely upon his written submissions which with the leave of the court had been duly filed. **MR. ONSERIO**, the learned State Counsel who appeared for the Respondent State opposed the appeal and urged this court to uphold both the conviction and sentence against the Appellant.

As a court of first appeal I am mindful of my obligation to re-examine and re-evaluate the evidence adduced at trial before the lower court and to draw my own conclusions on the same [see **OKENO –VS- REPUBLIC [1972] E.A.L.R. 3**).

I have perused the written submissions filed by the Appellant and I note that he raised the following grounds of appeal

- Defective charge sheet
- Violation of his constitutional rights as guaranteed by S. 72(3) of the (old) Constitution
- Failure by the prosecution to discharge its burden of proof
- Failure by the trial court to consider his defence

On the first ground the Appellant submits that the charge sheet filed in the lower court on 16th March 2006 was fatally defective as it was not signed by the O.C.S. Taveta Police Station. Firstly I know of no legal requirement that a charge sheet be signed by the O.C.S. Secondly failure to so sign a charge sheet would not in my view render the same fatally defective. Finally on this point I have perused the charge sheet which was filed before the lower court. I note that it bears a stamp from Taveta Police Station and is signed by ***"Officer in charge Taveta Police Station"***. Therefore these submissions by the Appellant were not only misleading but were also factually incorrect. The charge sheet was valid and was properly before the court. I dismiss therefore this ground of the appeal.

The second ground raised by the Appellant is that his rights as guaranteed by S. 72(3) of the Constitution were violated as he was not produced in court within 24 hours of his arrest. No doubt the Appellant was referring to S. 72(3) of the old Constitution. I note that Appellant was arrested on 12th March 2006 and brought to court on 16th March 2006 a period of 4 days after his arrest. This was clearly beyond the 24 hour time limit provided for by S. 72(3). However it is now accepted that the mere delay in bringing an accused person before a court will not entitle such an accused person to an automatic acquittal [see **ELUID NJERU NYAGA –VS- REPUBLIC 2006 KLR pg 2**]. The test is whether such delay was inordinate. In my view a four (4) day delay cannot be termed inordinate and did not amount to a fatal violation. As such I do dismiss this ground of the appeal.

I will now proceed to examine the evidence adduced before the lower court. The charge which the Appellant faced was that of Incest by Male. This is defined as sexual intercourse with a female relative within the prohibited confines of kinship. One of those prohibited categories include a sister or a step-sister. The complainant told the court that the Appellant was her step-brother. This is confirmed by **PW2, PW3, PW6** and **PW7** all of who were the complainant's siblings. The Appellant in his own defence

confirms that the complainant was his sister. At page 9 line 29 he states

"My sister who is the complainant lost her shoes on the way …"

I therefore find as a fact that the complainant was a sister to the Appellant.

In her evidence the complainant told the court that on the material day she and the Appellant were headed to the funeral of an uncle and the Appellant was carrying her on his bicycle. On the way Appellant stopped, took **PW1** off the bicycle and led her to some nearby bushes. There in the complainant's own words page 2 line 7

"He [the Appellant] placed his shirt on the ground. He told me not to scream. He removed his pair of long trousers. He laid me on the shirt. He undressed me and removed the panties I was wearing. He lay on me. He put his penis in my vagina …. He had sexual intercourse with me for a long time. I cried and the accused told me to keep quiet. I kept quiet …."

The complainant here has given a very detailed and graphic account of what happened to her. I find it unlikely that a 10 year old girl would fabricate such a story. Following her defilement the complainant went home. **PW2 A.N.D** the complainant's sister told the court that when the complainant got home she appeared ***'disturbed'*** which is evidence of her state of mind after the incident. **PW1** questioned her and the complainant revealed that she had been defiled by the Appellant. **PW2** examined her private parts and noted they were wet (indicative of the presence of seminal fluid). The complainant told **PW2** that their brother commonly known as ***'J'*** had defiled her. **PW3 A. N. M** who is also a sister to both the complainant and the Appellant also told the court that the complainant named the Appellant as the man who had raped her. It is clear therefore that the complainant did not decide to name the Appellant as an afterthought. She gave out his name to her sisters immediately after the defilement occurred. **PW3** also examined the complainant and found that her private parts were wet. **PW8 DR. HENRY KIPRONO** is the officer in charge at Taveta Sub-District Hospital. He produces the complainant's P3 form duly filled and signed. He stated that upon examination her hymen was found to be torn. In addition the complainant was found to have contacted Syphillis which is a sexually transmitted disease. All this evidence proves that the complainant was defiled as she alleged on the material day.

The complainant named the Appellant as the man who defiled her. The Appellant was very well known to her as he was her brother. The incident occurred at 6.00 p.m. in daylight hours. The complainant was being carried on the Appellant's bicycle. She had adequate time and opportunity to see him well. As stated earlier the Appellant did name the Appellant as her attacker to **PW2** and **PW3** immediately after the incident. **PW6 M.J** and **PW7 N.J** both of whom are the complainant's sisters corroborate the complainant's evidence that on the material day she was traveling with the Appellant to a funeral. Both testify that the Appellant was carrying the complainant on his bicycle. This evidence places the Appellant with the complainant on the material date. All the said witnesses **PW2, PW3, PW6** and **PW7** identify the Appellant before the lower court as their brother. Theirs is evidence of recognition as opposed to visual identification alone which has been held to be more a reliable form of identification. In the case of **ANJONONI –VS- REPUBLIC [1980] KLR 59**, the Court of Appeal held that

"recognition of an assailant is more satisfactory, more assuring, more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

More importantly the complainant was found to be infected by syphilis during her medical examination. **PW8** the doctor told the court that the Appellant was also examined and found to have syphilis. This is a sexually transmitted disease. The fact that both were infected is proof that sexual

intercourse did occur between them further implicating to the Appellant in this offence.

In his defence the Appellant claims that he was framed. He gives no possible reason why **PW1** his 10 year old sister would frame him on such a charge. There is no evidence of any pre-existing grudge between the two. The complainant claims that the doctor gave false testimony against him. I further fail to see what would motivate the doctor a practitioner in a public hospital to frame the Appellant whom he did not know at all. There is no evidence of any previous relationship or dealings that could have caused bad blood between them. The Appellant did not raise any such issue in his cross-examination of the doctor. This defence has no merit and I find that the learned trial magistrate was right in dismissing it.

Finally I am satisfied that the Appellant was clearly and positively identified as the man who raped the complainant, whom he was fully aware was his sister. The offence of Incest was proved beyond a reasonable doubt. The Appellant's conviction was sound both in law and based on the facts. I hereby confirm the same.

The appellant was accorded an opportunity to mitigate after which the learned trial magistrate sentenced him to serve twenty (20) years imprisonment. No doubt the trial magistrate considered the seriousness of the offence and the fact that the complainant was a minor of tender age in imposing the sentence. The sentence was lawful and I do uphold the same. The upshot of the above is that this appeal fails in its entirety. The conviction and sentence of the lower court are 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:-
Mr. Onserio for State
Appellant in person

M. ODERO

JUDGE

14/10/2010