REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 133 OF 2007

(From Original Conviction and Sentence in Criminal Case No. 71 of 2007 of the Senior Resident Magistrate's Court at Taveta: ***J.M. Githaiga – S.R.M.)***

JONA NGALA KILIMBI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant **JONA NGALA KILIMBI**, has filed this appeal contesting his conviction and sentence by the learned Senior Resident Magistrate sitting at Taveta Law Courts. The Appellant had been arraigned before the lower court on 5th February 2007 on a charge of **INCEST BY MALE CONTRARY TO SECTION 20(1) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the offence were that:-

"On the 21st day of January, 2007 at M Village in Taita Taveta District within Coast Province, being a male person had carnal knowledge of N N a female person who was to his knowledge his daughter aged 9 years."

The Appellant denied the charge and his trial commenced on 31st May 2007. The prosecution led by **INSPECTOR MUASYA** called a total of five (5) witnesses in support of their case. The facts were that on 22nd January 2007 at about 9.00 A.M. two women **E S PW1** and **H S PW2** both neighbours of the Appellant noticed the Appellant's 9 year old child playing outside. She was not wearing any panties. The two women called the child and questioned her. She told them that her father had instructed her not to wear panties in the evening. The child revealed that the Appellant had defiled her severally. **PW1** and **PW2** examined the child's private parts and noted seminal fluid. They reported the matter to police. The child was taken for medical treatment and the Appellant was later arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was put on his defence in compliance with S. 211 Criminal Procedure Code. He elected to give an unsworn defence in which he denied the charge. On 20th August 2007, the learned trial magistrate delivered his judgement in which he convicted the Appellant of the offence of Incest and after listening to his mitigation sentenced him to serve thirty (30) years imprisonment.

The Appellant appealed against this conviction and sentence. **MR. ONSERIO** learned State Counsel opposed the appeal and urged this court to uphold both the conviction and sentence of the lower court.

Being a court of first appeal I am guided by the decision of the Court of Appeal in the case of **OKENO – VS- REPUBLIC [1972] EALR** where it held"-

> ***"It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court shall be upheld."***

I have perused the grounds of appeal raised by the Appellant in his written submissions. He submitted that the delay in arraigning him before a court amounted to a denial of his constitutional rights as guaranteed by S. 72(3) (b) of the Constitution of Kenya. No doubt here the appellant is referring to the old Constitution of Kenya which was in force at the time of his arrest. S. 72(3) (b) of that Constitution provided that any suspect arrested and held on suspicion of having committed a non-capital offence was required to be brought before a court within 24 hours of his arrest. The Appellant does not state how long he was detained in police custody but from the charge sheet it is evident that having been arrested on 22nd January 2007, the Appellant was not taken to court until 5th February 2007 fourteen (14) days after his arrest. The Appellant further submits that following the decision in the case of **ANN NJOGU & OTHERS –VS-REPUBLIC MISC. APP. 551/2007** this delay entitles him to an automatic acquittal. I do not agree. Our jurisprudence has developed somewhat. Courts have held that whilst the pre-trial rights of a suspect must be guarded and upheld, these pre-trial rights must be balanced against the right of the public to have all charges heard to their logical conclusion. This was the decision of the Court of Appeal in the case of **ELUID NJERU NYAGA –VS-REPUBLIC CRIMINAL APPEAL 182/2006.** A delay in bringing a suspect is not grounds for an automatic acquittal. The Appellant retains his right to sue for and recover damages for his extended stay in custody. In my own view the 14 days does not amount to an inordinate delay taking into account the fact that this charge involved a sexual offence committed in a relatively remote part of Kenya, where medical evidence would need to be sought and obtained. I therefore dismiss this ground of the appeal.

Moving on to the substance of the appeal, the charge the Appellant faces is that of Incest by male which is defined as sexual intercourse with a female relative including a daughter. The fact that the complainant **PW5** was the biological child of the Appellant is not in any doubt. **PW5** states at page 9 line 16

> ***"I know the accused in the dock who is my father."***

The Appellant on his part does not deny that the child is his daughter.

The complainant alleged that she and her siblings lived alone with their father their mother having left the home following a domestic dispute. She states that the Appellant defiled her several times. She states at page 9 line 19

> ***"The accused undressed me. He removed the panties I was wearing. He lay on me. He inserted his penis in my vagina. I felt pain. I cried. My siblings were sleeping. The accused had sexual intercourse with me earlier."***

This is very clear and cogent evidence from a child so young. She has given a detailed account of what her father did to her. Her evidence is corroborated by **PW1** and **PW2** who confirms that they saw the child playing with no panties on. When they questioned her she informed them that her father had told her to remove them. **PW1** and **PW2** examined the complainant's private parts and saw seminal fluid. They then called in the police. Both **PW1** and **PW2** were neighbours to the family. They had no grudge against the Appellant and no reason to fabricate evidence against him. They were simply good Samaritans who noticed a problem and took action. Indeed **PW1** went on to accommodate the child until the children's officers took her into their custody. Further corroboration of the complainant's evidence is provided by **PW4 DR. HENRY N'GENO**, the medical officer from Taveta Sub District Hospital. He testified that he examined the complainant. He found bruises on both her labia majora and minora. A vaginal swab revealed presence of spermatozoa. His conclusion was that the complainant had been defiled. From this incontrovertible evidence I am satisfied that the complainant was indeed defiled as she alleged.

The complainant positively identified the Appellant as the man who defiled her. She knew the Appellant very well as he was her father. The complainant was consistent in the identity of her assailant as she also told both **PW1** and **PW2** that it was her father who defiled her. This was his own child who had no

possible reason to frame him on any offence.

In his defence the Appellant alleged that the charge was instigated by his former wife one Wambui. He has not shown how or why Wambui could have influenced **PW1** and **PW2** to testify against him. He was also not shown what influence if any Wambui could have had over the child as there is no evidence that she was the complainant's biological mother. I find this defence to be a mere fabrication, more so because the Appellant did not raise it all in his cross-examination of either **PW1** or **PW2**.

In her judgement the trial magistrate observed at page 12 line 4

"The court has considered the evidence on record. PW1 EUNICE SHEVSA, PW2 HADIJA STEPHEN and the complainant impressed the court as credible witnesses who had no reason to frame up the accused."

The trial magistrate had the advantage of seeing and hearing the evidence and was best placed to comment on the demeanour of the witnesses. I am in agreement with the above findings. On the whole I am satisfied that the prosecution did prove their case beyond a reasonable doubt. I find the conviction of the Appellant to have been sound both in fact and in law. I have no hesitation in confirming the same.

The court did allow the Appellant an opportunity to mitigate. He was thereafter sentenced to serve thirty (30) years imprisonment. No doubt the court considered the heinous nature of the offence and the young age of the complainant. The Appellant's actions have scarred her for life. Instead of protecting his child the Appellant turned into a predator and defiled her. A stiff and deterrent sentence was called for. I do uphold the thirty (30) year sentence imposed by the trial court. The upshot is that this appeal fails. The conviction and sentence of the lower court are hereby confirmed and upheld.

Dated and Delivered in Mombasa this 8th 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
8/10/2010