



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 215 of 2008**

**J.R.W.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From the original conviction and sentence in Criminal Case No. 1013 of 2007 of the**

**Senior Resident Magistrate's Court at Githunguri by L. K. Mutai**

**– Senior Resident Magistrate)**

**JUDGEMENT**

The appellant was charged with incest of a child contrary to section 20(1) of Sexual Offences Act No.3 of 2006 Laws of Kenya. The particulars are that on the 23<sup>rd</sup> and 24<sup>th</sup> day of September 2007 in Kiambu District within Central Province had carnal knowledge of M.W.W, a girl aged 7 years, who to his knowledge at the time of the act was his daughter. He also faced an alternative charge of indecent assault contrary to section 11(1) of Sexual Offences Act No.3 of 2006. The facts of the case as presented by the prosecution is that the complainant who is aged 7 years is a daughter to the appellant and that on the material time the appellant was the one who was in charge of the safety, protection and well being of the minor. On the material day the appellant undressed the minor and had sexual intercourse with her on several times. He then told her not to disclose the ordeal to anybody and later washed the soiled clothes in order to conceal the evidence of sexual intercourse. The minor stated that she disclosed the ordeal to a Mr. Jicho and Kijana who took her to hospital where she was treated. It is also the evidence of PW1 that on the material day the appellant had come with another girl and as he tried to sleep with her the girl ran away. It is also her evidence that on the material day her mother was away in Nakuru meaning that she was alone in the house with the appellant. Under cross examination from the appellant the minor replied;

***“You are the one who did me bad things. Nobody told me to say you sexually assaulted me.”***

Pw2 Samuel Njoroge Kinyanjui stated that on 25<sup>th</sup> September 2007 at about 7 p.m. he had been informed that the complainant had been defiled by her father. He then alerted the Assistant Chief and with the help of the neighbours the complainant was taken to [G ] Health Centre where she was referred to Githunguri Police Station. And since the complainant's mother was away to Nakuru he took her to his house where he instructed his wife to take care of her until her mother returned from Nakuru.

PW4 PC Eric Ogutu who was attached to Githunguri Police station stated that on 26<sup>th</sup> September 2007 he received the appellant from the members of the public with an allegation that he had defiled a minor who was his daughter. He then booked the report and escorted the child to Githunguri Health Centre for treatment. He also referred the minor to Nairobi Women Hospital for further treatment and counseling.

PW5 Dr. Nguru based at Githunguri Health Centre produced a P3 form which was filled by his colleague

since he was conversant with his signature and handwriting. The P3 form produced by PW4 confirmed that the lower abdomen of the complainant was tender and her hymen was perforated. It was confirmed the walls of her private parts were severally bruised indicating that she had been sexually assaulted on several occasions.

After the close of the prosecution case the appellant was put on his defence but he denied any involvement with the charges preferred against him. The appellant now claims that he was convicted on insufficient evidence and that the conviction was improper and unlawful. In my view if there is reasonable doubt created by evidence brought forward by the prosecution, then the case of the prosecution has not been proved beyond reasonable doubt. In that regard it is the duty of the prosecution to prove its case beyond reasonable doubt and to seal all loopholes which may give the benefit of doubt to the appellant. The evidence of the complainant is that she was sexually assaulted by her father after a girl he brought home ran away from him. And that he had severally had sexual intercourse with her with a warning not to disclose to any person. The evidence of PW2 and PW3 confirm that the complainant had been defiled and that she was defiled by the appellant. This evidence is supported by the medical report from Nairobi Women Hospital and the P3 form which was produced as exhibit 2 and 3 respectively. I therefore agree with the trial court that as a result of the evidence given by the complainant and the two medical reports which support the assertion by the complainant is a clear indication that the complainant was actually sexually assaulted. The question is whether the sexual assault was carried out by the appellant. In my assessment of the evidence of the complainant and the medical evidence, I am satisfied that it is the appellant who sexually assaulted his own daughter. The evidence by PW1, PW2, PW3, PW4 and PW5 is consistent and straight forward that it is the appellant who sexually assaulted the complainant. In deed there is no material to show that the appellant was set up in the way he was charged with the present offence. The history as indicated in the two medical reports clearly shows that the complainant had a history of defilement carried out by the person who had the trust and security of the complainant. There is no reason or basis why the complainant would make up a case against her own father save the fact that she was prompted by the urge to speak the truth and to reveal her ordeal to the members of the public. As was stated by the trial court the evidence by the prosecution is clear, consistent and unshaken by the defence on cross examination and I am in agreement with the trial court that the evidence of the complainant is cogent and forthright.

In the premises there is sufficient and overwhelming evidence to link the appellant with the commission of the offence. The complainant clearly narrated how she was sexually assaulted by her father who warned her not to tell any person. She informed PW2 and PW3 who reported the matter to the relevant authorities. In my humble view the evidence of PW2 and PW3 corroborated the evidence of PW1. The evidence of the doctor further confirms that there was sexual intercourse and that there was penetration in the private parts of the complainant.

After he was put on defence the appellant testified that his daughter had reported to him that one Njuguna had defiled her. That evidence was not supported by any evidence and can only be termed as an afterthought to mislead the court from seeing the clear acts or omissions by the appellant. As stated earlier the trial court warned itself before allowing the evidence of a single witness, however, I add by stating that the circumstances surrounding the commission of the offence as given by PW2 and PW3 and as corroborated by the P3 form and the medical report from Nairobi Women Hospital is a clear manifestation that the appellant is the one who committed the offence subject to this appeal. In short the charges against the appellant was proved beyond reasonable doubt and that there is no basis to interfere with the sound decision reached by the trial court. The appeal has no merits and it is hereby dismissed.

On sentence I think the trial court took into account all the relevant factors but nevertheless proceeded and gave a maximum sentence as provided under section 20 (1) of the Sexual Offences Act No.3 of 2006 which provides to imprisonment for life. I appreciate that the offence committed by the appellant is very serious and cannot be underestimated. However, the trial court should not have given the maximum sentence without stating the reason for doing so. In the circumstances of this case and without underestimating the seriousness of the offence, I set aside the life imprisonment sentence and substitute with a prison term of 40 years with effect from the date of sentence. Order that the appeal against conviction fails but on sentence it succeeds to the extent stated hereinabove.

Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of September 2009.

**M. WARSAME**

**JUDGE**