



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 179 of 2007

T K N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

T K N, the Appellant was charged with incest by male contrary to **Section 166(1)** of the **Penal Code**. The allegation against him was that on 4th July 2005 at *[particulars withheld]* Estate, Elburgon in Nakuru District within Rift Valley Province, he had unlawful carnal knowledge of M M N who was, to his knowledge, his daughter. He denied the charge but after trial before the Ag. Principal Magistrate at Molo, he was convicted and sentenced to 20 years imprisonment. He has appealed against the said conviction and sentence.

In his submissions the Appellant contended that the charge against him was a frame up by his own family members. He claimed that his other brothers who were sired by a different man conspired with his mother to deny him of his share of the family land. They beat him and chased him away. When his wife died his mother took his children and went to live with them.

While admitting that he slept in the same house with his daughter, M M N, he denied defiling her. He said on the material night he slept with the wife he had taken after the death of M M mother in another room in the same house. The following day the girl went to school and he was surprised when he was later arrested and charged with defiling her.

Mr. Mugambi for the Republic dismissed the Appellant's claim that the charge against him was a frame up as an afterthought. He submitted that the Appellant's conviction was based on overwhelming evidence and urged me to dismiss the appeal on both conviction and sentence.

The case against the Appellant was that he requested his daughter M M N, who was staying with her grandmother after the death of her mother, to go to his house so that he could buy some clothes for her. She went and during that night he defiled her and warned her not to tell anybody about it. The following day the girl's teachers noticed that she was walking with difficulty but she did not tell them what the problem was because of the warning she had been given. When she went home her grandmother noticed that and after some prodding she said that she had been defiled by her father. The matter was reported to police and the Appellant was arrested and later charged with this offence.

Having considered the Appellant's submissions as well as those of the learned state counsel and having carefully read the record in this appeal I find it unmeritorious.

M M N, the complainant, **PW1**, whose evidence the trial court believed, is a girl aged about 12 years old. She testified that during the night of 3rd July 2005, she slept in her father's two roomed house at Elburgon. Her father slept in one room and she slept in the other. While she was asleep she woke up in the dead of the night to find her father on her having removed her underpants. He defiled her and she felt a lot of pain. He warned her not to tell anybody about that. The following day she went to school and her teachers noticed that there was something amiss but she feared to tell them because of the warning her father had given her. When she went home her grandmother noticed that she was walking with difficulty and prodded her to revealing what had happened to her. She was taken to hospital where she was examined and a report was made.

Dr. Betty Ouma, PW5, who examined PW1 after 15 hours corroborated the complainant's evidence. She confirmed that she had indeed been defiled. Although there were no obvious bruises on the complainant's genitalia she found that the hymen had been broken and there was a whitish discharge from her vagina. A high vaginal swab revealed that she had been infected with gonorrhoea.

The Appellant's mother and brother testified in the case and he never asked them a single question. I am satisfied and I agree with Mr. Mugambi that the allegation of a frame up is an afterthought. The Appellant's own daughter especially did not have any reason to frame up her father. Even if she was sucked into the family feud, who defiled her that night in Appellant's house? In the circumstances I find no merit in the Appellant's appeal against conviction and I accordingly dismiss it.

The appeal against sentence has also no merit. The Appellant defiled his own daughter and caused her trauma which she will have to live with for the rest of her life. The 20 years he was given against life imprisonment provided for by the section under which he was charged cannot in the circumstances of this case be said to be harsh. I therefore dismiss the appeal against sentence as well.

In the upshot this appeal is hereby dismissed in its entirety.

DATED and delivered at Nakuru this 10th day of July 2008.

D. K. MARAGA

JUDGE