



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

Criminal Appeal 217 of 2004

(From Original Conviction and Sentence in Criminal Case No. 294 of 2003 of the Principal Magistrate's Court at Nyahururu – L. K. MUTAI - S.R.M)

D K W APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant, D K W was charged with the offence of incest by male contrary to Section 166 (1) of the Penal Code.

The particulars of the offence are that on the 25th day of October 2002 in Laikipia District of the Rift Valley Province, being a male person had unlawful carnal knowledge of AN a female person who was to his knowledge his daughter.

The appellant also faced an alternative charge of **indecent assault on female** contrary to **Section 144 (1) of the Penal Code**.

The particulars of the alternative charge are that on the 25th day of October 2002 in Laikipia District of the Rift Valley Province, unlawfully and indecently assaulted AN by touching her private parts.

The appellant pleaded not guilty to the charges and after a full trial he was convicted of the first count and sentenced to five (5) years imprisonment. Being dissatisfied with the conviction and sentenced by the learned trial magistrate, he has appealed to this court and raised several grounds of appeal. The appellant took issue with the fact that the trial court failed to note that the report by the complainant was made after considerable delay and thus the report made to the police by the complainant was an afterthought. The appellant also challenged the quality of evidence which be termed as flimsy and full of doubts.

The appellant also faulted the trial court for failing to consider that there was a grudge between him and the complainant and finally for failing to consider his defence.

This appeal was opposed by **Mr. Koech**, the learned Senior State Counsel who argued that the offence of incest against the appellant's daughter was proved as can be seen from the evidence on record.

The complainant was warned by the appellant of due consequences if she ever reported the incidence and that explains the delay in reporting the incident to the police. However, the complainant reported to her mother immediately.

As regards the sentence, Counsel submitted that the same is lenient considering the seriousness of the offence.

I hereby wish to review the evidence that was before the trial court briefly. The complainant, (**PW 1**) is also the daughter of the appellant. During the month of March 2002, the appellant requested her to accompany him to R so that he could get for her a secondary school. **PW 1** obliged, but they could not get a school, but insisted the appellant enrolled her in a tailoring school. Both the appellant and complainant were living in the same house, later the appellant lost his job as a watchman and so the complainant also dropped out of the tailoring college, and while staying at home, **PW 1** testified how the appellant used to quarrel her for flimsy reason.

On 25th October 2002, the appellant made sexual advances to the **PW 1** which she ignored but the next day the appellant knocked her down, removed her clothes and raped her. The appellant also threatened her with dire consequences if she revealed this to anybody. On 28th October 2002, **PW 1** reported the incident to her mother who did not take action.

J W,(PW 2) the mother of the complainant also testified and recounted to the court how the appellant took the complainant to go and live with him in R. After six (6) months, the complainant reported to her how she was raped by her own father. **PW 2** accosted the appellant who denied having committed the offence.

Lucy Njeri Ngugi, PW 3 was a community worker, she had heard the ordeal **PW 1** used to go through and on 6th January 2003, she met with **PW 1** whom she took to R Health Centre where she was examined and found to be pregnant. The matter was reported to the police and the appellant was arrested.

Richard Kateiya, (PW 5) is a clinical officer attached to Nanyuki District Hospital but at the time of this incidence, he was attached at R Health Centre. He said he examine **PW 1** who was aged 17 years and found no injuries or infection, however **PW 1** was pregnant which was an indication that **PW 1** who was three (3) months pregnant had had sexual intercourse.

Put on his defence, the appellant gave unsworn statement and denied the offence. He argued that if he had committed the offence, the complainant would have made the report to the police station which was within the locality. He contended that the complainant framed up the charges because he took issue with her behaviour of visiting towns and thus the complainant threatened to put him in jail.

This is the brief summary of the evidence. This being the first appeal, this court has the mandate to re-consider and re-evaluate the evidence and arrive at its own determination of whether to uphold the conviction, and in doing so bear in mind that the court never saw or heard the witnesses and give due allowance for that (*See the case of **Njoroge –Vs- Republic [1987] KLR 19***).

The evidence before the trial court raises only one issue that is the issue of credibility of the witnesses especially the complainant. The trial court accepted her evidence and this court cannot fault that decision which was based on the trial court's own assessment of the demeanour and credibility of the witness.

The other issue that is raised by this appeal is regarding the defence by the appellant. There was evidence by the complainant about the rape, and the trial court analysed this evidence against the appellant's defence which did not shake the prosecution's case. I find no material to support the contention by the appellant that he was framed up by the complainant. The complainant told her mother about the incidence, she was threatened by the appellant, who was in a position of power and authority over her (*note he was living with the complainant and paying for the tailoring school*) it is understandable why the complainant did not report the matter to the police. The evidence on record especially by **Zablon Makori, PW 4**, a pastor at Rumuruti was to the effect that the complainant lived with his family for two

weeks in August 2002 with the express permission of the appellant.

I am satisfied that the learned trial magistrate properly directed himself and evaluated the evidence and arrived at the correct conclusion. It is inconceivable that no matter what grudge there was or disagreement, a daughter would go to the length of implicating her own father with such a heinous, shameful and serious offence like rape. The initial silence by the complainant is understandable due to trauma and stigma attached to such an abomination.

Accordingly, the conviction was proper in the circumstances and considering the seriousness of the offence and the extent of the psychological effect the ordeal may have on the complainant for the rest of her life, the sentence of five (5) years imprisonment is lenient. The upshot of the above findings is that the appeal is dismissed and the conviction and sentence confirmed.

Judgment read and signed on 17th day of November 2006.\ 04

MARTHA KOOME

JUDGE