**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCRA NO.E024 OF 2021**

**JK.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original judgment of Hon. C.A Mayamba in***

***Kilungu Principal Magistrate's Court PMCR (S.O) Case No.35 of 2020***

***pronounced on 8th October, 2020).***

**JUDGMENT**

1. The appellant was charged in the magistrates' court with incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 21st July 2020 at [Particulars Withheld] Village in Mukaa Sub County within Makueni County intentionally penetrated the vagina of VKM with his penis who was to his knowledge his daughter a child aged 8 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of offence were that on the same day and place intentionally touched the vagina of VMK a child aged 8 years with his penis.

3. He denied both charges. After a full trial, he was convicted of the main count of incest and sentenced to 40 years imprisonment.

4. Dissatisfied with the conviction and sentence, he has appealed to this court, relying on the following grounds –

***1) That he was charged and sentenced to serve 40 years imprisonment when there was no plea of guilty entered.***

***2) That both counts of incest and defilement (should be indecent acts) were fabricated on him.***

***3) That he is a family man and bread winner of his family.***

***4) That he is a first offender who has never been caught on the wrong side of the law.***

***5) That his sentence should commence from the date of his arrest.***

***6) That he prays that this court set aside his case and set him at liberty.***

5. The appeal proceeded by filing written submissions. I have perused and considered the submissions of both the appellant and the Director of Public Prosecutions.

6. This being the first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32.**

7. I have re-evaluated the evidence on record. In order to prove their case, the prosecution called four (4) witnesses. Pw1 was the victim who stated that she was a standard 2 pupil aged 8 years and that the appellant who is the father took her to the farm and had sexual intercourse with her. She said that the mother Pw2 had at that time gone to hospital, and on her return she informed her about the incident.

According to her also, she informed the mother about the incident in the presence of the father (the appellant). According to her, this was not the first time of such an act with the appellant, and that after the first incident she informed her younger sister S about the appellant's action.

8. Pw2 was MKK, the wife of the appellant and mother of the victim. It was her evidence that on 21/7/2020 she took a young child to hospital and when she came back home in the evening, she found JS crying. She also noted that the victim had difficulty in walking. When she touched the victim's private parts and enquired from her, the girl declined to say anything. After pressing her to say what the matter was however, she disclosed that the father had defiled her in the farm. Pw2 said that she did not have money to take the girl to hospital and managed to make a report on xx/x/xxxx and took the victim to Kilungu hospital. She said that the victim was born on 24/3/2013 and produced the birth certificate as an exhibit.

9. Pw3 was PC Florence Menza the Investigating Officer who received the report on 29/7/2020 at 3pm when the victim and the mother went to Salama police station. It was her evidence that the report made was that the victim did not inform the mother till the sister (Syombua) informed the mother that she had seen the victim naked.

10. Pw4 was Eric Kasiamani a Clinical Officer who medically examined the victim and noted a broken hymen. He also medically examined the appellant and found nothing unusual.

11. In his defence, the appellant tendered a sworn defence testimony denying the offence. He described how he was arrested by Police Officers who came with his wife, and claimed that his wife fabricated the allegation against him because she wanted him to sell land which he had declined.

12. This is a case of incest. The prosecution was required to prove the relationship of the victim and the appellant. Secondly, as the victim was said to be below 18 years, the prosecution was required to prove the age of the victim as the sentence is determined on the basis of the age. Thirdly, the prosecution was required to prove sexual penetration even if of a partial nature. Lastly or fourthly, the prosecution was required to prove the identity of the culprit.

13. With regard to the relationship of the victim and the appellant, the evidence both of the prosecution and the defence is in agreement. The victim was the daughter of the appellant. Thus just like the trial court, I find that the prosecution proved the biological relationship of the victim and the appellant beyond any reasonable doubt. They were daughter and father.

14. With regard to the age of the victim, again there is no dispute. The victim (Pw1) stated her age. Her mother Pw2 also confirmed the age and produced the birth certificate. It was not contested. I find that the prosecution proved beyond reasonable doubt that the victim was 8 years at the time of the alleged incident.

15. I now turn to the issue of penetration. The medical evidence of broken hymen is prima facie evidence of sexual intercourse, as the hymen of a girl can be missing for various other reasons.

16. The victim Pw1 stated that the father had sexual intercourse with her on 21/7/2020. She also stated that it was not the first time. She said that she informed her mother about it on that 21/7/2020. The mother Pw2 MKK said that the victim was initially reluctant to disclose the incident but, on persuasion, she disclosed the matter. It was her evidence that she reported the incident on 29/7/2020 because she did not have money.

17. I find that gap of six (6) days of silence by Pw2 to be quite telling. Indeed, Pw2 might not have had money to take the victim to hospital, but sexual offences being what they are, I cannot imagine for once that Pw2 as a mother could not inform anybody about the incident, not even a friend or a neighbour or relative for 6 running days. In my view, such a delay in reporting could only be justified if she explained the reason why she did not inform anybody for that long period. With sexual offences being both sensitive and very serious offences with harsh penalties, I have no choice but to give the benefit of the doubt to the appellant, as from the evidence on record, there could have been a high probability of domestic disagreement as explained to the trial court by the appellant in his defence.

18. With regard to the culprit, since I have found that sexual penetration was not proved beyond reasonable doubt, I also find that the prosecution has not proved that the appellant is the culprit of the alleged offence.

19. Consequently, I will have to allow the appeal on conviction and also set aside the sentence.

20. For the above reasons, I allow the appeal of the appellant, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

## DELIVERED, SIGNED & DATED THIS 17TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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## GEORGE DULU

## JUDGE