



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 51 OF 2019

SAMUEL NABURUK CHEPSAGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement, conviction and sentence dated 7th May 2019 of

Hon. L. N. Kiniale, Principal Magistrate in the Principal Magistrate's Court at Sirisia

in Criminal Case No. 46 of 2018, Republic v Samuel Naburuk Chepsagat)

JUDGEMENT

[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]

1. The appellant has appealed against his conviction and sentence of twenty years' imprisonment in respect of the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.
2. The state has supported both the conviction and sentence.
3. In this court the appellant has in his petition of appeal raised four grounds of appeal. Ground 4 is the most important, in which the appellant has faulted the trial court both in law and fact by relying on contradictory evidence of the complainant to convict the him. SC (her initials), is the complainant (Pw 1). She testified on oath after successfully undergoing a *voire dire* examination. It was her evidence that the appellant is her biological father. Additionally, she testified that the appellant had always been having sex with her. It was also her evidence that in one night in December 2017 as they were sleeping with her sister, the appellant went to where she was and removed her panty. He then proceeded to forcefully have sex with her.
4. There is further supporting evidence from Onesmus Wafubwa (Pw 4), who is a clinical officer. After examining S. C. PW 4 found her to be pregnant.
5. In answer to the foregoing evidence, the appellant testified on oath that it was the son, who was having sexual intercourse with S. C. He also testified that the chairman of nyumba kumi had framed the instant case against him.
6. The real issue before this court is whether the proper charge against the appellant was incest or defilement. Section 20 (1) of the Sexual Offences Act creates the offence of incest. In addition to providing a sentence of imprisonment for not less than ten years, it also provides for divesting the convicted person of parental control over the victim and such person cannot be appointed a guardian of the said victim in terms of section 20 (3) of the Sexual Offences Act. Ms. Nyakibia for the state submitted that the charge preferred against the appellant is proper. In other words, it is not defective. She cited the case of *D. K. K. O v Republic (2018) eKLR*, in which the court held that the preferment of a charge of defilement instead of a charge of incest did not prejudice the appellant in any way. That case concerned a niece and an uncle. I am unable to agree with pronouncement of the court in that case.
7. In the light of the statutory provisions of section 20 of the Sexual Offences Act, I find that the charge that ought to be have been preferred against the appellant is incest and not defilement. This was a fundamental defect. The appeal succeeds with the result that the conviction and sentence are hereby quashed. It is moot to consider and determine the other grounds of appeal.
8. The next issue for consideration is whether this court ought to order for a re-trial or not. I find that the potentially admissible evidence

against the appellant might lead to a conviction. I hereby order that the appellant be tried on the offence of incest before another magistrate other than the one who convicted and sentenced him. The appellant is to be remanded in custody pending his being produced before the court of the Chief Magistrate at Bungoma to be tried on a charge of incest.

Judgement dated and signed at Narok this 27th day of August 2019.

J. M. Bwonwonga

Judge

AND

Judgement signed, dated and delivered in open court at Bungoma this 12th day of February 2020.

S. N. Riechi

Judge

12/2/2020