



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CRIMINAL APPEAL NO 7 OF 2019**

**SK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original conviction and sentence in Bomet Sexual Offence Case No. 1 of 2018 (Hon. P. Achieng (PM) dated 26<sup>th</sup> February 2018)**

**JUDGMENT**

1. The appellant was convicted by the Magistrate's Court at Bomet for incest contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 10 years imprisonment.

2. He has now come to this court on appeal on three (3) grounds that-

***1) The learned magistrate erred in law and fact on relying on the evidence of PW2, PW3, PW4 which testimony was never corroborated by an independent party.***

***2) The learned magistrate erred in law and fact by relying on contradictory testimony of the prosecution witnesses which story was incredible, unbelievable to justify his imprisonment.***

***3) The learned magistrate erred in law and fact by convicting and sentencing him to imprisonment for 15 years without considering that there was a dispute between PW3 and the appellant regarding a hoe cultivating the farm.***

3. The appellant also filed written submissions which he relied upon, and elected not to highlight the same in court.

4. Mr. Murithi the Learned Principal Prosecution's Counsel for the state opposed the appeal and submitted that the prosecution called 5 witnesses and that PW1 the complainant gave a clear account of her ordeal with her father who forced her to have sexual intercourse with her when an uncle PW3 and the public came to rescue her. Counsel added that the doctor PW2 produced a medical report, which confirmed sexual penetration.

5. This being a first appellate court, I am duly bound to consider the evidence on record afresh and come to my own independent conclusions and Inferences-See Okeno -Vs- Republic (1972) EA 32.

6. I have reconsidered the evidence on record and the submissions of both the appellant and the state.

7. The burden is always on the state in a criminal case to prove a case against an accused person beyond any reasonable doubt. The accused person does not have a burden to prove his/her innocence.

8. In the present case PW1 the complainant clearly testified in court on how her father the appellant took her to a house in their homestead at about 5:00 pm and defiled her. PW3 DC a brother of the appellant having been alerted by his wife went to that house and found PW1 lying down and the appellant having lowered his trousers. There was a resulting fight between him and the appellant who was drunk and members of the public came to the scene and the appellant was arrested. The doctor PW2 Dr. Ronald Kibet on the other hand testified that a medical examination of the complainant two days after the incident, established bruises in her vaginal canal and the hymen was missing. The doctor concluded that there was sexual penetration and produced the medical examination report, called P3 form.

9. In my view, though in parts of the evidence, PW1 the complainant referred only to an attempt by the appellant to defile her, the totality of the evidence on record from the prosecution witnesses was that sexual intercourse between the appellant and the complainant did actually take place that evening. Even if it was a mere attempt, that would be an offence under Section 20 (2) with the same consequences.

10. There is no dispute about the relationship of the appellant and the complainant. They were a father and a daughter. Thus in terms of Section 20 (1) of the Sexual Offences Act, the ingredients of the offence were established.

11. The sentence is lawful. The maximum sentence was life imprisonment as the complainant was under 18 years of age. I thus find no merit in the appeal. I dismiss the appeal and uphold both conviction and sentence.

Right of appeal explained.

**Dated and delivered at Bomet this 4<sup>th</sup> day of March 2020.**

**GEORGE DULU**

**JUDGE**

**4/3/2020**