



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 68 OF 2019**

**(From Original Conviction and Sentence in Sexual Offence No. 9 of 2018**

**by the Kakamega Chief Magistrate's Court at Kakamega)**

**DOK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant was convicted by Hon. TA Odera, Senior Principal Magistrate, of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006, and was sentenced to life imprisonment. The particulars of the charge against the appellant were that on the 5<sup>th</sup> day of April 2018 at [particulars withheld] Village, Bumini Location, in Mumias East Sub-County of Kakamega County, he, intentionally and unlawfully, caused his penis to penetrate the vagina of MN, a girl aged 14 years, who was, to his knowledge, his daughter.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act, No. 3 of 2006. The particulars of the alternative charge were that on the same date and at the same place, stated in the main count, he had intentionally touched the vagina of the subject child with his penis. There was also a second Count, that on the same date and at the same time, he had unlawfully assaulted the said child, causing her actual bodily harm. The second count was subsequently withdrawn.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called five (5) witnesses.

4. MO, the complainant, testified as PW1. She gave sworn testimony. She identified the appellant as her father. She said that she was 14 years old, having been born in November 2003. She explained that on the material day, 5<sup>th</sup> April 2018, the appellant came home and found her stepmother and her siblings at home. He beat her stepmother and the children, accusing the children of failing examination. He moved her stepmother and her siblings to another house. When left alone with her, he assaulted her with a piece of firewood, she screamed but no one came to her rescue. He, thereafter, sexually assaulted her. He stripped her naked and inserted his penis into her vagina. He left the house, whereupon she left the house, and went to the house of her uncle, BK, and reported the matter to him, but he referred her to her grandfather. Before she could get to her grandparent the appellant followed her and returned her to his house, removed her clothes and again inserted his penis into her vagina. He then left, after locking the house from the outside. She remained locked up in there for two days, until she was rescued by her maternal uncles, who took her to her maternal grandmother, and from thence to hospital and to the police.

5. PW2, ENM, was the maternal grandmother of PW1. She described the appellant as a man who was formerly married to her daughter, the mother of PW1. She testified that she was informed, on 7<sup>th</sup> April 2018, that PW1 had been seriously physically and sexually assaulted by the appellant. The next morning, she sent her sons and nephews to the home of the appellant to pick up PW1. They came with her, and she took her to Makunga Hospital, and later to Shianda Police Station. The doctor at the hospital informed her that the child had been defiled. Judith Ester Boka Karan, (PW3), was the village elder, to whom the incident was reported by a sister-in-law of the appellant. She testified that she had heard screams, on 5<sup>th</sup> April 2018, from outside at about 10.00PM. She sent her son to investigate, who reported to her that the screams were coming from the home of the appellant. The next day a stepmother of the appellant reported to her, that she had been informed by BK, that the appellant had physically and sexually assaulted PW1. The witness went to the home of the appellant, and saw PW1 outside. Her face was swollen and covered with a scarf. She informed the local Assistant Chief of the incident.

6. Mila Ombuya testified as PW4. He was a clinical officer at Makunga Health Centre. He produced medical records relating to PW1. He explained that she was a 14 year old girl, who complained of pain in her eyes, throat and vagina. She gave a history of physical and sexual assault by her father on 5<sup>th</sup> April 2018. She had been slapped and given body blows, locked up in the house and defiled twice by her father.

She was locked up in the house until she was rescued by other relatives. She informed that during the incident the appellant threatened her not to report, and he guarded her. She was taken to hospital on 8<sup>th</sup> April 2018. She looked sick and was anxious. Both her eyes, thighs and the front side of her neck were swollen. Her vagina was bruised, and a white discharge came out of it. Her hymen was torn. HIV, pregnancy and syphilis tests were negative. He put her on medication. He concluded that the child had been sexually abused. Number 236459 Inspector of Police, Frederick Okuta, testified as PW5. He was the police officer who received the report and investigated the matter. He testified that PW1 was escorted to the police station by PW2. The report made was that the child had been defiled by his father. The child was taken to hospital and the appellant was subsequently arrested. He stated that he did not take the appellant for medical examination as he was arrested one and half months after the incident.

7. The appellant was put on his defence. He gave a sworn statement and called one of his wives and two of his children as witnesses. He denied the offence, and explained how he came home after work, and was annoyed after seeing his children's report cards. He told them to lie down so that he could discipline them, but PW1 refused. He beat them, but was restrained by his wife. His brother came to find out what was happening, and was informed he was disciplining his children. He denied sexually assaulting the child. DW2 was his wife, JAO. She explained that the appellant came home and disciplined his children for poor grades, but PW1 refused to lie down, was slapped by the appellant, and she went out and refused to return, until her uncle BK intervened. The children gave similar evidence.

8. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of this judgment.

9. Being dissatisfied with the conviction and sentence, the appellant appealed to this court, and raised several grounds of appeal. He averred that the trial court convicted on evidence that was malicious contradictory and fabricated, that he was not subjected to corresponding medical examination as envisaged by section 36 of the Sexual Offences Act, the evidence on the medical examination of PW1 was unworthy and short of merit, the case was poorly investigated, the sentence was excessive, and the court shifted the burden of proof on to him.

10. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of **Okeno vs. Republic (1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

*“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”*

11. The appeal was canvassed on 6<sup>th</sup> February, 2020. The appellant relied on written submissions that he placed before the court, while Mr. Mutua, Prosecution Counsel, relied on the trial court record.

12. I have read through the record of the trial court. The testimonies of the witnesses were fairly straightforward. PW1 spoke clearly of what befell her in the hands of the appellant. She positively identified him as the perpetrator. The events happened in the early evening at their home. PW2 and PW3 said they got reports of what had transpired not so long after the event. PW4 attended to PW1 shortly after she was rescued from her home and PW5 received a report of the incident shortly thereafter. The inconsistencies that the appellant points at were minor. There was no obligation for the appellant to be medically examined, and in any event he was arrested a month and half after the incident. There is nothing to suggest that the burden of proof was shifted to him. I agree with the state that the minor inconsistencies did not dent the prosecution's case.

13. I am not persuaded that the appellant has a case for me to quash the conviction.

14. On sentence being excessive, the appellant had been charged with incest contrary to section 20 of the Penal Code, which states as follows:

*“20. Incest by male persons*

*(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years: Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”*

15. It will be noted that the victim of the offence was aged fourteen years old years at the material time. The offence created under section 20(1) provides for a maximum of ten years upon conviction. The proviso to section 20(1) of the Sexual Offences Act provides that where the victims are minors the maximum penalty is life imprisonment. The proviso to section 20(1) says:

*“Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”*

16. The penalty available for incest with respect to fourteen-year-old victims is discretionary life imprisonment under the proviso to section 20(1). The trial court took that into account when it was sentencing the appellant. It noted that the appellant was the father of the child in

question, the right of the child to parental care and the effect of the offence on her.

17. I am satisfied that the trial court made the right considerations. The appellant as the father of the complainant had an obligation to protect her from exploitation of any kind by anyone, including of a sexual kind. It was no doubt a gross breach of trust for the appellant to be the one to exploit her sexually instead of protecting her. The home, ideally should form the bulwark of protection for underage girls. It is where they should feel most secure under the care of their fathers. It is unfortunate that those who ought to protect then turn against them in the most violent manner within the walls of their homes where they should be at the securest. Such conduct calls for the harshest punishment, to make the perpetrator pay for the crime and to deter him from ever exploiting other underage girls under his care. I shall not interfere with the sentence imposed by the trial court as I find it to be deserving in the circumstances.

18. The appeal herein has no merits, and it is hereby dismissed.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF MAY, 2020**

**W MUSYOKA**

**JUDGE**