



**REPUBLIC OF KENYA**

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

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 85 OF 2017**

**BETWEEN**

**AOA .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original conviction and sentence of Hon. S. Onjoro, SRM dated 11<sup>th</sup> January 2017 in Criminal Case No. 2203 of 2013 at the Magistrate's Court at Kisii)**

**JUDGMENT**

1. The appellant, **AOA**, was charged with the offence of incest contrary to **section 20(1)** of the **Sexual Offences Act, 2006** ("the **Act**"). It was alleged that on 21<sup>st</sup> December 2013 in Kisii Central District within Kisii County, he intentionally and unlawfully caused an act of penetration to MNS who was to his knowledge his aunt. He also faced an alternative charge of committing an indecent act with an adult contrary to **section 11(9)** of the **Act** based on the same facts. He was convicted on the principal count and sentenced to serve 15 years' imprisonment.

2. The appellant has now appealed against the conviction and sentence on the grounds set out in his petition of appeal and written submissions. He contended that the prosecution did not prove the case beyond reasonable doubt. He stated that the incident was not reported to the police at the earliest opportunity. He also pointed out that the relationship between him and the complainant was not established and that his defence of a grudge was not considered. He also submitted that the sentence imposed on him was harsh and excessive.

3. Counsel for the respondent, Mr Otieno, opposed the appeal. He submitted that the prosecution proved the case beyond reasonable doubt. He further submitted that the appellant was well known to the complainant and that he was caught at the scene of the incident. He added that the act of penetration was corroborated by medical and other evidence. He urged the court to dismiss the appeal.

4. Before I proceed to consider the grounds of appeal, I remind myself the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction. The court must bear in mind that it neither heard or saw the witnesses testify. In dealing with this task, I shall outline the evidence before the trial court.

5. The complaint (PW 1) testified that she was aged 84 years. She narrated what happened to her on the evening of 21<sup>st</sup> December 2013 as follows:

At about 5.00pm – 6.00pm the accused came back and said he wanted me to be his wife. I was seated on the bed. He came in through the window. He held me and (I) started to scream but the neighbours houses are far. He pushed me on the bed upwards. He had put on a trouser, but unbuttoned the trouser and removed and used his genital organ into my vagina until he ejaculated and ran away. He raped me for about an hour..... After the accused fled through the window, people saw him run away due to my screams and he fled to his brother's house where he was apprehended.

6. After the appellant had run away, PW 1 was taken for initial treatment at a Christamarriane Hospital where she was treated. The matter was reported to Kisii Police Station. She was issued with a P3 Form which was filled at Kisii Level 5 Hospital on the next day. PW 1 testified that the appellant's father was her brother in law and that she knew him well.

7. The complainant's son, PW 3, testified that the complainant informed him that she had been raped by the appellant. He went and informed PW 2 and a community police member, PW 4. They all came to the home where they found PW 1 crying. She told them that she had been raped by the appellant. PW 2, PW 3 and PW 4 testified that they examined the complainant's private parts and noted that she was bleeding

and the blanket on which she was laying on had a whitish discharge and stool. They assisted to take her to the hospital where she was treated. PW 4 told the court that he went to the appellant's home and removed him from under the bed and rushed him to Kisii Police Station as members of the public wanted to lynch him.

8. The investigating officer, PW 6, testified that on 21<sup>st</sup> December 2013 at about 7.00pm, while he was at the police station, the appellant was brought by members of the public on the allegation that he had committed an act of rape. He escorted PW 1 to Christamarriane Hospital where she was treated and discharged. He visited the scene and recovered a blanket stained with blood and stool which he produced in evidence. PW 5, a clinical officer at Kisii Level 5 Hospital testified that he examined PW 1 on 22<sup>nd</sup> December 2013 and filled the P3 form. He noted that she had vaginal lacerations and her vagina was bleeding. He concluded that there was penetrative sexual act.

9. In his unsworn statement, the appellant stated that PW 1 was his aunt. He denied committing the offence. He recalled that on the material day, he worked the whole day making bricks and when he went home in the evening, he was arrested and later charged. He told the court that he was charged because he disagreed with PW 1 over the land she was using while he was in Mombasa and which he had decided to sell.

10. After reviewing the evidence, the trial magistrate was satisfied that the offence was proved. The appellant was charged with the offence of incest under **section 20(1)** of the **Act** states as follows:

20. (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. [Emphasis mine]

11. From the definition, the prosecution may either prove an indecent act or an act of penetration. An "*indecent act*" under **section 2(1)** of the **Act** is defined as an unlawful intentional act which causes, "*(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration.*" While "*Penetration*" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

12. A key element of the offence of incest is the relationship between the appellant and complainant. It is also immaterial there act of penetration is consensual as the offence of incest is aimed at prohibiting sexual relations between relatives of a certain degree. In this case, PW 1 testified that she was the appellant was her nephew. The appellant did not contest this fact and admitted that PW 1 was his aunt in his unsworn defence.

13. As regards the element of penetration, PW 1's testimony, which I have set out above, was clear and left no doubt that the appellant committed an act of penetration. Her testimony was corroborated by PW 2, PW 3 and PW 4 who saw her immediately after the incident in a state of distress with injuries on her private parts. PW 6 produced the blanket with blood and stool stains identified by PW 1, PW 2 and PW 4 confirming that PW 1 was subjected to forceful penetration. Finally, the medical evidence produced by PW 6 confirmed that the act of penetration and the fact that she was bleeding.

14. The appellant was not a stranger to PW 1. He was known her and to the other witnesses. Further, he was arrested by PW 4 immediately after the incident and taken to the police station. The totality of this evidence explodes the appellant's defence that he did not commit the felonious act. His defence that he was framed because of a land dispute was a statement unsupported by any other evidence and was an afterthought. He did not put any question regarding the land issue to PW 1, PW 3 and PW 4 who were well known to him and who would have had knowledge of the issue. I am therefore satisfied that the prosecution proved all the elements of the offence of incest and I affirm the conviction.

15. I now turn to the sentence. The minimum sentence under **section 20(1)** of the **Act** is 10 years' imprisonment. In this case, I note that PW 1 was an old woman and the act of penetration was without her consent. The sentence of 15 years' imprisonment was deserved and it is also affirmed.

16. The appeal is dismissed.

**DATED and DELIVERED at KISII this 8<sup>th</sup> day of FEBRUARY 2019.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.