



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 44 OF 2018**

**AMO.....APPELLANT**

**=VRS=**

**THE REPUBLIC.....RESPONDENT**

**{Being an Appeal against the Conviction and Sentence of Hon. A. C. Towett – RM dated and delivered on the 8<sup>th</sup> day of November 2018 in the Original Nyamira CM Sexual Offence No. 25 of 2017}**

**JUDGEMENT**

The appellant was charged with Incest contrary to Section 20 (1) of the Sexual Offences Act. The particulars of the charge were that on diverse dates between 1<sup>st</sup> January 2017 and 4<sup>th</sup> July 2017 in Nyamira County being a male person caused his genital organ penis to penetrate the genital organ vagina of TNN aged 10 years a female person who was to his knowledge his daughter.

He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

The particulars of this charge were that on diverse dates between 1<sup>st</sup> January 2017 and 4<sup>th</sup> July 2017 at Nyamira County he intentionally and unlawfully touched the genital organ vagina of TN alias N a child aged 10 years with his genital organ, penis, who was to his knowledge his daughter.

The appellant pleaded not guilty to the charge following which the prosecution called six witnesses and the appellant testified on oath. In the end the trial Magistrate after evaluating the evidence by both sides found the appellant guilty, convicted him and sentenced him to life imprisonment on the principal charge.

Being aggrieved by that conviction and sentence the appellant preferred this appeal.

One of the issues raised by the appellant both here and in his submissions in the lower court is that he did not understand the language used in the trial. However, going by his written submission it is clear that he comprehended the proceedings fully.

I have as the first appellate court not only considered the rival submissions of the parties but also evaluated the evidence in the lower court so as to arrive at my own determination. First of all, I have noted a typographical error on the coram of the day the plea was taken as appears in the typed proceedings. The plea was not taken by Hon. K. W. Kiarie – PM but by A. C. Towett – RM. That error ought to be corrected. More importantly it is my finding that the voire dire was not properly conducted. The fact that a child goes to Church and is taught not to lie does not necessarily imply that the child understands the nature of an oath or that she understands the duty of speaking the truth. Does the child understand the consequences of lying – what it can do to her and to others? Does she know why it is important to tell the truth and not lies in the circumstances of the matter before court? Does she know why people take oath or swear on the Bible before giving evidence? Does she attach any meaning to the Bible for instance? It would only be upon receiving positive answers to these or other questions to that effect that a court would be satisfied that the child understands the nature of an oath to justify reception of her evidence on oath. It is my finding that the appellant's right to a fair trial was compromised. Despite this being a very serious charge the trial was conducted in a very casual manner with the trial Magistrate even omitting to indicate the language(s) in which evidence was given. As there was evidence that could sufficiently prove the charge, I direct that the matter be remitted back to the lower court to be tried on a priority basis by a Magistrate other than A. C. Towett – RM.

**Signed, dated and delivered in open court this 6<sup>th</sup> day of June 2019.**

**E. N. MAINA**

**JUDGE**