



**REPUBLIC OF KENYA.**

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

**(CORAM: MAJANJA J.)**

**CRIMINAL APPEAL NO. 57 OF 2016**

**BETWEEN**

**J M.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. M.L. Nabibya,*

*SRM dated 27<sup>th</sup> January 2016 at Butali Principal Magistrate's Court in Criminal Case No. 430 of 2015)*

**JUDGMENT**

1. The appellant, **J M**, was charged and convicted of the offence of incest contrary to **section 20** of the **Sexual Offences Act** and sentenced to 30 years' imprisonment. The particulars of the offence were that on 23<sup>rd</sup> April 2015 within Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of L M, a child aged 13 years, who was to his knowledge his daughter.
2. The appellant now appeals against conviction and sentence. He contends that the evidence against him was weak, doubtful and inconsistent and could not support a conviction. The State opposes the appeal on the ground that the prosecution proved all the elements of the offence.
3. The complainant (PW 1) testified on oath after a *voire dire*. She stated that she was 12 years old and that the appellant was her father and that her mother had passed away. She recalled that on 23<sup>rd</sup> April 2015, the appellant came where she was staying with her mother's relatives, took her away by force and went to his home. After making dinner, the appellant insisted that they share a bed. He put her on his bed and proceeded to insert his penis into her vagina. In the morning, she made breakfast and when he sent her to buy snacks, she went back to her relatives. She reported what had happened to the aunt. She was then taken to hospital for examination and treatment.
4. According to PW 2, a village elder, the appellant was arrested on 4<sup>th</sup> June 2015 at his home when he had taken PW 1. He stated that PW 1 had disappeared about 41 days before that date and he consequently arrested the appellant.
5. The Clinical Officer (PW 3) who examined PW 1 recalled that PW1 was brought to the hospital on 22<sup>nd</sup> April 2015 on account of the complaint of defilement. PW 3 filled the P3 form on 5<sup>th</sup> June 2015. The investigating officer (PW 4) told the court that the complaint of defilement was lodged at Kabras Police Station on 25<sup>th</sup> April, 2015 when PW 1 was brought by her relatives. She issued the P3 form and investigated the matter.
6. In his sworn defence, the accused denied that he committed the offence. He told the court that he was old and was arrested by the elders when going to visit his brothers.
7. I have considered the entire evidence and I am not satisfied that the case was proved. Whereas PW 1 was said to be telling the truth, there was no explanation why the appellant was not arrested immediately after the offence yet he was well known. He was arrested after two months and according to PW 2, he was with PW 1 when he was arrested. PW 1 did not allude to this fact in her testimony. Further, although the matter was reported early, the P3 form was issued and recorded much later. I also note that PW 1 told her relatives what had taken place but none of them were called to testify.
8. All this evidence leads me to conclude that the conviction is not safe. The appeal is allowed and the conviction and sentence quashed. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at KAKAMEGA this 6<sup>th</sup> day of April 2018.**

**D. S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Ng'etich, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.