REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 62 OF 2016

J O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.77 of 2015 of the Chief Magistrate's Court at Busia by Hon. H.N Ndung'u (Miss) – Chief Magistrate)

JUDGMENT

1. **J O,** the appellant, was convicted for the offence of incest contrary to section 20 (1) of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on 15th May 2015 at **[particulars withheld]** Division of Busia County, being a male person he caused his penis to penetrate the vagina of **N.N,** a female who was to his knowledge his daughter.

3. He was sentenced to serve life imprisonment. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised six grounds of appeal which I have summarized as follows:

a) That the learned trial magistrate erred in law and in fact by ignoring gross violations of his rights as envisaged under Articles 49 and 50 of the Constitution.

b) That the learned trial magistrate erred in law and in fact by relying on medical evidence which lacked probative value.

c) That the learned trial magistrate erred in law and in fact by relying on hearsay and contradicting prosecution evidence.

d) That the learned trial magistrate erred in law and in fact by disregarding his defence.

5. The state opposed the appeal through M/s Ngari, the learned counsel.

6. The facts of the prosecution case were briefly as follows:

While the complainant's mother was in her farm, the appellant was at home with the children. He send two of his children for an errand. This is when he had an opportunity to defile **N.N**. The children reported the incident to their mother and the appellant was arrested after a report was made to the police.

7. The appellant gave an account of what he did throughout the day and denied that he committed the offence.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

9. Article 49 of the Constitution stipulates the rights of an accused person. The appellant has complained that upon his arrest he was not informed the reasons for the said arrest. Whereas Article 50 of the Constitution prescribes the rights to a fair hearing. The appellant has complained that he was not supplied with copies of statements and documentary evidence.

10. The appellant was arrested on 16th May 2015 which was on a Saturday. The plea was taken on 19th May 2015. If we assume that indeed he was not informed of the reason for his arrest, then he must have known the reason when the charge was read to him. This did not prejudice

him in any way. This complaint is however an afterthought for he never raised it at the time of the plea or during trial.

11. On 19th May 2015 when the plea was taken, the learned trial magistrate made an order suo moto that the appellant be supplied with copies of statements. At the time of the hearing or earlier, the appellant did not complain to the court that the order had not been complied with. The assumption to make is that he never raised the complaint for he had been supplied with the necessary documents.

12. One of the ingredients of incest like in other sexual offences is proof of penetration. The appellant has attacked the medical evidence contending that it did not prove penetration. Section 2 (1) of the Sexual Offences Act No. 3 of 2006 defines penetration as follows:-

> ***"penetration" means the partial or complete insertion of the Genital organs of a person into the genital organs of another person;***

From this definition, penetration need not be complete. The medical evidence can be interpreted to mean that there was partial penetration.

13. **J.B.E (PW1),** in his evidence testified that his father (the appellant) sent him and his brother to buy alcohol at Jackie's house. Upon their return, they found him lying on **N.N**, defiling her. He was defiling her on a mattress. When their mother returned home, she reported to her. Their mother is **E A (PW2).** This is what she testified:

Upon her return home, **J.B.E (PW1)** informed her that when he returned home from an errand for their father, he found **N.N** crying. When he asked her what the matter was, she informed him that the appellant had taken her to the bed, removed her pants and lay on her. She further said that when she called **N.N**, the latter confirmed the incident was in bed. These are two competing versions by the prosecution and there was no attempt to reconcile them. Can we rely on the evidence of **J.B.E (PW1)** who is said to be the source of both versions? The court of appeal in the case of In **NDUNGU KIMANYI vs. REPUBLIC (1979) KLR 282** the court of appeal held:-

> ***The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence***.

14. I find that it was unsafe to rely on the prosecution evidence with such glaring contradictions. **J.B.E (PW1)** who is said to be the source of both versions cannot pass the test of a credible witness.

15. Had the learned trial magistrate addressed her mind to the contradictions, she ought to have found merit in the defence of the appellant. I there quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and **SIGNED** at **BUSIA this 3rd day** of **May, 2018**

KIARIE WAWERU KIARIE

JUDGE