



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 62 OF 2017

J O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. E.K Nyutu, PM dated 12th April 2017 at the Principal Magistrate's Court at Nyamira in Criminal Case No. 235 of 2015)

JUDGMENT

1. The appellant, **J O O**, was charged and convicted of the offence of committing incest contrary to **section 20(1)** of the *Sexual Offences Act*, ('the *Act*'). He was sentenced to life imprisonment. The particulars of the offence were that;

On the 7th day of March 2015 in Manga Sub-County within Nyamira County intentionally penetrated the vagina of CKO with his penis who was to his knowledge his daughter.

2. The appellant now appeals against conviction and sentence on the grounds that the prosecution did not prove its case beyond reasonable doubt.

3. As this is a first appeal, I am required to independently evaluate the evidence and reach my own conclusion as to whether to uphold the conviction bearing in mind that I neither heard or saw the witnesses testify.

4. The child (PW 1) gave unsworn testimony. She stated that the appellant was her father and that she was going to nursery school. She recalled that on the material day, the appellant called her to his bedroom. He told her to get on top of the bed, then locked the door. He removed her clothes and his trousers and organ then did "*bad things to her.*" She stated that he put his organ into her vagina. Since her mother, PW 2, was not at home, when she came back she told her what the appellant had done to her.

5. PW 2 recalled that on 7th March 2015, she had left her children including PW 1 at home. She came back at about 11.00am and found the appellant with the children then proceeded to make lunch. PW 1 then told her what the appellant had done to her. She said that the appellant had threatened her. Since PW 2 feared to confront the appellant about the issue, she went to inform the clan elder. In the meantime, she examined PW 1's vagina and saw bleeding and noted that the child was in pain. The village elder referred her and the child to the hospital.

6. The village elder, PW 4, testified that PW 2 came with PW 1 to her office on 7th March 2014 to report that PW 1 had been sexually assaulted by the appellant. She advised her to take PW 1 to hospital. She later took her to report the matter at the police station.

7. The Clinical Officer from Kisii Teaching and Referral Hospital, PW 5, testified that he examined PW 1 on 10th March 2015. He confirmed from the hospital notes that she had been examined and treated at the hospital on 7th March 2015 and the labia majora was tender and swollen. The hymen remained intact although there was blood discharge from the vagina. A high vaginal swab revealed red blood cells and pus cells which PW 5 opined were indication of partial penetration.

8. The investigating officer, PW 7, testified that a report of the incident was made by PW 2 on 7th March 2015. The appellant was arrested and they were both taken to hospital. The appellant was examined by PW 6, a clinical officer, and nothing remarkable noted. The appellant was later arrested by the Assistant Chief, PW 3, on 10th March 2015 and charged.

9. The appellant denied the offence in his unsworn statement. He complained that his wife had been unfaithful and that he was being framed.

10. The offence of incest under **section 20** of the **Act** is proved by either an indecent act or by penetration of a person who is related to the child in the prohibited degrees.

11. In this case it is not in doubt that the appellant was the father of PW 1. This is confirmed also by PW 2 and the appellant in his defence. PW 1 gave clear evidence on how the appellant proceeded to lure her into the bedroom and sexually assaulted her. Her description of the act left no doubt that an act of penetration took place. PW 1's testimony was corroborated by that of PW 2 who examined her private parts immediately after the ordeal and the medical evidence. According to PW 5, there was partial penetration which under **section 2** of the **Act** falls within the meaning of penetration.

12. PW 1 reported the incident to PW 2 who, because of fear reported to PW 4, instead of confronting the appellant. Although the appellant lay his woes on PW 2, the evidence clearly points to him. There is no reason the child could lie or at least none emerged from the proceedings. The issue of disagreement was not put to PW 2 in cross examination hence it was an afterthought. The totality of the evidence is that the prosecution proved its case.

13. Although the appellant complained that the age of the child as stated in the alternative count of an indecent act differed from the age proved, I do not think this is material. I am of the view that since incest includes an indecent act, it is unnecessary to include an alternative charge under **section 11(1)** of the **Act**. Nevertheless, the age of the child under **section 20** of the **Act** is immaterial to prove the offence as the key ingredient is the relationship. At any rate, it was not disputed that PW 1 was a child below the age of eighteen years.

14. The appellant complained that he was initially charged with attempted incest contrary to **section 20(2)** of the **Act** but the charge sheet was later substituted. He submitted that he was never informed of the charge. The record reflects otherwise. The court granted leave to substitute on 16th September 2015 and he pleaded to the fresh charge whereupon the hearing commenced.

15. Considering all the evidence, I am satisfied that the offence of incest was proved. The sentence of life imprisonment was within law as the child was below eleven years consistent with **section 8(2)** of the **Act**, it was warranted.

16. I affirm the conviction and sentence. The appeal is dismissed.

Dated and delivered at Kisii this 12th day of October 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.