



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. 96 OF 2014**

**F N M ..... APPELLANT**

**V E R S U S**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case No. 10 of 2014 of the PM Magistrate's Court at Mwingi)*

**JUDGMENT**

The appellant was charged with attempted incest Contrary to Section 20(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 3rd May 2014 at Thitani Location Migwani District of Kitui County attempted to cause his penis to penetrate the vagina of M. N who was to his knowledge his daughter a child aged 14 years. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 10 years imprisonment.

Aggrieved by the decision of the trial court, the appellant filed his appeal on 6th November 2014. Before the hearing of the appeal, the appellant filed an amended petition of appeal as well as written submissions. His grounds of appeal in the amended petition of appeal are three and are as follows:-

1. The trial magistrate's erred in law and fact to convict him without considering that the prosecution failed to discharge the burden of proof against him as required under the law in Section 109 and 110 of the Evidence Act.
2. The trial magistrate erred in law and facts to convict him without considering that the evidence adduced in support of the complaint and the prosecution case was contradictory and full of inconsistencies Contrary to Section 163 of the Evidence Act.
3. The learned magistrate upon execution of his verdict failed to consider that the alleged case emanated from vendetta between him and the complainant's mother.

At the hearing of the appeal, the appellant relied on his written submissions, which I have perused and considered.

The learned prosecuting counsel Mr. Orwa submitted that there were no contradictions in the prosecution case as the evidence of PW 1, PW 2, and PW 3 corroborated each other. Counsel further argued that if there existed any contradictions the same must be relating to form and not of substance.

With regard to the issue of a grudge, counsel submitted that no grudge existed as the appellant did not cross examined on the same.

Counsel submitted further that there was ample evidence on record that PW 2 heard noises and on proceeding to the house saw what happened. Counsel emphasized that, in cases of attempted defilement, there was no need for the production of a P3 form. Counsel submitted also that the only other person in the one roofed house was a boy aged 4 who could not comprehend what happened and therefore there was no failure by the prosecution to call any witnesses.

Counsel submitted also that the mitigation of the appellant was considered and that the court went out of its way to call for a probation officers report before sentencing.

According to counsel, the defence of the appellant was a mere denial and that the prosecution had proved all the ingredients of the offence of attempted incest. Counsel urged the court to dismiss the appeal.

In response the prosecuting counsel's submissions, the appellant stated that the counsel was not saying the truth in that there were contradictions when PW 1 at one point, said that he was naked but in cross examination said that he was wearing a pair of shorts. He also said that PW 2 said that he had removed all the clothes which was different from what she later said that he had unbuttoned his pair of trousers. He stated that he asked questions in cross examination on the contradictions. He said that the probation report also confirmed the existence of a dispute between him and PW 2.

During the trial the prosecution called four witnesses. PW 1 was the complainant aged 14 years. After being tested by the court on her understanding of the nature of an oath and her intelligence, she was sworn by the trial court.

It was her evidence that on the night of 3rd May 2014 at around 11.00 am, the appellant who was her father came home at 11.00 Pm while drunk. They slept in a one roomed house which was shared by the entire family, with a bed for the appellant and his wife PW 2 and the children sleeping in another bed.

On arrival, the appellant asked his wife PW 2 to go and warm food for him. The mother went out to the kitchen which was approximately 15 meters away. Thereafter the appellant pulled the blanket which covered PW 1, and tried to undress her by pulling her inner wear. She screamed and PW 2 came from the kitchen.

When PW 2 arrived the appellant became harsh, hit PW 2 with a stick and chased them all out of the house. They stayed awake outside the house till morning when they went and reported the incident to the Administration Police and later to the Regular Police. The appellant was arrested when he followed them at the Administration Police Camp. She stated that the appellant had made three previous attempts to defile her by offering to buy her some shoes.

In cross examination, she admitted that there were differences and disagreement between the appellant and his wife PW 2. When shown the police witness statements, she agreed that some words had been added without her knowledge and that she did not sign for those additional words.

PW 2 was K N the wife of the appellant who was also the mother of the complainant PW 1. It was her evidence that they shared a single room with her husband the appellant and the children. That the room had two beds, one used by herself and the husband and the other by the children.

She stated that on the 3rd of May 2014 at 11.00 Pm, the appellant arrived home and asked her to go to warm food for him. She proceeded to the kitchen which was about 5 meters away from the main house.

While warming the food, she heard noise from the main house and when she went there she found that the appellant had switched off the torch and was standing beside the children bed.

When she asked him what he was doing he kept quiet, hit her on the head and ordered her to get out. She stated that she went out together with the complainant and sat outside the house until daybreak, when they proceeded to report the incident to the Administration Police. It was her evidence that the appellant also went to the Administration Police camp and was thus arrested. She stated that the appellant was fond of

creating disturbances when he came home. She also stated that her daughter the complainant, was aged 14 years and produced a copy of her birth notification.

In cross examination, she stated that the appellant was drunk on that day and that it was his habit to come home drunk. She also stated that the appellant had made several previous attempts to defile the complainant. She stated that the other child was in deep sleep when the incident occurred and therefore could not be a useful witness.

PW 3 was PC Jackson Karumba of Migwani Police Station, the Investigating Officer. He stated that on 4 of May 2014 between 3.00 Pm to 4.00 Pm, he was informed that a person had been arrested at the Administration Police camp. He proceeded to arrest the suspect who said that he had differed with his wife who had framed him with the offence. When he went to the scene the next day, he found that the kitchen was about 5 – 10 meters away from the main house.

PW 4 was APC Issack Momanyi of Thitani Administration Police Camp. It was his evidence that on 4th May 2014 at 7.00 am, a mother and a daughter reported an attempted defilement case wherein the mother said she heard her daughter shouting “**why are you flashing a torch at me**”. The mother also reported that she ran to the house and found that the appellant had removed the under pant. He stated that he saw the appellant coming towards the Administration Police Camp and arrested him.

In cross examination, he maintained that PW 2 found that the under pant of the complainant had been removed.

When put on his defence, the appellant stated that he was married to K and that they had five children. He stated that the complainant was the second born. That on 3rd of May 2014 at 6.00 am, they left with his eldest son who was older than the complainant to a place of work until 6.00 Pm when he went to Thitani market. His son proceeded home earlier.

He left the market at around 8.00 Pm on his bicycle and arrived home at 9.00 Pm. When he knocked at the door, his wife did not respond but the complainant opened the door and when he asked his wife why she did not open the door, she started abusing him saying that he had been with prostitutes.

He then asked to be served with food and PW 2 said that he should be served by the children and was eventually served food by the complainant. According to him, when he went to bed the complainant called her mother and she did not respond.

The following day, he woke up at 6.00 Am went to the farm, and noticed that some beans and maize had been damaged by a donkey. He then enquired about the destruction of the crops from the his wife PW2, and she ran behind the house. He later left for Thitani market and, outside the Administration Police Camp, he met Issack Momanyi an Administration Police Officer, informed him about a complaint made that he had attempted to remove the underpant of the complainant. According to him, the charges were framed by his wife. He denied committing the offence.

This being a first appeal, I am required to reevaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the advantage of seeing witnesses testify to determine their demeanor. See the case of **Okeno –vs- Republic (1972) EA 32**.

The appellant has raised a number of complaints on appeal. The burden is always on the prosecution to prove an accused person guilty beyond reasonable doubt. The defence has no burden to prove the accused innocent, but may merely raise some doubts. This position was clearly articulated in the English case of **Woolington -vs- DPP (1932) AC 462**, whose reasoning has been consistently applied by the courts in Kenya.

The appellant has complained of contradictions in the prosecution evidence. PW 2 the mother of the complainant, who is the wife of the appellant testified that as she was warming food she heard noise from the main house which was nearby and she rushed there. She found the appellant standing beside the

children bed switched off the torch.

She said that at the Administration Police Camp the appellant admitted committing the offence. However PW3 the Investigating Officer said that the appellant did not admit committing the offence. He said the appellant said they had a disagreement with his wife PW 2 and she was framing him. This was a contradiction in the prosecution evidence.

PW 4 also contradicted the evidence of PW 2, when he said that PW2 told him that the appellant had removed the underpant, while PW2 said in court that the appellant had switched of the torch.

The incident occurred at night, and it was dark, because nobody tendered evidence of existence of a light except the torch of the appellant. The torch was said by PW 2 to have been switched off when she came back from the kitchen. PW 2 also said that when she came from the kitchen, she found the appellant standing near the children's bed in that single roomed house. She did not describe anything else that would show that the appellant attempted or was attempting to undress the complainant. The fact that the appellant hit her with a stick would amount to an assault, but in my view he did not itself constitute attempted incest. The contradictions on important details herein are crucial.

In addition to the above, there is evidence from both PW 1 and PW 2 that the appellant had made previous attempts to commit incest with the complainant. However there is no indication from any of the prosecution witnesses that any report was made on the attempts to either relatives, village headmen or any person in authority just for the records. In my view the three consistent attempts by the appellant to commit incest with the daughter, was a serious matter which should have been reported to someone. The fact that appellant was a man of drunken habits, and the fact that he was fond of creating disturbances whenever he came home, should have been a good reason for reports to have been made incest with his daughter. The absence of any evidence of a report on such a serious matter begs the question if indeed there were such attempts to commit incest, and whether PW1 and PW2 were credible witnesses.

The Investigating Officer PW 3 PC Jackson Karuba also went to the scene the day after report was made. It was his evidence that the distance between the one roomed house where the incident occurred, and the kitchen was a mere 5 to 10 metres apart. One would wonder if the appellant truly wanted to commit incest with his daughter, when his wife was just 5-10 metres away? The appellant tendered a long detailed defence. In my view taking into account the long defence tendered by the appellant and his cross examination of the prosecution witnesses, together with his first statement to the Administration Police PW4, that he was implicated by his wife because of reasons which he gave, his version of the story is believable.

In a criminal cases, when the defence creates a believable doubt against the prosecution case or evidence, the benefit of such doubt has to be given to an accused person, the result of which is an acquittal. From the facts and evidence before the trial court, I find that the appellant had created a reasonable doubt about his guilt. The learned magistrate should therefore have given him the benefit of doubt and acquitted him.

In my view the matter herein appears to been precipitated by a long standing domestic misunderstanding between a wife (PW2) and a husband (the appellant) which was twisted and reported to the police as a criminal case of attempted incest, while in reality it was not.

I find that the appeal has merits. The prosecution did not prove its case against the appellant to the required standard in the criminal case.

I allow the appeal and quash the conviction. The sentence also has to be set aside, and I do so. I order that the appellant be set at liberty forthwith unless otherwise lawful held.

**Dated and delivered at Garissa 1<sup>st</sup> day of March 2016.**

**GEORGE DULU**

**JUDGE**