



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 91 OF 2015**

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

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal against conviction and sentence from the judgment of the Hon.V.Kachuodho Resident Magistrate, Kangema delivered on 10<sup>th</sup> December, 2015 in P.M.Criminal Case No.12 of 2013)

**JUDGMENT**

1. The Appellant, was charged with four Counts; Count I was for the offence of incest contrary to **Section 20(1)** of the **Sexual Offences Act**; the particulars of the charge was that on the 8<sup>th</sup> June, 2013 in Nyeri County, the appellant being a male person caused his member to penetrate that of CWG a girl aged 11 years who to his knowledge his daughter;
2. The alternative charge was the offence of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; the particulars of the offence are that on the above mentioned date the appellant intentionally touched the private parts of CWG.
3. Count II was for the offence of incest contrary to section 20(1) of the Sexual Offences Act; the particulars are that on the 8<sup>th</sup> June, 2013 in Mathira East District within Nyeri County caused his member to penetrate the anus of CWG a girl aged 11 years whom he had knowledge to be his daughter.
4. Count III was the offence of Sexual Assault contrary to Section 5(1)(a)(i) of the Sexual Offences Act; the particulars of the offence was that on the 1<sup>st</sup> July, 2013 in Mathira East District within Nyeri County the appellant sexually assaulted LMG a girl aged 10 years by inserting his fingers in her private parts.
5. Attempted Incest contrary to Section 20(2) of the Sexual Offences Act was Count IV; the particulars of this offence was that on 1<sup>st</sup> and 2<sup>nd</sup> July 2013 in Mathira East District within Nyeri County the appellant intentionally attempted to touch the private parts of LMG with his member with the knowledge that she was his daughter.
6. After the trial, the Appellant was found guilty and was convicted on Count I and was sentenced to life imprisonment.
7. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and listed five (5) grounds of appeal which are summarized inter alia;

(i) The prosecution did not prove its case beyond reasonable doubt; that it was not proved that he

was the one who committed the act ; that penetration was not proved; that age was also not proved;

(ii) The trial magistrate rejected his sworn statement of defence without giving reasons.

### **ISSUES FOR DETERMINATION;**

8. After hearing the submissions of both the Appellant and Respondent this court has framed the following issues for determination;

(i) Whether the prosecution proved its case to the desired threshold.

(ii) The trial magistrate rejected his unsworn statement of defence without giving reasons.

### **ANALYSIS**

9. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

#### **Whether the prosecution proved its case to the desired threshold.**

10. The trial court conducted a voire dire examination on CWG (**PW1**) and found her to be sufficiently intelligent and that she understood the meaning of an oath; thereafter she was sworn and gave her evidence under oath; on the key ingredient pertaining to age the evidence of **PW1** was that she was eleven (11) years of age; this was corroborated by the Investigating Officer (**PW8**) who produced her Birth Notification Certificate which indicated that she was born on the 24/08/2002 and was aged eleven (11) years at the time of the incident; this document was marked as **“PExb.7”**;

11. The appellant now questions the authenticity of the Birth Notification but at the trial this court notes from the record that the appellant raised no objections to its production; this court is satisfied that the prosecution proved the issue of the age of **PW1** to the desired threshold.

12. The appellant contends that penetration was not proved beyond reasonable doubt; **PW1** narrated in her evidence that her father started defiling her when she was in class 3; that the appellant defiled her on numerous times; he would defile her to use her words **“in her front part or her behind”**; that the appellant would sometimes use his member or sometimes insert his fingers;

13. **PW1’s** evidence on defilement was corroborated by P M G (**PW3**) who was a cousin to the appellant narrated how the appellant had sent his children to her house; when there PW1 confided in her that her father was defiling her; PW3 reported the matter to a Children’s Officer (PW4); the children were referred to Karatina Police Station and then escorted to Karatina District Hospital.

14. Jane Mwendwa Murage (**PW4**) a Community Health Paralegal dealing with children issues also corroborated PW1’s evidence; she stated that she had received reports that the appellant had been defiling **PW1** and had occasion to question her about it and had in the company of **PW** a police officer taken the complainant for medical examination and saw first-hand that **PW1** had a prolapse of the rectum that it was swollen, infected and coming out and that she could not hold back stool nor could she control her bladder and had to use diapers.

15. The evidence of the Doctor Menge (PW5) was that the doctor who had examined the complainant and prepared the medical report marked as **PExb.2** found that the complainants’ hymen was not intact and made a finding that this had been occasioned by penetrative sex.

16. This court is satisfied that the trial court carefully considered the evidence tendered by the prosecution and find that it proved that the ingredient that is penetration was proved beyond reasonable doubt.

17. The offence of incest is defined at Section 20(1) of the Sexual Offences Act as;

**“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years. Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”**

18. The two minors PW1 and PW2 both stated in their testimonies that the appellant was their father; PW3 also confirms that the appellant was her cousin and that he was the father of PW1; PW4 also corroborated the fact that she knew the appellant to be the father of the complainant; PW6 the area chief also confirmed that PW1 was one of the daughters of the appellant.

19. That the appellant in his defence acknowledged that PW1 was his daughter.

20. This court is satisfied that the trial court made a proper finding that the issues of age, penetration, incest by a male and knowledge were all proved by the prosecution to its desired threshold.

21. This ground of appeal is found lacking in merit and is hereby dismissed.

**The trial magistrate rejected his sworn statement of defence without giving reasons.**

22. It is the duty of the trial court to look at the evidence as a whole and then consider whether or not the defence casts any doubt on the prosecutions' case.

23. Having perused the appellant's defence he contends that he was not the one who defiled her; that it was a teacher called Joseph who had defiled his daughter; he further stated that **PW3** had framed him with the offence due to a grudge arising from non-payment of monies; the appellant also had an alibi but never called any witnesses.

24. This court concurs with Learned State Counsels submissions that the defence does not in any way dislodge or controvert the evidence of the prosecution witnesses (**PW1, PW2, PW3, PW4 and PW6**); it is noted that the trial court considered the defence raised by the appellant and arrived at an informed decision and made the following finding;

**“ From the above I find that the prosecution has proved their case beyond reasonable doubt. Their witness testimony was reliable and truthful, with no reason to lie against the accused person. Their evidence was consistent and corroborated to the extent that the accused person was the father of PW1 and PW2 and was the one who defiled PW1.”**

25. This court is satisfied that the trial court analyzed the appellants' statement of defence and weighed it against the evidence tendered by the prosecution and gave good reasons for disregarding it as it did not cast any doubt on the prosecutions' case.

26. This ground of appeal is found lacking in merit and is disallowed.

**FINDINGS**

For the reasons stated above this court makes the following findings;

- (i) The prosecution proved its case to the desired threshold;
- (ii) The trial court properly disregarded the appellants defence and gave sound reasons.

**DETERMINATION**

27. The appeal is found to be lacking in merit and is hereby disallowed.

28. The conviction and sentence are hereby affirmed.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 8<sup>th</sup> day of September 2016.

**HON.A.MSHILA**

**JUDGE**