REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CRIMINAL APPEAL NO. 139 OF 2014

BETWEEN

N O R...APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1026 of 2013 at the

Chief Magistrates Court at Homa Bay, Hon.P. Mayova, Ag. SRM dated on 1st December 2014)

JUDGMENT

1. In the subordinate court, **N O R**, the appellant was charged with two counts of incest contrary to **section 20(1)** of the ***Sexual Offences Act, 2006.*** The particulars of the first count were that on 6th September 2013 at about 6.00 am in[Particulars Withheld] Village within Homa Bay County, he unlawfully and intentionally caused his penis to penetrate the vagina of FA, who to his knowledge was his daughter. The particulars of the second count were that on 6th September 2013 at about 6.00 am in [Particulars Withheld] Village within Homa Bay County, he unlawfully and intentionally caused his penis to penetrate the vagina of IA, who to his knowledge was his daughter. He also faced two alternative counts of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts.

2. After a full trial he was convicted on the first count and sentenced to life imprisonment. He was also convicted and sentenced to 15 years imprisonment on the 2nd alternative count. Both sentences were ordered to run concurrently.

3. He now appeals against the conviction and sentence. In the petition of appeal filed on 9th December 2014, the appellant contends that the complainant in this case did not come to testify and that the children who were offended were not called by the prosecution, that a principal witness one, SO, did not testify and on the whole the prosecution failed to prove its case. Mr Oluoch, learned counsel for the respondent, submitted that the prosecution proved all the elements of the offence.

4. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic*** **[1973] EA 32**).

5. The prosecution case was that FA (PW 1) and IA (PW 2) were sisters and that they were defiled by their father, the appellant. They both gave unsworn testimony on how they were defiled on 6th September 2013. PW 1 testified that she was aged 8 years and in Class 3 and she recalled as follows;

> *At 6.00 am my father came from work at night and came and started carrying us. He removed our blanket and slept on us. He held my thighs and removed my underpants. He slept on me. He did bad things and then we cried. He slept on us. He removed his penis and inserted it in my vagina. I felt great pain. I cried. I did not bleed. That was the first time he did it. He penetrated slowly. He left me to cry.*

6. PW 2 testified through an intermediary. She stated that she was 6 years old and recalled the events of the morning as follows;

> *My mother left us with our father. When my mother was away my father did some bad thing to us at night. We were sleeping with FA in the sitting room. We sleep on polythene on mattress, Out father came where were sleeping. He slept on us. He touched me on my body especially the buttocks and back. He took away out bedsheets and slept on us. He released some things on my thigh. He removed his trouser. He inserted his urinating things in my private parts. I felt great pain.*

7. PW 1 testified that she did not tell anyone on that day and she went for a crusade. Once again on that night, the appellant sexually assaulted her. She reported the incident to a lady called SO, who was a neighbour, and whom she referred to as Nyakisumu.

8. PW 3, an administration police officer from Ndiru AP Post, testified that on 7th September 2013 at about 5.00pm, he received a report from members of the public that an old man was engaged in an act of incest. He proceeded to the homestead of the appellant, whom he did not find. He however found PW 1 and PW 2 who, upon interrogation, narrated their ordeal. He traced the appellant at [Particulars Withheld] trading centre and arrested him. On 8th September 2013, he organized for the girls to be taken to [Particulars Withheld] Health Centre for examination and treatment. He also called the Commanding Officer, Homa Bay Police Station to collect the suspect and take over the matter. PW 5, a police officer attached to the crime office at Homa Bay, received the appellant and the two children from [Particulars Withheld] AP Post. The children narrated to her their ordeal. She issued P3 forms for the children and took them to Homa Bay District Hospital.

9. PW 4, a medical doctor practicing at Homa Bay District Hospital, examined PW 1 and PW 2 on 8th September 2013. He examined PW 1 and observed that she was afraid and traumatized. She had already changed clothes and had taken a bath. He found the labia minora had been inflamed with first degree vaginal tear and the hymen was absent. He did not find any discharge. He concluded that due to the inflammation, the defilement had occurred less than a day before. PW 4 also examined PW 2 and noted that the hymen was intact but there was a whitish discharge. He observed that she too was confused and traumatized. He also concluded that the child had been defiled.

10. PW 6, the Assistant Chief of [Particulars Withheld] Sub-location, testified that on 7th September 2013 at around 6.00pm, while he was at [Particulars Withheld] Centre, he received information from the Chairman of the Community Policing that one of the residents was defiling his children. He stated that the informer was called SO. He proceed to conduct investigations, went to the house of the appellant and found the children who confirmed to him that the appellant used to defile them. He instructed the AP officers to arrest the appellant.

11. After the close of the prosecution case, the appellant was put on his defence and elected to give sworn testimony. The appellant admitted that PW 1 and PW 2 were his children. The tenor of his defence was that there was a grudge between him, his wife and an officer at [Particulars Withheld] AP Post who was having an affair with the wife. He stated that he had a misunderstanding with his wife on 3rd August 2013 because of an affair his wife had with an officer working at [Particulars Withheld] AP Post with their neighbour, SO acting as a go-between. Due to the misunderstanding he beat his wife and SO. They

threatened him and told him that he would be locked up.

12. I have evaluated the evidence and I take the following view of the matter. The appellant was charged with incest under **section 20(1)** of ***the Sexual Offences Act, 2006*** which states as follows:

> *20.* (*1) Any male person who commits* <u>*an indecent act or an act which causes penetration*</u> *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 ………* [Emphasis mine]

13. An *"indecent act"* under **section 2(1)** of the ***Act*** is defined as an unlawful intentional act which causes, *"(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration." "Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

14. The appellant admitted that PW 1 and PW 2 were his children hence the offence of incest was properly laid. PW 1 and PW 2 gave unsworn testimony and no other witness saw them being defiled. Under **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the court may convict a person on the basis of such testimony so long as it is satisfied that the children are telling the truth. Like the learned magistrate, I find that the children gave clear and consistent testimony that was not shaken by cross-examination. Although the appellant suggested that the children could have been coached and that he was being framed, the evidence points to a different conclusion. Both children specifically denied that they were coached to lie when the issue was put to them. Even if the appellant had a dispute with his wife, a certain police officer and his neighbour, why would the two children lie about what the appellant did to them. In addition, there was corroborative medical evidence provided by PW 4, an independent witness, who examined both PW 1 and PW 2 and who observed that they were in a state of trauma and were indeed defiled. The injuries and trauma observed could not be explained in any other way other than what the children stated.

15. At this stage I think it is important to point out that in order to prove incest under **section 20(1)** of the ***Sexual Offences Act***, it is not necessary to prove penetration. The prosecution may prove either penetration or an indecent act to obtain a conviction. It was therefore unnecessary to charge the appellant with an alternative count of an indecent act with a child. In this respect the offence of incest was proved against PW 2 as she clearly testified how she was touched in a manner that constituted an indecent act.

16. The appellant raised the issue why the SO, the informer, could not have been called as she the report of defilement was made to her. **Section 143** of the ***Evidence Act*** states, *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact."* Hence it is not necessary to call all or any particular witness. However, in ***Bukenya and Others v Uganda*** **[1972] EA 549**, the Court held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. In this case, the evidence pointing to the appellant was clear and having found the children were truthful and their evidence was corroborated, the testimony of SO would not add or subtract anything from the prosecution case.

17. The appellant contended that the complainant was not called to give evidence. I understood him to be referring to the said SO but as I stated, her testimony was not necessary. Furthermore in the case of ***Kamau John Kinyanjui v Republic*** **NAI CRApp No. 295 of 2005 [2010]eKLR**, the Court of Appeal settled the issue that in criminal cases, the complainant envisaged under the various provisions of the ***Criminal Procedure Code*** is always the Republic. In this case the children who were subjected to the sexual assault were called to testify.

18. The age of the children was also proved. PW 1 and PW 2 stated that they were 8 years and 6 years respectively. Their testimony was consistent with the fact that PW 1 was in Class 3 while PW 2 was in baby class. PW 4, in his medical evidence, also confirmed their respective ages.

19. For purposes of sentencing the minimum sentence for the offence of incest is 10 years imprisonment while the maximum sentence is life imprisonment. The proviso to **section 20(1)** of the ***Sexual Offences Act*** states;

> *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.*

20. I do not find any fault in imposing the life sentence in respect of the first count as the appellant, had he been charged and convicted of defilement under **section 8(1)** and **(2)** of the ***Sexual Offences Act***, would have been liable to a sentence of life imprisonment. In this instance, the offence is aggravated by the fact that the appellant is the father of the children in whom they put their trust yet he violated it by sexually assaulting them. In fact the evidence suggested that the appellant had been sexually assaulting the children before. A life sentence was indeed warranted.

21. I affirm the appellant's conviction and sentence on the 1st count. I set aside the conviction and sentence on the 2nd alternative count and substitute it with a conviction for incest and impose a life sentence for the same. Both life sentences shall run concurrently.

22. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 10th day of June 2015

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecution instructed by the Office of the Director of Public Prosecutions for the respondent.