REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 134 OF 2011.

J S K :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(Being an appeal from the original conviction and sentence of E.A. Obina – RM in Criminal Case No. 2432 of 2011 delivered on 28th September, 2011 at Kitale.)

J U D G M E N T.

The appellant, **J S K**, appeared before the Resident Magistrate at Kitale charged with incest contrary to section 20 (1) of the Sexual Offences Act, in that on the 5th September, 2010, at [particulars withheld] Trans Nzoia County had sexual intercourse with S N, knowing her to be his daughter.

After a full trial, the appellant was convicted and sentenced to life imprisonment but being dissatisfied with the conviction and sentence preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 10th October, 2011.

At the hearing of the appeal, the appellant appeared in person and relied on his written submissions in support of his case.

Learned Prosecution Counsel, **M/s. Limo,** appeared for the state/respondent and opposed the appeal by submitting that the complainant aged 6 years old confirmed that she had been defiled by her father on several occasions. That, her mother became aware of the fact leading to her (complainant's) rescue by the police. That, the complainant was medically examined and found to have been defiled and infected with a veneral disease. That, the complainant's mother (PW1) also indicated that she had been infected with a venereal disease by the appellant.

The Learned Prosecution Counsel submitted further that the age of the complainant was confirmed by her mother and that the trial court observed that the complainant was a minor.

Learned Prosecution Counsel contended that the appellant was rightly convicted and asked this court to enhance the sentence to life imprisonment as the sentence imposed by the trial court was rather insufficient.

Having considered the submissions by all sides, the duty of this court is to revisit th evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witness.

Towards that end, the prosecution case was briefly that the appellant separated from his wife, **L N (PW1),**

in the year 2007.

Both are parents to the complainant, **S N (PW3)**, who remained with the appellant after the separation and was aged six (6) years at the material time of the offence. She alleged that the appellant did bad things to her such that she fell sick. Her mother (PW1) was informed of her sickness on the 11th September, 2010 and went to see her on that date.

The mother learnt that the complainant had been defiled and taken to a children home for management. She (mother) examined the child and noted that she was emitting a bad oduor from her private part.

A village elder, **B NW (PW2),** was at home on the 9th September, 2010, when she was informed about the complainant's strange behaviour by one T M. She met and examined the complainant only to find that the complainant's private parts had pus and emitting a bad oduor. She (PW2) took the child to hospital.

At the Kitale District hospital, the complainant was examined by a clinical officer, **Linus Ligare (PW5)**, who confirmed that she had been defiled and was in the process infected with a sexually transmitted disease.

P.C. Paul Kamau Mwangi (PW4), investigated the case and in the process arranged for the complainant to be medical examined before preferring the present charge against the appellant.

In his defence, the appellant denied the charge and stated that his mother was sick on the 12th September, 2010. he left work at 6.00 p.m. and went to see her. As he was preparing to go and buy drugs for her, two police officers arrived there and arrested him. He was later charged with the present offence.

From all the foregoing evidence, it is apparent to this court that there was no dispute that the complainant (PW1) was daughter to the appellant and that she was a minor aged about six (6) years or thereabout at the material time of the offence. Also not disputed was the fact that the appellant had the custody of the complainant and another sibling after he separated from his wife (PW1), mother to the complainant.

The issue that fell for determination by the trial was whether the complainant was indeed defiled and if so, whether the appellant was responsible for the offence.

The fact of defilement established by the medical evidence adduced by the clinical officer (PW5) and to some extent by the complainant's mother (PW1) and the village elder when they examined the complainant and noted an unusual oduor coming from her private parts.

The clinical officer also confirmed that the complainant was infected with a sexually transmitted disease after the unlawful trespass of her tender body by a male person suspected to be her own father, the appellant.

However, the appellant stated that he was a stranger to the unlawful act. The obligation to establish his culpability lay with the prosecution.

In her evidence after a seemingly “Voire dire” examination, the complainant indicated that she was defiled by her father. Her evidence was found credible and acted upon for the trial court to hold that she was indeed defiled by the appellant.

This court would have no reason to fault the trial court for the finding and must also find that it was the appellant who defiled his daughter thereby committing the offence of incest. His conviction by the trial court was therefore proper and is hereby upheld.

On sentence, the appellant was sentenced to serve fifty (50) years imprisonment. This was a lawful sentence but was rather excessive for a first offender even though section 20 (1) of the Sexual Offences

Act provides for life imprisonment but not necessarily as a mandatory sentence if the words “shall be liable” are given their true and actual meaning i.e. likely to be punished in a certain manner.

The life imprisonment sentence under the aforementioned provision of the law is a maximum sentence, the minimum sentence being not less than ten (10) years which may be enhanced to life imprisonment if the victim is less than eighteen (18) years or be enhanced to more than ten (10) years.

In the present case, it is the opinion of this court that a sentence of twenty (20) years imprisonment would be appropriate for a first offender. Consequently, the sentence imposed by the trial court is hereby set aside and substituted for twenty (20) years imprisonment.

Other than the alteration in the sentence, the appeal is dismissed.

[Delivered and signed this 4th day of March, 2014.]

J.R. KARANJA.

JUDGE.