



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**CRIMINAL APPEAL 299 OF 2008**

P.M.M.....APPELLANT

AND

REPUBLIC.....RESPONDENT  
(Appeal from a conviction and judgment of the High Court of Kenya  
at Nyeri ( Kasango, J) dated 28<sup>th</sup> October 2008  
in

**H.C.CR. APPEAL No. 242 OF 2007)**  
\*\*\*\*\*

**JUDGMENT OF THE COURT**

P.M.M., the appellant herein and a peasant farmer in Murangá District in Central Province, was charged before the Senior Resident Magistrate at Kangema with incest by male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. He was found guilty as charged and sentenced to life imprisonment.

The appellant being aggrieved by the verdict of that court, preferred an appeal to the High Court of Kenya at Nyeri against both conviction and sentence. On 28<sup>th</sup> October 2008, Kasango, J after hearing the appeal, upheld the conviction but reduced the sentence to twenty (20) years imprisonment. This is therefore a second appeal.

Incest is sexual intercourse between persons who are within the prohibited degrees of affinity, or consanguinity. See R v Ball [1911] AC47.

The case before us is a father-daughter incest. It is not a common offence before our courts. According to Wikipedia: The Free Encyclopedia – incest is any sexual intercourse between close relatives, irrespective of the ages of the participants and irrespective of their consent, that is illegal in the jurisdiction where it takes place, or socially taboo. Incest between adults and those under the age of majority or age of consent is considered a form of sexual abuse. It normally results in an extreme form of childhood trauma with serious long-term psychological damage. In this regard, therefore, most societies have prohibitions against incest.

The appellant and his wife separated many years ago. She left behind five children, four daughters and one son. She went to live at Kayole in Nairobi while the appellant lived with all the children in Muranga. By the time the wife left C.W (PW1), their third born daughter and the prosecutrix herein, was five years old. She was first sexually assaulted by

her father when she was 13 years old. She told the trial court:-

“In the first day to have sex with me my father came to our bed and carried me to his bed. He had sex with me. After he finished I went back to my bed. I informed my sister J. She told me to go and tell my grandmother. I told her we wait until morning. In the morning we asked my father what he did. He told us if we tell anybody he will kill us. This was in February 2005. In one week he could defile me on Monday and Friday. He would defile at night. He stopped defiling J when J threatened to tell his mother. He continued with me because I did not tell my grandfather.”

PW1 further testified that the appellant continued sexually abusing her from time to time until 14<sup>th</sup> November 2006 when she felt a lot of pain because the appellant had violently defiled her the previous night. She was not able to walk and when she reached school she told her teacher about what the appellant had all along been doing to her. She was referred to Kangema Health Centre, and on being examined she was found to be pregnant. This fact was confirmed by the P3 form dated 21<sup>st</sup> November 2006.

J.W (PW2), PW1's younger sister aged 13 years old at the time of the trial in April, 2007, corroborated the testimony of PW1. She testified that on 14<sup>th</sup> November 2006 at about 2.00 a.m. the appellant went to the bed in which the two girls slept and had sexual intercourse with PW1. She saw him on top of PW1 and when he removed PW1's pants. She stated that when PW2 cried the appellant threatened to cut them with a panga.

PW1 also narrated the incidents of the sexual assaults on her by her father to Margaret Nyambura (PW4), a Children's Officer working with an NGO known as Pendekezo Letu based at Thika and which defends the rights of vulnerable children. PW4 testified:-

“On 20/11/2006 I went to the school. I talked to the teachers and the children. When I was about to board my motor vehicle C.M came to me. She told me she wanted me to take her out of their home for their father was troubling her. She then started crying. She told me that even he was also troubling W. She told me that their father normally force them to have sex with him since January 2004”

The above story was told by PW1 in the presence of the Headmaster of K Primary School, her school, and in the presence of B. K (PW7), a teacher there.

The appellant in his defence dismissed the allegations by the complainant and his other daughter. He termed the case a frame-up. He stated that PW1 made up the alleged crime because he beat her when he discovered that she was having an affair with a local boy called S and because she wanted to go and live with her mother in Nairobi.

The appellant who was unrepresented before us, raised three grounds of appeal, none being on a point of law. In them, the appellant merely reiterated, as he did in the first appellate court, that he did not have carnal knowledge with his daughter. Both the trial and the first appellate courts were satisfied that the appellant had, on several occasions had sexual intercourse with the complainant and continued to do so for many years. PW1's testimony was adequately corroborated by PW2 and her teachers and the medical report. It matters not, and it would not assist the appellant, that his daughter, was also having sexual intercourse with S.

The appellant appeared to raise issues relating to the facts of the case in the trial court, but, we must reiterate that

a second appeal (like the present one) must be confined to points of law and this Court would not interfere with concurrent findings of fact of the two courts below unless they are shown to have been based on no evidence. See KAINGO V REPUBLIC [1982] KLR 213.

Having considered the issues raised in this appeal and the submissions by the appellant, we are satisfied that the appellant was convicted on very sound evidence. His conviction was indeed safe and the superior court was entitled to uphold it.

In the result, this appeal is rejected and is hereby ordered dismissed.

Dated and delivered at Nyeri this 25<sup>th</sup> day of June 2010.

**P.K. TUNOI**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**