



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**HIGH COURT CRIMINAL APPEAL NO. 25 OF 2018**

**JKB.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***Being an appeal from the conviction and sentence of Hon. E.W. Karani (RM)***

***in Kericho Cr. Case No.61 of 2017 delivered on 8/6/2018).***

**J U D G M E N T**

1. The Appellant was charged with attempted incest contrary to section 20 of the Sexual Offences Act (SOA) No.3 of 2006 and he was found guilty and sentenced to fifteen (15) years imprisonment on 8/6/2018.
2. The particulars of the charge were that on 14/11/2017 in Bureti District within Kericho County, the Appellant attempted to cause his penis to penetrate the vagina of VC a female aged seven (7) years who was to his knowledge his niece.
3. The prosecution called a total of six (6) witnesses whose evidence in summary was that the Complainant in this case who testified as PW.1 was staying with her grand-mother together with her siblings and the Appellant in this case who is her Uncle.
4. PW.1 said on the material day the Appellant called her and told her he wanted to send her to the shop but instead the directed her to her grandmother's kitchen which was also the Appellant's bedroom and told her to sleep on his bed which was in the kitchen.
5. The Complainant said the Appellant removed her trousers and removed his "kitu ya kukojoa" (the thing for urinating) and inserted it into her thing for urinating and he did "tabia mbaya" (bad manners) to her. She felt pain and cried and the Appellant stopped.
6. The grandmother called the Complainant but the Appellant told her to keep quiet. The Appellant opened the door and told the grandmother of the child (PW.3) who is also the mother of the appellant that he had sent the Complainant to the shop.
7. PW.1 searched for the Complainant in the Kitchen which was also the Appellant's bedroom and found her covered with beddings on the Appellant's bed and he took her to Hospital.
8. Before taking her to Hospital, she called the Chief who came and arrested the Appellant. She locked the Appellant in the house with PW.2 (the Appellant's brother) when she went to get the Chief.
9. The Appellant was arrested and taken to the Police Station. PW.6, the Clinical Officer who examined the Complainant at Roret Sub-County Hospital said she had pain and lacerations on her private parts which he described as redness on the vulva and tenderness.
10. PW.6 also said on lab analysis, there were red blood cells in her urine as well as pus cells but no spermatozoa. PW.6 said there was attempted defilement. He produced the treatment notes as Exhibits.
11. The Appellant in his defence said that he was taking tea at the Kitchen with his brother (PW.2) when his mother(PW3) told him to pull down the Kitchen.
12. The Appellant said he told her he would not pull it down as it was the place their father had left for him. He said their mother got angry and locked him in the house with PW.2 and she went and called the Chief who arrested him.

13. The Trial Court found the Appellant guilty of attempted incest and sentenced him to fifteen (15) years imprisonment. The Appellant has now appealed to this Court on the following grounds:-

**(i) THAT the prosecution case was marred with contradictions and further that the Magistrate would have found it ridden with doubts and gaps had the said evidence been exhaustively examined and scrutinized.**

**(ii) THAT the Appellant was not given sufficient time to prepare for the trial.**

**(iii) THAT the evidence was a fabrication due to bad blood between the Appellant and his mother and further that no penetration was proved and no essential witnesses were not called to testify.**

14. The parties were directed to file written submissions which I have duly considered.

15. The appellant submitted that the prosecution case was marred with contradictions and inconsistencies. That the prosecution did not prosecute the case to the required standard of proof.

16. The appellant also submitted that he was not given adequate time to prepare for the trial.

17. The appellant further submitted that he did not attempt to defile the minor herein rather that he had been framed by his mother after he failed to demolish a structure in the compound contrary to his mother's wishes.

18. The appellant submitted that the prosecution did not avail crucial witnesses.

19. The respondent submitted that all the ingredients of the offence of attempting to commit incest contrary to section 20 of the Sexual Offences Act were proved beyond reasonable doubt.

20. The respondent submitted that the evidence adduced by the prosecution witnesses was cogent, credible and trustworthy and thus sufficient to secure a conviction. The prosecution witnesses' testimonies were consistent and corroborative and based on direct evidence. The respondent cited the following authorities *Philip Nzaka Watu vs. Republic (2016) Cr. App 29 of 2015, Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993* which I have considered.

21. The respondent further submitted that the trial court considered the appellant's unsworn evidence which was tantamount to a mere denial against the incriminating, consistent and well corroborated evidence adduced by the prosecution witnesses.

22. The sole issue for determination in this appeal is as follows:-

**(i) Whether the prosecution discharged the burden proof to the requisite standard**

23. This being the first Appellate Court, it is my duty to re-evaluate the evidence adduced before the Trial Court and arrive at my own conclusion as to whether or not to support the findings of the Trial Court while bearing in mind that the Trial Court had the advantage of seeing the witnesses.

24. In the case of **MARK OIRURI MOSE VS. REPUBLIC [2013] eKLR** the Court of Appeal stated as follows:

***"...the first appellate Court has the duty to revisit the evidence tendered before the trial Court, afresh analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."***

25. In the well celebrated Court of Appeal case of **OKENO VS. REPUBLIC (1972) EA 32** it was stated that the duty of the first appellate court is to analyse, re-examine and re-evaluate the evidence and arrive at an independent conclusion, bearing in mind that the court did not see and hear the witnesses testify. This case has been referred to in several decisions of the High Court and the Court of Appeal.

26. I find that there is evidence that the Appellant attempted to defile the Complainant.

27. The testimony of the Complainant was corroborated by that of the Clinical Officer (PW.6) who confirmed attempted defilement and produced the treatment notes as exhibits.

28. There is evidence that the Complainant is a niece to the Appellant since the mother of the complainant and the Appellant are brother and sister.

29. There is evidence that the Appellant was found by his mother (PW.3) inside PW.3's Kitchen with the Complainant.

30. PW.3 saw the Appellant calling the Complainant and entering the Kitchen with her and there is evidence that he locked the Kitchen from inside and tried to conceal the act by covering the Complainant under his beddings.

31. The Defence by the Appellant is a mere denial. I find that the Trial Court was right in convicting him with attempted incest.

32. I also find that the sentence of fifteen (15) years imprisonment is lawful and I find no need to interfere with it.

33. I find that his appeal lacks in merit and I accordingly dismiss the same and uphold both the conviction and sentence.

**Delivered, dated and signed at Kericho this 19<sup>th</sup> day of November, 2021.**

**A. N. ONGERI**

**JUDGE**