



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO.19 OF 2018

(AN APPEAL FROM THE DECISION OF HON. P. BIWOTT (PM) IN CRIMINAL CASE NO.39 OF 2017 AT KITALE DATED 222ND AUGUST 2017)

PES.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **Incest by a male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were **that on diverse dates between January 2017 and 16th March 2017 at [particulars withheld] farm, Makutano location within Transzoia County inserted his penis into the anus of MN a girl aged 9 years' old whom he knew to be his daughter.**
2. The alternative charged was **committing an indecent act against the Complainant contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.**
3. The Appellant was convicted and sentence to 10 years' imprisonment hence this appeal. The Appellant has argued in his grounds that the trial court based its findings on extraneous evidence. That the court failed to appreciate the alibi he raised in his defence.
4. The summary of the evidence as presented during is that the Complainant who was a class 3 pupil at [particulars withheld] primary school and aged 9 years testified that the appellant was her father. That on a date she could not recall he came home at around 1.00 pm and sent the rest of her siblings, H and M to go and fetch firewood. He then took her inside his bedroom and removed her skirt and her underpants. He then proceeded to defile her and when he was through he told her to put on her clothes.
5. When her mother who had gone for a funeral arrived later she found her sited on the bench and her eyes were reddish because of crying. She informed her of what had happened and after observing her private parts she took her to Kapsara dispensary. Later they went to the police station.
6. When cross examined by the Appellant she said that that was not the first time as he had done so before.
7. **PW2 JK** is the mother to the Complainant and a wife to the Appellant. She said that she was 9 years old and she identified the clinic card which was later produced by the Investigating Officer. She said that she came back home at around 4.00 pm where she found the Complainant crying and after prompting and threatening to beat her she told her what her father had done. She then took her to Kapsara hospital where she was examined and treated. She also reported the matter at the police station where her statement was recorded.
8. **PW3 DR. DENNIS MANGONGI** from Kapsara Sub County hospital examined the Complainant on 17th March, 2017 when she was brought by her mother. He concluded that her anus had been penetrated. The vagina had some whitish discharge.
9. **PW4 CPL STEPHEN WERE** from Cherangany police station carried out the investigation when the matter was reported by PW2. He referred them to the hospital and had the P3 form filled. He had the Appellant arrested and preferred charges against him. He also produced the child's clinic card which indicated the date he was born.
10. When placed on his defence the Appellant gave unsworn evidence. He said that he worked as a Security Officer at KVDA and that PW2, his wife sold his cows and sheep and went to their home. The cow was sold at Kshs. 21,800 and the sheep at Kshs.7000. He asked for permission from his place of work to have the issue resolved by his father in law but in the process he was arrested by boda boda guys and taken to the police station. He denied that the Complainant was his child.

ANALYSIS AND DETERMINATION

11. The court ordered the appeal to be determined by way of written submissions. The Appellant in his home grown submission has argued that the case was not proved beyond the shadow of doubt and that the trial court failed to take into consideration his defence. He argued that the court failed to appreciate that the Complainant was not his daughter. He went on to challenge the clinic card which contained several erasing's and therefore unreliable.

12. The court is enjoined to re-evaluate the evidence afresh and arrive at an independent finding noting that it did not have the benefit of seeing the witnesses and their demeanour. **See Okeno V. Republic. 1973 EA 32.**

13. The ingredients of this offence that ought to be proved by the prosecution are the age of the Complainant, the identity of the perpetrator and the relationship between the complainant and the Appellant as well as penetration.

14. On the question of the age of the Complainant the production of the clinic card was sufficient to show that she was 9 years of age. Although the Appellant submitted that the clinic card relied upon by the Respondent had erasing's and not clear, the court agrees with the same to some extent but it still shows that he was indicated as the father to the Complainant. At any rate he did not raise an objection at the level of production of the same. Even for arguments sake, the complainant was still a child by all standards as found by the doctor in the P3 forms as well as the treatment notes produced.

15. On the same note, it was not disputed that the minor was staying with him as his father all along something which he did not raise with his wife during cross examination.

16. The element of penetration was proved by the evidence of the child and the medical documents produced. There was prove of anal injury as found by the doctor. This was corroborated by the evidence of the minor in which she graphically described how she was sodomised.

17. The incident occurred between 3 and 4 pm. The issue of identification was not difficult in the circumstances. The twin question to this is whether it was the Appellant who defiled the Complainant.

18. This court has perused carefully the evidence on record as well as the written submissions by the Appellant and it does not find any reason why the Complainant zeroed on the appellant. The relationship between them was father and daughter and it is not true that she was not her daughter. I do not see any reason why she should lie even assuming that there was a dispute between her parents.

19. It should also be noted that her mother took her to the hospital the same day although the treatment was done the following day as it was already late. The treatment documents showed that the injuries she sustained were still fresh. There was nothing to suggest that she may have been defiled elsewhere that particular day.

20. During cross examination of PW2, the issue of whether the Complainant was their daughter did not feature. There was no evidence to the contrary of how she was defiled by any other person or how she got the injury. The minors evidence therefore was believable and there is nothing to demonstrate that it may have been concocted.

21. The above conclusion is based on the fact that immediately the matter was reported to PW2 she went to seek medical attention when the matter was fresh.

22. As regards the Appellant's defence, the same has no much probative value for the simple reason that it was not tested on cross examination as it was unsworn. The issues regarding him, his wife and the father in law respect to the sale of his livestock by PW2 did not feature when PW2 was being cross examined by the Appellant. It was therefore too late in the day to have raised it and more importantly on unsworn evidence.

23. In view of the above findings, this court does not find any merit on this appeal. The same is hereby dismissed.

Dated, signed and delivered via zoom this 28th day of May 2020.

H. K. CHEMITEI

JUDGE

28/5/2020