



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. 165 OF 2019

AKAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable D. Milimu in Eldoret Chief Magistrate's court Criminal Case No. 140 of 2019 dated 18th October, 2019)

JUDGMENT

The appellant herein, one AK was charged in the main count with the offence of Incest, contrary to *Section 20(1)* of the Sexual Offences Act No. 3 of 2006.

The particulars of this offence are that on the 28th day of May 2019 in Soy Sub County, within Uasin Gishu County, the appellant being a male person intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of one SJ, a female person who was to his knowledge his cousin.

To this offence there is an alternative count of committing an Indecent Act with an adult, contrary to *Section 11(A)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of the said offence are that on the 28th day of May 2019 in Soy Sub-county, within Uasin-Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of SJ, against her will.

The prosecution case is that SJ, the complainant herein, was aged 20 years by the time of the alleged offence, that is on 28/5/2019. That day at about 3 p.m she was alone in the house as her parents had gone to town. It was raining and she was in bed. The appellant herein who is her cousin got into the house. She asked him what he was up to and he questioned why she had plaited his wife's hair. He held her and threw her out of the bed to the floor. She tried to resist him but in vain. She screamed but was not heard due to the rainfall. The appellant raped her. When he was through he sat on a chair. The complainant went to her cousin J and reported the incident. Josephine sent a child to call PW-3. PW-3 went to the house of J and found the complainant there crying. She was as well dirty. PW-3 went to complainant's house and her parents were not present. However the appellant was still there. PW-3 looked for a motorbike to take the complainant to the hospital.

PW-1, a doctor at Moi Teaching and Referral Hospital examined her on 29/5/2019. She noted that she had scratches and bruises on the left cheek. The hands were in pain. Her hymen was torn at positions 5 o'clock and 11 o'clock. The tears were fresh. There was also redness and bruises. There was an abnormal brownish yellow discharge with some blood mixture. She was HIV negative. Urinalysis was done which revealed presence of epithelial cells, pus cells and spermatozoa. High vaginal swab also revealed numerous epithelial cells and spermatozoa. The doctor filled the P-3 form and was of the opinion that Rape or Incest had taken place as there was evidence of penetration.

The appellant was then arrested and charged with the offences carried in the charge sheet.

The appellant offered a sworn testimony in his defence. He stated that he worked as a waiter at Silver Line Hotel. On 26/5/2019 he left work as he had asked for a 3 days off. He got home at Kayebich on 27/5/2019. On 28/5/2019 he took breakfast and told his mother he was to look for money in which he had rented his land to his uncle. He was told he could go for money in August. He went to the centre and met his friends. They had fun and played pool till 1:45 p.m when he went for lunch at his friend's place. They watched football thereafter and played pool till 8:00p.m. He was arrested at the time by the village elder and taken to Ziwa police station. The complainant went and complained that he had taken advantage of her, so as not to pay the money. He was taken to hospital and later on charged.

The trial magistrate evaluated the evidence, found that indeed the offence in Count 1 was proved by the prosecution beyond reasonable doubt. She therefore convicted the appellant of the offence, and sentenced him to serve 10 years imprisonment. The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

1. The trial court erred in law and fact as it failed to hold that the charge sheet was defective.
2. The prosecution failed to prove the case beyond reasonable doubt.
3. The medical evidence did not link him to the offence.
4. The evidence was inconsistent and inadequate to warrant a conviction.
5. Circumstantial evidence in place did not connect him to the offence.

The appellant filed submissions and expounded on the said grounds. The prosecution/Respondent offered oral submissions in which they opposed the appeal and urged the court to uphold the conviction and the sentence of which in their views, is proper in law.

I have gone through the offences carried in the charge sheet, the evidence adduced by the prosecution witnesses, the appellant's defence, grounds of appeal, and submissions by both sides. Having done so, I do realize there is only one ground of appeal which need be weighed, and that is; the charge sheet was defective.

Section 20(1) of the *Sexual Offences Act* creates the offence of Incest by male person. It state as follows:-

“Any male person who commits an indecent act or an act which causes penetration 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.”

The Section is clear that cousins are excluded in the relationship consanguinity that gives rise to the offence of Incest. The charge preferred against the appellant is that he had sex with his cousin and the evidence supports the fact. He was therefore charged with an offence not known in law, given its particulars which does not support the offence as charged, and also likewise, the evidence does not support an offence known in law. To the extent, the charge is incurably defective.

The offence of Incest is different from that of rape, as for incest lack of consent is not an ingredient where as it is for rape. The appellant having been charged with incest could not therefore have considered during trial the defence of consent as it was not available to him. As such, he would be heavily prejudiced if I were to consider whether rape as an offence was established and make a finding on it. The option is therefore to allow the appeal.

The conviction and sentence are hereby quashed and the appellant set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 25th day of November, 2020.

In the presence of:-

The appellant

Ms Limo for state

Ms Gladys - Court assistant