



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 3 OF 2013**

**(Being an appeal arising from Judgment delivered by Hon. P. Kulecho in Criminal Case No. 450 of 2012 between Republic vs. Duncan Emmanuel Simiyu)**

**DES.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant was charged with the offence of Incest by a male contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge was that on the diverse dates between the year 2009 and the 16<sup>th</sup> of February, 2012 at [Particulars Withheld] Farm within Trans Nzoia County intentionally caused his penis to penetrate the vagina of S. N. S. aged 11 years who is to his knowledge his biological daughter.
2. The alternative count was committing and Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars are that on the 16<sup>th</sup> day of February, 2012 at [Particulars Withheld] Farm within Trans Nzoia County intentionally touched the vagina of S. N. S. a child aged 11 years with his penis.
3. The Appellant was convicted and sentence to life imprisonment hence this appeal. Before looking at the merits or otherwise of the appeal it shall be appropriate to summarise the proceedings at the trial court.
4. **PW 1 S.N.S.** the Complainant told the court that the Appellant who was her biological father had defiled her on several occasions and was unable to report him since he had threatened to discipline her. She testified that she was a class 2 pupil at [Particulars Withheld] primary school though previously she was at [Particulars Withheld] primary school.
5. She said that on the material day they had gone for sports and when they came back in the evening their father who was not happy with them having gone for the sports decided to discipline them. Their mother took off and they spent the night with their father. That night he took her to his bed while she slept on the floor and defiled her. She screamed but nobody came to assist her as her mother had gone to the home of one Esther.
6. She then told her mother who reported to the village elder and a meeting was called and the women present examined the Complainant and found that she had been defiled. She was escorted to kachibora health centre where she was treated and later referred to the District hospital at Kitale.
7. **PW2 JN** the mother to the Complainant and the wife to the Appellant testified and told the trial court that they had four children with the Appellant including the Complainant. She said that on the 16<sup>th</sup> day of February, 2012 at 2.00 Pm she had gone to the river to fetch water and when she came back she found the Appellant with the Complainant in bed. She said that he was defiling her and that he was naked. He threatened her and she went to her neighbour called KT who told her to go and inform their land lady. The land lady in turn told her to inform the village elder called Esther who summoned the villagers. Some of those who came checked her and found that she had been defiled. The Appellant was handcuffed, beaten and escorted to the Police Station. The child was taken to the hospital as well as the Police Station where the P3 form was issued and filled. She also produced the child's immunisation card which shows that she was born on 19<sup>th</sup> August, 2001.
8. **PW3 P.C Edward Rugut** arrested the appellant after he was informed of the incident by one Titus and that the suspect was almost being lynched by the members of the public. He took him to the police station.
9. **PW4 Kirwa Labatt** a Clinical Officer from Kitale District hospital examined the minor and filled the P3 Form. He found that the hymen was torn and old looking and that there were no vaginal discharge. He produced the p3 form as well as the initial treatment notes.

10. **PW5 P.C David Olari** from Cherangany Police Station carried out the investigation once the Appellant was brought to the station. He recorded statements from the witnesses who said that the appellant had defiled the minor on other occasions. He issued them with a P3 Form which was later filled and he produced the same.

11. When put on his defence the appellant gave sworn evidence denying the charge. He said that he stayed with his family at [Particulars Withheld] and he survived on odd jobs. He then decided to go to Namanga where he had gotten some work. He came back in 2011 and his wife said that she was mistreating the complainant herein.

12. Later on 17<sup>th</sup> February, 2012 he found that the kids had defied him and gone for sports and yet he did not want them to go. She spanked them and their mother did not come home. The following day he went to get milk and the neighbour told him that his wife had gone to the home of Esther where she spent the night.

13. He then went to Esther's place and agreed that she should come home. While working at a farm he was called by an old man who took him to the shopping centre and his children were brought and were accused by the mob of defiling the minor. He was beaten and taken to the Police Station.

#### ANALYSIS AND DETERMINATION

14. The court has perused the proceedings carefully as well as the submissions by both the Appellant and the learned State Counsel. The substance of the grounds of appeal is a general assault on the entire fabric of the prosecution case and in particular the inconsistencies in the evidence.

15. The duty of this court is to re-evaluate afresh the evidence and come up with an independent fresh finding. There is no doubt that the age of the minor was well proven by the production of the immunisation card a fact not disputed at all.

16. Secondly the relationship between the appellant and the minor was that of father and daughter a fact not disputed too.

17. The question then is whether in the light of the evidence on board the Appellant indeed committed the offence. The primary evidence was that of the minor and her mother. I have read the two pieces of evidence and I find the same at variance. In the first instance the child said that the appellant defiled her that night after chasing away their mother PW2. On the other hand PW2 stated that she found the Appellant on the act and she decided to go and inform one Esther as the Appellant threatened her.

18. On the other hand the minor stated that the incident took place during the night and that she informed her mother when she returned which I presumed it was the following day. If indeed the appellant was found ready handed at around 2.00 Pm as per PW2 why then did the child say that the incident took place at night and her mother said during daytime?

19. I think someone may not be very sincere in this evidence. Is it possible that the child was just used as a pawn in her parent's wars as was stated by the appellant in his defence? If the 15 ladies checked the minor and concluded that she had been defiled did they not record any statements and more importantly Esther who was said to be a village elders. Why did she not record her statement and give evidence in court. Esther is an important link for the reason that she was mentioned by PW1 and PW2 as well as the Appellant.

20. Esther it appears was the one who may have hosted pw2 overnight and called for the meeting that afternoon. Her evidence in my view was very critical. She would have shed more light on the relations between the said family members. The rest of the witnesses were generally routine witnesses.

21. What I find disturbing again is the evidence of PW2 who said that the child had always been defiled by the Appellant and all her efforts to report had been thwarted by the Appellant's clan. Really? What was so difficult in informing her friend Esther the village elder whom she even had spent the night in her house that night? This would have helped the court to agree with the findings of the clinical officer that the defilement had earlier taken place and that is why the hymen was old looking.

22. In the premises, I find that the inconsistent evidence given by PW1 and PW2 was too wide to reach a meaningful conclusion. The time of the incident was at variance to belief either of the witnesses. Even if one was to believe that the minor had been defiled by the appellant on another day, no evidence was led to point such. On the contrary the same were mere generalities by both the complainant and her mother. The Investigating Officer did not dig in to inquire at least from other family or clan members if what PW2 was alleging the truth.

23. For now it would not be in the interest of justice to disallow this appeal. The offence was so grave and the consequences too, namely that the appellant would spend all his life behind bars. Proper investigation ought to have been undertaken and not a supposed settlement of vendetta.

24. The appeal is allowed, the appellant set free unless lawfully held.

**Dated, signed and delivered at Kitale this 7<sup>th</sup> day of August, 2019.**

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**H K CHEMITEI**

**JUDGE**

7/8/19

**In the presence of:-**

**Mr Omoria for Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgement read in open court.**