



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 92 OF 2017

(Being an appeal arising from conviction and sentence in Kitale chief magistrate's court Sexual Offence NO. 125 of 2017 delivered by G.N. Sitati (RM) ON 20//12/ 2017)

JKK.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **incest contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the diverse dates between 1st September, 2017 and 7th October, 2017 within Trans Nzoia County being a male person caused your penis to penetrate into the vagina of TNK a female person who was to your knowledge your step daughter aged 10 years.**
2. The alternative charge was committing an **indecent act with a child contrary to section 11(1) of the Sexual Offences Act**. The particulars of the charge was that on the **diverse dates between 1st September, 2017 and 7th October, 2017 within Trans Nzoia County intentionally caused the contact between your genital organ namely penis and genital organ namely vagina of TNK a child aged 10 years.**
3. The Appellant was convicted and sentenced to 10 years imprisonment hence this appeal. The issues raised in the home made grounds of appeal are general in nature and before looking at the same it would be appropriate to summarise the evidence as presented during trial.
4. **PW1 KIRWA LABATT** a Clinical Officer from kitale county referral hospital examined the minor and produced the P3 form. He found no external bruises on the labia but the hymen was missing and old looking. There was also some whitish discharge and the presence of epithelial cells. He concluded that she had been defiled.
5. **PW2 MERCY OYIEKE** a dentist from kitale county referral hospital did dental age assessment on the minor and concluded that she was about 10 years.
6. **PW3 MW** testified that she was the mother of the complainant and the appellant was her husband but not the father to her. She said that they had lived as husband and wife for 4 years and that the other children they got had passed on.
7. She said that she went to her normal duties on the 7th October, 2017 but on 11 October, 2017 the child opened up to her and told her that the Appellant had been defiling her while she was away. She explained to her how he picked her and place her on their bed and proceeded to undress her and thereafter defile her. She checked on her private parts and saw some whitish discharge. He asked the appellant after coming back from work but he denied. She took the child to the hospital and had her examined. The Appellant was then arrested.
8. PW4 the minor gave sworn evidence stating that the appellant had defiled her twice but she cannot recall the dates. She said that she could find herself on their parents bed after she had slept and that he did remove her clothes and defiled her. She said that she did not tell anyone as she was scared and the appellant told her not to do so. She however later told her mother and she was taken to the hospital.
9. **PW5 PC ESTHER NOLARI** attached to gender unit kitale police station carried out investigation and recorded witness statements and preferred charges against the Appellant. She said that the matter had been referred to the local chief but he could not handle the same and that he referred it to the station.
10. When placed on his defence the appellant gave sworn evidence explaining how he was arrested on the 13th October, 2017 and taken to the police station and charged with the offence. He said that he knew he had problems with her family due to the miscarriage by his wife. He said that he wanted to refund the dowry which he did and went back to his work at West Pokot. When he came back he found his wife

communicating with her ex-husband and she promised to do something bad to him.

ANALYSIS AND DETERMINATION

11. The Appellant's submissions have been perused by this court although there were none by the Respondent. The grounds or ingredients for this kind of offences are now known which include, the age of the minor, whether there was penetration, the identity of the perpetrator and the relationship between the minor and the Appellant.

12. The age of the minor was not in dispute as the dental age assessment even in the absence of any other documentary evidence was sufficient.

13. As to the relationship between the Appellant and the complainant the same was not in dispute. Both the appellant and the mother conceded that she was a step daughter.

14. Was she defiled? The evidence on record is that of the minor, the Clinical Officer and the appellant. There was no any other independent witness nor was the appellant found in the act. The minor though young was found to possess sufficient skills to give sworn evidence. She described how the appellant would take her from the sitting room where she was sleeping and defile her.

15. The incident seemed to have taken place severally or at least twice before she opened up to her mother. From the demeanour and the graphic description as recorded by the trial court the minor in my view and as found by the trial court appeared truthful. She may not have recalled the dates but the scenes and the occasions seemed to fit perfectly well.

16. Further and as found by the Clinical Officer how did the minor of that age sustained injuries in her private parts? There was no evidence that there was another male within the home as in their evidence it became clear that the three of them stayed in the house and nobody else.

17. I have also examined the defence raised by the Appellant in respect to his marital status with his wife and although they had problems of miscarriages I do not see how the defilement of the minor would come in. The issues of dowry and the related challenges did not afford him any defence.

18. In the case of *OKENO VS. REP.(1973) E. A 32*, this court would only interfere with the findings of the trial court if it did misdirect itself. The same goes on to state that the trial court had the benefit of seeing the demeanour of the witnesses and in this case the said court had the benefit of seeing the minor testify and was thus able to record the way it did.

19. In essence the child was truthful and thus would benefit from the provisions of Section 124 of the Evidence Act.

20. This appeal is therefore unmeritorious and the same is hereby dismissed. On the period of sentencing the same shall run from the 16th October, 2017 when he was arraigned in court.

Dated signed and delivered in open court at Kitale this 7th day of August, 2019.

H. K. CHEMITEI

JUDGE

7/8/19

In the presence of:-

Mr Omoria for Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court