



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 10 OF 2019

EEY.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of Hon. P. K. Mutai in Kitale Chief Magistrate's Court in Criminal Case No. 130 of 18)

BETWEEN

REPUBLIC.....PROSECUTION

VERSES

EEY.....ACCUSED

JUDGEMENT

1. The Appellant was charged with the offence of **Incest contrary to Section 20(1) of the Sexual Offences Act**. The particulars of the offence were that **on diverse dates between 14th and 24th June, 2018 at [particulars withheld] farm in Endebbes location, within Trans Nzoia County, being a male person, caused your penis to penetrate the vagina of SE a female person who is to your knowledge his niece.**
2. The Alternative charge was **Indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006**. The particulars of the offence were that **on diverse dates between 14th and 24th June, 2018 at [particulars withheld] farm in Endebbes location within Trans Nzoia county intentionally caused the contact between your genital organ namely penis and genital organ namely vagina of S E a child aged 14 years.**
3. The Appellant denied the charge and the prosecution called several witnesses whose evidence merits a summary before looking at the substance of the grounds of appeal raised by the Appellant.
4. **PW1 ROSE WANYAMA** testified that she is a teacher by profession and she knew the Complainant who was in class 3. She said that on 17/7/2018 she was handed over the Complainant by a fellow male teacher so as to interrogate her. The child was crying and upon asking her she said that she was staying with the Appellant who was her uncle and had defiled her.
5. The witnesses went on to state that it was the minor's aunt who had reported the matter and she did not want to be known. The minor was then taken to the hospital and upon examination it was found that she had been defiled.
6. **PW2**, after being sworn testified that she was a student and was aged 10 years old and that before the incident she used to stay with the Appellant and her aunt one Irene. She said that she did not know her parents.
7. She said that she was defiled early morning by the Appellant when his wife had gone to work and one of her children had gone to school and the other child was asleep. She used to sleep in the sitting room but he took her to the bedroom. She came back from school but she did not tell anybody till on a Saturday when she informed her aunt. Her aunt then informed her teacher who then questioned her and examined her. She was later taken to the police station.
8. When cross examined she said that it was her grandmother who took her to the Appellant and that at some point she stole from her aunt. Though she could not recall the exact date she was however conscious that the incident took place in the morning. She also said that blood came out of her private parts during the incident.

9. **PW3 LINUS LIGARE** a Clinical Officer from Kitale hospital produced the P3 form after examining the Complainant. Earlier she had been seen by **DR. KEGOLI**. He concluded that her hymen was torn and old looking and shows premature sexual intercourse.
10. The said witness produced the age assessment report prepared by **DR. SORE** and which estimated the complainant's age at 14 years.
11. **PW4 (PCW), RUKIA ZAHARA** of Endebbes police station carried out the investigation after the matter had been reported there. It was alleged that the girl was limping and crying and was thus questioned by the teachers. She issued them with the P3 form and later had the Appellant arrested.
12. On cross examination she said that the child was brought by her teachers and was in school uniform. She said that the incident would not have been known had teachers not taken any action.
13. When placed on his defence the Appellant gave sworn evidence denying the charge. He said that on 5/8/18 he was in his place of work when he found the boda boda chairman who told him that he had something to discuss with him. He was told that he had not cleared his loan and they went to the police station where he was booked in despite asking for more time. The following day his fingerprints were taken and brought to court.
14. On cross examination he admitted that the Complainant was his niece and they stayed together. He said that he used to work in Eldoret and he would leave the complainant with his wife. He generally denied the charge.

ANALYSIS AND DETERMINATION

15. The court has perused the submissions on record by the parties herein and for the interest of time do not see the reason to reproduce them. The grounds raised by the appellant in his grounds of appeal are that the medical evidence relied on were not to the required standard to sustain the charge and that penetration was not proved. He generally attacked the entire evidence as presented during trial.
16. This court is alive to the decision in **OKENO V. REP 1972 EA. 32** where it was stated that the duty of this court is to re-evaluate the evidence afresh and come up with a fresh and independent finding noting however that unlike the trial court the appellate court does not enjoy the benefit of seeing the witnesses testify and their demeanour unlike the trial court.
17. There are four areas in which it must be established so as to sustain this charge, namely, the age of the victim, whether there was penetration, the identification of the perpetrator and finally the relationship between the complainant and the perpetrator.
18. The age of the minor was well proven by the production of the dental age assessment report as prepared by **DR. OSORE** and which showed that she was 14 years old contrary to what the minor said that she was 10 years old.
19. The relationship between the Complainant and the Appellant was not in dispute and the same was admitted by the Appellant.
20. This again goes to the question of identity. The Complainant did not indicate whether it may have been someone else who defiled her. She said that twice she was defiled and although she could not recall the dates, she was sure that it was the Appellant.
21. There was no eye witness to the incident and thus it was her word against his. The lady who reported the matter to the teachers, did not want to be involved for her own reasons but it appears that she was satisfied that she had delivered the message.
22. The minors evidence in my view appeared truthful considering her age. Although she admitted that she was punished at some point by the Appellant for not doing well in her exams, that did not appear to be the reason for complaining against the Appellant. Neither do I see any malice on the part of PW1 to report the matter to the police as well as taking her to the hospital.
23. PW1 said that she was a counselling teacher and that is why the male teacher brought the Complainant to her for interrogation. The only person she could trust was her aunt, whom I assume could be the Appellant's wife.
24. On cross examination she said that she bled during the incidence. The Appellant asked her whether the blood may have been because of her monthly cycle and although the answer was not clear, the production of the medical reports as well as the P3 form dispel this line of argument.
25. Penetration was therefore proven by the Respondent. There was no suggestion or evidence that she may have been defiled elsewhere save at her home. There was no other male person at the home and I find that the conclusion linking the Appellant with the offence was logical.
26. The proviso to Section 124 of the Evidence Act, covers such scenario. The evidence by the minor was truthful and consistent. The findings by her teachers that she was walking with difficulty was corroborated by the production of the medical evidence and in particular the P3 form. Even if there was menstrual blood, the injuries found by the medical personnel especially the torn hymen which was found to be old looking could not be caused by the menstrual cycle.
27. The Appellants defence did not help much. There was no evidence that he had taken some boda boda loan and had been unable to pay as he testified. He was therefore arrested lawfully for this offence.
28. The appeal in a nutshell is unmeritorious and the same is hereby dismissed.

Dated, signed and delivered in open court at Kitale this 18th day of December, 2019.

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H. K. CHEMITEI

JUDGE

18/12/19

In the presence of:-

Mr. Omooria for respondent

Appellant – present

Court Assistant – Silvia

Judgement read in open court.