



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

GARSEN HCRA No. 39 OF 2016

S W.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of 10 years imprisonment

by Hon. J.W Ochuru(PM) at LAMU on 11/2/2016)

JUDGEMENT

1. The Appellant was convicted with attempted incest contrary to section 20(c) the offence of the sexual offence Act No. 3 of 2006 and sentenced to 10 years *Imprisonment on 11/2/2016*.

2. The particulars of the offence were that on 2/11/2013 at around 1200hours in [particulars withheld] village, Mkunumbi location, Mpeketoni Division Lamu West County, the Appellant intentionally touched the vagina of xx with his penis who was to his knowledge his niece aged 6 years of age.

3. The prosecution evidence was that the Appellant who is an uncle to the complainant took the complainant a girl aged 6 years old who is his niece to the bushes and touched her vagina with his "kadudu penis"

The complainant said her sisters had left for the shops. When her mother came, the complainant told her and she checked the complainant and found semen on her dress. The Appellant was arrested and charged with this offence.

4. The Appellant said in his defence that on the day he was arrested he had just arrived at home from work and the complainant's parent had also arrived with KPR officers and they alleged that he had defiled the complainant and he was arrested and taken to the police station where he was charge.

5. The trial court found the Appellant guilty as charged and convicted him and sentenced him to 10 years imprisonment. The Appellant has appealed against both conviction and sentence on the following grounds;

(i) That he pleaded not guilty on trial.

(ii) That he was sentenced to ten (10) years imprisonment for the offence of attempted incest c/sec.20 (2) act no. 3 of 2006 in cr. Case no. 510 of 2013 on 11/2/2016 before PM'S COURT LAMU.

(iii) That the judgment delivered to me by the HON. J.W.ONCHURU PM'S COURT LAMU on the above date was not fair.

(iv) That it was a grudge between him and his brother because of land dispute and also a grudge between his wife and my brother's wife.

(v) That the day which the incident occurred he was not at home but was at Witu working in his Shamba.

(vi) That the one who was used as complainant was unfamiliar to him.

(vii) That the witnesses lied to the court that he was grazing with the complainant while there were no animals at his

homestead.

(viii) That the prosecution side failed to produce the owner of the animals who were being grazed by the accused and the complainant as they claimed.

(ix) That he is a married man with three children, and his wife is also disabled she cannot be able to manage the whole family alone since she need his financial assistance and the lonely bread winner of his family.

(x) That he is an orphan since his parents passed away long time ago.

6. I have carefully considered the submissions by both parties, my findings are as follows;

(i) The three elements for attempted incest are identity of the perpetrator, attempted penetration and age of the complainant.

(ii) In the current case the evidence of the identity of the perpetrator is wanting.

(iii) The complainant in the sole witness who testified in this case. The trial court did not give any reasons why be believed the complainant as required by section 124 of the evidence Act.

(iv) The medical evidence did not support the testimony of the complainant.

(v) I find it unsafe to rely on the testimony of the complainant in the circumstance of this case.

(vi) I find the conviction herein unsafe and I allow the appeal and order that the Appellant be set free unless lawfully held for any other reasons

Due to the security situation at Hindi Prison, the appellant could not be availed to court for this judgment which has been long pending and the judgment is now delivered on this 28th day of February, 2018 in the absence of the Appellant.

_____ for the Appellant.

Mr. Kasyoka for the Respondent

Order to issue accordingly.

ASENATH ONGERI

JUDGE.