



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 70 OF 2012

D K M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. S.R Wewa – SRM dated 23rd November 2006 at the Chief Magistrate’s Court at Kisii in Criminal Case No. 422 of 2006)

JUDGMENT

1. The appellant, DK, was charged with incest of a girl contrary to section 166 of the Penal Code (Chapter 63 of the Laws of Kenya). The particulars of the offence were that on 29th February 2006 in Kisii District of Nyanza province, he had unlawful carnal knowledge of MM, a girl under the age of 16 years. He was convicted and sentenced to life imprisonment.

2. The appellant contests the conviction and sentence on the ground that the prosecution failed to prove its case beyond reasonable doubt.

3. The testimony of the child (PW 1) was that she was at home on the material day at about 7.00 pm when the appellant, who was her brother, came into the kitchen. She described what took place as follows:

“D had jeans white in colour and also white shirt. I was sleeping down when D came. She found I had spread a sheet and I was lying on it. I had my clothings on. He lay on top of me. I started crying he said he could penetrate slowly his penis. He unzipped his trouser where he removed it. He penetrated me in the vagina. He opened up my legs wide. I did cry. I opened the door and ran away. I lay on my back. The accused slept on me. This was the first time for such act to be done to me. I did feel pain. There was blood which came out. It was red in colour.”

4. After the appellant had completed the felonious act, he locked himself in the house. PW 1 went out crying and met her mother, PW 2. PW 2 testified that she saw PW 1 in a state of distress and that PW 1 narrated to her the ordeal. In the meantime the appellant had locked himself in the house.

5. PW 2 screamed when she learnt what had taken place and her brother in law and other people came but she told them not to demolish or break the door. Among those who came were PW 3 and PW 4 who testified that when they heard PW 2 scream they went to her house and they found the appellant had locked himself in the house. The police were called and they arrested the appellant who was taken to the police station.

6. The investigating officer, PW 4, confirmed that the appellant was brought to the police station. He issued the P3 form and accompanied PW 1 and PW 2 to the hospital where PW 1 was examined and treated.

7. The clinical officer, PW 5, who examined PW 1 at Kisii District Hospital on 28th February 2006, testified that when PW 1 was examined on 24th February 2006 she had bruises on her birth canal and on the vulva. In addition, some pus cells were detected. PW 5 concluded that there was penetration.

8. The appellant elected to remain silent in his defence.

9. I have reviewed the evidence as required by the first appellate court and I find the testimony of PW 1 clear and consistent. She gave a description of what the appellant did to her and which in law constituted an act of penetration. She knew the appellant as it was her brother. PW 1’s testimony was corroborated by that of PW 2 who found her in a state of distress. Further corroboration is to be found in the medical evidence of PW 5 which clearly showed that an act of penetration had taken place. The appellant’s guilt was fully cemented by the conduct of the appellant who locked himself in the house and refused to get out until he was arrested. This confirms that there was no break in the chain of evidence until he was arrested.

10. Finally, the child's age was established by production of Child Health card by PW 2 which showed that she was born on 7th January 1997. In addition, the age assessment showed that the child was aged nine (9) years. Although the charge sheet stated that the child was aged 16 years, the evidence produced proved her actual age. I therefore do not find the error of her age in the charge sheet material or prejudicial to the appellant.

11. The appellant was charged under section 166 of the Penal Code before the Sexual Offences Act came into force and repealed that provision. Section 166 thereof provided as follows:-

166(i) Any male person who has carnal knowledge of a female person who is to his knowledge his granddaughter, daughter, sister or mother is guilty of a felony and is liable to imprisonment for five years; Provided that, if it is alleged that the female person is under the age of thirteen years, the offender shall be liable to imprisonment for life.

12. The testimony of PW 1 and PW 2 is that the appellant was the brother to PW 1 and son to PW 2. The offence of incest was therefore established. Since PW 1 was below the age of 13 years, the sentence of life imprisonment was merited in light of the age of the child.

13. Even if the Sexual Offences Act was applicable, section 10 thereof provides for a maximum sentence of life and in the case of a child below the age of nine (9) years, a sentence of life imprisonment prescribed by Section 8(2) of the Act in the case of defilement would be imposed.

14. The totality of my reasoning is that the conviction and sentence are affirmed. The appeal is dismissed.

Dated and delivered at Kisii this 16th day of August 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.