



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KITALE

CRIMINAL APPEAL NO. 6 OF 2018

(Being an appeal arising from Conviction and sentence in Kitale Chi

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(Being an appeal arising from Conviction and sentence in Kitale Chief Magistrate's Court Sexual Offence No. 71 of 2017 delivered by P.K. Mutai Resident Magistrate on 16/2/2018

A O A.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

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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 offence were that **on the diverse dates of May 2017 in trans Nzoia West sub county within Trans Nzoia County, being a male person, caused his penis to penetrate the vagina of F O a female person who was to his knowledge his grand daughter.**

2. He was equally charged with the offence of **Committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the diverse dates of May 2017 in Trans Nzoia West sub county within Trans Nzoia County, touched the vagina of F O a child aged 10 years with his penis.**

3. The appellant after full trial was convicted and sentenced to 30 years imprisonment hence this appeal.

4. The brief fact as presented during trial were as follows.

PW1 Pharise Silali the clinical officer from Kitale county hospital produced the dental age assessment report prepared by Dr Osore which concluded that the complainant was aged 10 years.

5. **PW2 the complainant** gave sworn evidence and stated that in May 2017 she was with other children when the appellant took her to a maize farm and proceeded to remove her pant and defiled her. She screamed after feeling pain but the appellant threatened to beat her. After defiling her he took a stick and beat her. By then she was bleeding from her private part. She did not go to school for 5 days. She was taken to hospital by S and M. She said that the incident took place at Middy. S he identified the P3 form.

6. **PW3 J N** testified that the complainant was her grand daughter. She said that during the month of May 2017 she left the complainant with the appellant as she went to Kisii as she was taking care of a sick person. When she came back she heard that the appellant had defiled the complainant. She found him in the cells.

7. **PW4 Peter Masake** a clinical officer from Kitale District Hospital examined the complainant and produced the P3 form. He found that the hymen was present but had tears which was not fresh. She also had some discharge and had been infected with hepatitis C. He concluded that there was penetration.

8. **PW5 J M M** said that when he came back from Nairobi he saw the complainant walking with difficulties. She inquired from her grandmother who told her that she had been defiled. He then took her to Big Tree clinic where after examination she was indeed found to have been defiled. He then reported to Big Tree police post and was issued with a P3 form. Later the appellant was arrested whom he knew as her grandfather.

9. **PW6 Shem Ocharo** is employed by PW5. She said that her mother brought the complainant to stay with him as she had a patient in Kisii. He was given some medicine as she was said to be unwell. She was withdrawn and was walking with difficulty. When PW5 came he informed her of the child's case and they decided to take him to the Big Tree clinic where it was confirmed that she was defiled. A p3 form was issued by the police post and filled at Kitale District hospital. He testified that the child implicated her grandfather. The witness was a cousin to the complainant.

10. **PW7 Sergeant Robert Ndiwa** from Sibanga police patrol base who was previously at Big Tree patrol Base carried out the investigation. He said that the child was brought by 2 people and after booking the complainant he referred them to the hospital for purposes of filling the P3 form. He recored the statements and preferred charges against the appellant.

11. When put on his defence the appellant gave unsworn evidence. He said that his wife was away and she took the minor to his cousin who then took her to the hospital. He was later arrested and continued to plead his innocence. He admitted on cross-examination that the minor was his granddaughter.

Analysis and Determination

12. The court has read the proceedings herein as well as the submissions by both the appellant and the learned State counsel.

13. There is no doubt that the following ingredients of the offence were established namely Age – which the dental age assessment report produced as well as the oral testimony by the complainant was in my view sufficient.

14. Secondly, the question of penetration was clearly proved. The complainant testified that after the ordeal, she saw blood in her private parts and she felt pain. The clinical officer who produced the P3 form testified to this. Although the hymen was intact there was signs of penetration. He also found an infection of hepatitis C which among others is transmitted through sexual intercourse.

15. The relationship between the complainant was not disputed. This was equally admitted by the appellant during cross-examination.

16. The question of who defiled the minor was in my view also established. PW3 and PW6 confirmed that indeed the child was left under care of the appellant. There was no eye witness to the incident. However the incident took place according to the complainant at noon. The complainant was therefore able to recognise the perpetrator very well.

17. Why would the complainant zero in on the appellant if he did not commit the offence?

I do not see any malice by the child. Infact the evidence of the grandmother of leaving the child with PW6 shows that the appellant was cruel to the child.

18. Although the medical examination occurred after a while (1 month or thereabouts) I am persuaded that the same was sufficient enough to prove that she had been defiled.

19. The proviso to Section 124 of the Evidence Act Cap 80 provides that the court shall convict if it believes the child to be speaking the truth. Looking at the whole spectra of evidence presented by the child including cross-examination as well as the medical reports (P3) produced, I am persuaded that she spoke the truth. She was graphic on how the appellant defiled her.

20. Contrary to the grounds raised by the appellant in his appeal I find that the prosecution proved that he offence was committed by the appellant. More particularly, he was the grandfather to the minor.

21. I would therefore disallow the appeal and I hereby do. On the question of sentencing the learned State counsel has conceded that the proper sentence should be 10 years imprisonment as court did not indicate the age of eh complainant.

22. Clearly **Section 20(1) of the Sexual Offences Act** provides that;

“ Any male person who commits an indecent act or an act with a female person who is to his knowledge his daughter, grand daughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the Indecent act was obtained with the consent of the female person.”

23. Consequently I shall tamper with the sentence and order that the same be and is hereby reduced from 30 years to 10 years from the date of the lower court's judgment.

Orders accordingly.

Delivered, signed and dated at Kitale this 27th day of September, 2018.

H.K. CHEMITEI

JUDGE

27/09/18

In the presence of:

Mr. Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court