



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 28 OF 2017

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court in Sexual Offence No. 91 of 2016 delivered by M.I.G. Moranga Principal Magistrate on 15/3/2017)

B M W.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with **Incest contrary to Section 20(1) of the Sexual offences Act No. 3 of 2006**. The particulars of the charge were that **on the 27th day of June 2016 at [particulars withheld] village in Trans County being a male person, caused his penis to penetrate the vagina of L. M. aged 8 years, a female person who was to his knowledge his half-sister.**
2. The alternative count was **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 27th day of June 2016 at [particulars withheld] village in Trans Nzoia County, intentionally caused contact between his genital organ namely penis and the genital organ namely vagina of L. N. M. a girl aged 8 years.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal. The sum total of the grounds of appeal raised by the appellant is that the prosecution did not prove its case beyond a shadow of doubt.
4. The brief facts as presented during trial are that **PW1, the complainant** who was aged 7 years old and a class 1 pupil at [particulars withheld] primary school testified that on the material day (27/6/2016) she had come back from school and was playing with her friends at her grandmother's house. When it started raining, the appellant whom she called B came to his house and told the complainant to sleep. He then undressed her as he also undressed. He proceeded to defile her and the child called it "akanirep." she felt pain in her private parts. He warned her not to tell anyone or else he will kill her. He told her to go to Mama Rosy.
5. She did not tell her mother that day but was unable to walk. Her grandmother then realized and when she inquired she told her what had transpired. The matter was reported at Matisi police station. She was also taken to Matisi hospital where she was treated. A P3 form was later filled. The complainant stated that the appellant was her brother but different mother.
6. **PW2 L N C** testified that the complainant was her grandchild and that she realised when she came home that she was not walking well and had fever and trembling. She told the mother to take her to the hospital but she did not. She was emitting bad smell from her private parts and could not tie her shoes. She inquired from her and she told her what the appellant had done. They later together with the complainant's mother went to Matisi police station and with the aid of Kenya Police Reservists as well as Nyumba Kumi arrested the appellant. She also obtained a P3 form which was filled.
7. **PW3 Kirwa Labatt** from Kitale Referral Hospital produced the P3 form issued at Matisi police post. When she examined the minor she found no physical injuries but a wound on her genitalia which oozed pus. There was a foul smell around the labia. There was also yellow pus. The hymen was intact. He concluded that there was penetration because of the septic wounds.
8. **PW4 P.C. Mubarak Mwashambi**, from Matisi police post carried out investigations and recorded statements from the witness. He also issued a P3 form in respect to the complainant and preferred charges against him.
9. **PW5 Pharis Silali** from Kitale District Hospital produced the dental age assessment report for the minor which showed that she was aged 8 years.
10. When put on his defence the appellant gave unsworn evidence denying the charge. He explained how he was doing his work on 26/6/2016 all the way to 30/6/2016. It was only on 1/7/2016 at 4.30 pm that while he was doing his work at the hotel he was approached by

3 people who requested that they go to the police station. He obliged and while at Matisi police post the complainant and his grandmother arrived and was accused of defiling the child. He said that he had differed with PW2, her grandmother over some allegations that he had stolen her maize and that he had defiled a 13 year old girl. He denied the charge.

Analysis and Determination

11. I have perused the proceedings herein as well as the submissions by the appellant as well as the learned State counsel. The duty of this court is to reevaluate this matter afresh and arrive at an independent decision.

12. The following ingredients are essential to determine this offence, namely, the age of the victim, whether defilement occurred that is penetration, the identity of the perpetrator and the relationship with the complainant and of course whether the perpetrator was clearly identified.

13. I find the question of the age clearly proven by the production of the dental age assessment report herein. She was estimated to be 8 years old.

14. Secondly, the relationship between the complainant and the appellant is not in dispute. They are step brother and sister. Their father is one F W M.

15. As regards the identity of the perpetrator, the incident occurred at around 5.00 pm. Clearly I do not think the minor could mistake her assailant.

16. Did the appellant sexually assault or defile the minor? I find that all depended on the veracity of the evidence by PW1. In my view, she appear to be intelligent, straight forward and forthright. She graphically explained the whole episode to the trial court and even on cross-examination by the appellant she did not waver. She described for instance that the appellant's house had a stool and a bed and the same is partitioned with a curtain. I find that her evidence is what was anticipated under the proviso to Section 124 of the Evidence Act Cap 80 Laws of Kenya namely, that it was believable.

17. She could not of course fail to identify the appellant who was the assailant. There was no suggestion that she may have been defiled by any other person since the rest of the children according to her left when it started to rain.

18. As to whether she was defiled, I find the evidence of the complainant, her grandmother and the clinical officer corroborated each other. True there was no tearing of the hymen but **Section 2 of the Sexual Offences Act No. 3 of 2006** defines penetration as;

“ The partial or complete insertion of the genital organ of a person into the genital organ of another person.”

19. This was summed up in *Mark Oiruri Mose Vs Republic (2013) eKLR* , where the court stated that;

“ -----Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the genital organ -----”

20. The finding of the clinical officer herein settles it all. The child seemed not to know what the appellant used to penetrate her but she felt pain and was unable to walk properly for 3 days. She emitted foul smell as a result of Septic wounds from her labia.

For the above reason I find that indeed penetration occurred.

21. Looking at the appellant's defence, the same apart from being unsworn, clearly did not oust the line taken by the prosecution. It was not convincing. Neither was there any proof that she had differed with PW2, her grandmother.

22. This appeal is hereby dismissed.

Judgment read, 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.