



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 55 OF 2017

(Being an appeal arising from Kitale Chief Magistrate's Court Sexual Offence No. 51 of 2016 delivered by G.N. Sitati Resident Magistrate on 6/7/2017)

K S APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

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 diverse dates between 1st December 2015 and 24th December 2015 within Trans Nzoia County, being a male person, caused his penis to penetrate the vagina of I K a female person who was to his knowledge his daughter, a child aged 10 years.**
2. The alternative charge was committing an **Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on diverse dates between 1st December 2015 and 24th December 2015 within Trans Nzoia County, intentionally caused contact between his penis and vagina of I.K. a child aged 10 years.**
3. The appellant was convicted and sentenced to Life imprisonment hence this appeal. The brief facts and evidence as presented during trial were as hereunder.
4. **PW (1) Dr Mercy Oyieke**, the dental doctor from Kitale District hospital produced the age assessment report which shows the complainant's age to be 10 years.
5. **PW2 John Koima** a clinical officer from Kitale County hospital did produce the P3 form on behalf of Dr Gekode who when, She examined the complainant found that the hymen was absent and the vaginal orifice was gaping (open) and that she had smelly discharge. She did not have any venereal diseases and she was HIV negative.
6. **PW3 Medina Kemboi Ondek** a social worker from Shekina glory mission centre testified that the complainant was brought to the Children's home on 2/3/2016. The child was limping and she was advised to take her to the hospital and she took her to Gender recovery Unit where she was found to have been defiled by the appellant. She reported the matter at Kitale police station.
7. **PW4 E M** is a caretaker at the orphanage where the complainant was placed. One Madam D told her that she suspected that she had been defiled as she would hear screams from their house at night. The child then opened up and told her what the appellant, her father had been doing to her at night. They took her to the hospital and later the matter reported at the police station. She said that she had earlier examined the child and found that her vagina was reddened and her stomach bulged out. By January 2016 the appellant had been employed at the said children's home.
8. **PW5 the complainant** told the court that the appellant was her father. That they used to sleep on the floor on a sack together with her younger brother R. The appellant would sleep on a mattress within the same one single room. At night he appellant would pick her and place her on the mattress and proceed to defile her. He did this severally and would threaten to cut her if she screams or tell anyone. She said that when she was taken by PW4 she opened up and told her what had been taking place.
9. **PW6 P.C. Peter Khwatenge** from the Gender and Children Protection Unit Kitale police station carried out the investigations after receiving information from E M. He recorded the statements from the witnesses and later had the appellant arrested and charged with the offence.
10. When placed on his defence the appellant stated in his unsworn evidence that he was a guard at **[particulars withheld]** and that he was

framed by his employer when he asked for his money. He did not call any witness.

Analysis and determination

11. The court has perused the proceedings by the appellant as well as the learned State counsel. What the appellant has raised in his undated grounds of appeal amount to a general attack on the evidence as presented by the prosecution. According to him the complainant's evidence was not corroborated and the evidences of the doctor as well as the clinical officer were at variance. He said that the court also failed to take into consideration his defence.

12. The ingredients of this kind of offences are consist of the following, namely, the age of the victim must be proved, that penetration occurred, the identification of the perpetrator and the relationship between the victim and the perpetrator.

13. On the question of age and penetration I find the evidence of PW1 and PW2 unchallenged. The child was 10 years and there was sufficient evidence from the child that she had been defiled. PW2 clearly found for a fact that the hymen was not there and there was gaping (opening) of the vagina with foul smell and discharge.

14. The identification of the perpetrator in my view was established. There was no evidence to suggest that the child may have been defiled elsewhere apart from her home. The only male person she shared the house was her father. The other male was her younger brother R who may have been too young and innocent to know what had transpired.

15. The appellant did not deny the fact that the complainant was his daughter. His only defence was that his employer framed him when he asked for the salary. He did not even explain how much he was owed. Had he given sworn evidence, the prosecution would have had a chance to cross-examine him.

16. In the premises I do not find this appeal meritorious. The appellant dwelling on his HIV status is neither here nor there. Luckily, the complainant did not contract the decease which I presume the appellant was attempting to do after his wife and the mother of the child allegedly infected her.

17. The appeal is otherwise dismissed.

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.