



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 85 OF 2017

**(Being an appeal arising from conviction and sentence in Senior principal Magistrate's Court
at Iten in Sexual Offences NO. 17 of 2017 delivered by N.C. Adalo Resident Magistrate on 3/8/2017)**

W R K.....ACCUSED

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 the 14th day of May 2017 at around 1800 hours, at [particulars withheld] village, within Elgeyo Marakwet County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of C. J. K., a girl aged 7 years known to him as his granddaughter.**
2. The alternative charge was **Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 14th day of May 2017 at around 1800 hours, at [particulars withheld] within Elgeyo Marakwet County, intentionally and unlawfully caused his penis to come into contact with the vagina of C.J.K, a girl aged 7 years old.**
3. He was committed and sentenced to life imprisonment hence this appeal.
4. The summary of the evidence as presented was that **PW1 S J K** testified that the appellant was her father in law and the complainant her daughter. She was married to one L K R, the son to the appellant.
5. That on 14/5/2017 at 7.00 Pm she had gone to a Chama meeting. When she came back home she found the complainant distraught. She then narrated what the grandfather had done. She checked her private parts and saw some white substance which looked like semen. She confronted the appellant who however denied. He informed her husband. They took the minor to Kapsowar AIC Hospital. The following day the appellant was arrested despite denying before the relatives that he defiled the minor.
6. **PW2 the complainant** on the other hand testified that she was a class 1 pupil at [particulars withheld] primary school and that the appellant was the grandfather. That on the material day, he called her to assist in putting thread to a needle. She went to his house which was not far from where they lived. While putting the thread to the needle the appellant had her sleep on his bed and he proceeded to defile her. She thereafter told her to go home.
7. Meanwhile her younger sister J saw the entire episode and decided to run away.
8. When her mother came **PW3 M J** told her mother what the appellant had done to the complainant. She testified that she saw the appellant on top of the complainant. She was clear in her testimony that the appellant saw her.
9. **PW4 Paul Kosgei** the Assistant Chief Talai sub-location testified that he was called by Luka, the son to the appellant and informed him of what he had done. He went with police officer and arrested the appellant.
10. **PW5 PC(W) Vivian Chesang Kirwa** from Kapsowar police station carried out the investigations, issued P3 form to the complainant, recorded evidence from the witnesses and preferred charges against the appellant.

11. **PW6 Dr. Winfred Kimosop** from AIC Kapsowar hospital examined both the appellant as well as the complainant. He found that the complainant had her external genital hyperemic and haedimetous, the labia minora and Majora were also haedimetous and still fresh. He concluded that there was evidence of penetration.

12. As regards the appellant he found that there were lacerations on his genitalia and they were indifferent stages of healing, some were healed and others were fresh. He concluded that there was evidence of forceful penetration because of the injuries he had.

13. When put on his defence the appellant gave sworn evidence denying the charge. He said that he had been framed. He said that PW1 came and threw unga at him and he was shocked as he had done nothing. He was however later arrested.

Analysis and Determination

14. The court has perused the proceedings herein together with the exhibits produced especially the P3 forms. The age of the minor was not in dispute as per the clinic card produced which showed that she was born on 18/6/2010.

15. Equally the relationship between the appellant and the minor is that of grandfather and granddaughter. That was not disputed.

16. As to whether she was defiled or not, that answer was explained by Dr. Kimosop. Apparently the examination and the filling of the P3 form was done the following day and was still fresh.

17 Equally, the doctor's conclusion in respect to the appellant was done the following day. Both examination showed that the complainant as well as the appellant had engaged in sexual activity.

18. From the appellants defence I do not see any explanation of the injuries he had in his genitalia. He did not attempt to offer any explanation.

19. Did the appellant defile the complainant? According to PW1 and PW2 and PW3 it seems so.

20. Infact the explanation by PW2 and PW3 were consistent. The incidence occurred during daytime (evening) and there was no suggestion that it occurred elsewhere. The story concerning the thread and needle was explained and admitted by both PW2, PW3 as well as the appellant.

21. PW3 saw what the appellant did to the complainant. I did not read any malice on the part of the children.

22. Infact PW1 when told of what had taken place examined the child, she told her husband and took the child to the hospital that night. There was no break in the chain of events.

23. Consequently, I do not find merit in this appeal. The grounds raised by the appellant are too weak and general in nature. The examination by the doctor was conclusive and water tight. I do not believe that the appellant was being "fixed" maliciously by his daughter in law the son as well as his grand children.

24. The appeal is otherwise dismissed.

Delivered, signed and dated at Eldoret on this 19th day of October , 2018.

H.K. CHEMITEI

JUDGE

19/10/18

In the presence of:

R. Karanja for the Respondent

Appellant – present

Court Assistant – Christine

Judgment read in open court.