



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 1 OF 2018

SKN ALIAS

AKT.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Cr. Case No. S.O 5 of 2017 PMs Court Bomet – Hon. Nyigei – SRM)

JUDGMENT

The appellant was convicted and sentenced to 15 years imprisonment for the offence of incest C/S 20(1) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 26th day of January 2017 at Motigo Sub location- Merigi Location Bomet county, intentionally and unlawfully caused is penis to penetrate the vagina of PS who to his knowledge was his daughter.

Being aggrieved by the decision of the learned trial magistrate, the appellant lodged this appeal.

The main grounds are that the learned magistrate relied on the evidence of PW1, PW2 and PW3 who were untrustworthy.

That the learned trial magistrate did not appreciate that fact there did exist a grudge between the appellant and PW3 over land disputes. That the defence offered was not considered.

This being the first appellate court, it has the duty of evaluating and considering a fresh the evidence on record so as to arrive at its own conclusion, bearing in mind that it did not have the opportunity to observe the demeanour of the witnesses. **-Okeno -vs- R 1972 EALR.**

Brief Facts

The complainant gave an unsworn evidence and testified that on the 25th Day of January 2017 her father called her as she was on her way to cut napier grass for the cattle. It was in the morning. She found him washing clothes. He pulled her into the house, removed her pants and touched her breasts. He lied on top of her as she was facing upwards. A emerged looking for a brush and upon seeing them left screaming. Her mother arrived at the scene and the accused was arrested.

AN (PW2) testified that on 25th day of January 2017 at about 8.00 a.m she went to the house of the accused to borrow a brush. She called C three times but there was no answer. She went to look for the brush which is kept on the top of the door. She heard some noise and upon looking inside she saw the thighs of a man, beside him there was a trouser and an under wear. He had heard her asking for the brush and he told her that it was lying outside. She checked but did not find it. She returned and saw the complainant carrying her pants and biker on her hands.

She was shaking. She asked her what was the problem. She said that her father had called her. The father of the complainant went and sat on a bench and started to dress up. He put on is trouser and took the underwear for washing outside.

The complainant said that she wanted to go and cut grass but the witness demanded to know where her mother was. The witness went and called the mother of the complainant and explained her what she had observed. She screamed for help and members of public arrived at the scene. The appellant was beaten by members of public. He was alleging that the child was not his but upon receiving threats of being burnt alive he accepted paternity of the child. The area chief was called and the accused was arrested and taken to police station.

The witness informed the court that the accused was her brother in law and she bore no grudge against him.

JCN (PW3) is the mother of the complainant. She testified that on the 25th day of January 2017 at 8.00 a.m. after breakfast she proceeded to visit a neighbour called M. While there she was told that Alice (PW2) was calling her. She met Alice who told her of what she had observed. She asked her why she had not screamed for help.

Upon arrival near home she screamed for help. Members of public arrived and beat him up and he was taken to police station. A P3 form was later issued and filed at Longisa District Hospital. Julius Magut (PW5) is a clinical officer at Longisa County Hospital. He examined the complainant on 23/1/2017. She was 17 years old and mentally retarded. Upon examining her genitalia, and taking a high vaginal swab he found presence of numerous epithelial cells.

There were bruises on the labia minora. The hymen was broken (not recent). The injuries were eight hours old.

The doctor was of the opinion that there was vaginal penetration.

The investigating officer (PW7) testified that when the accused was taken to police station he had received a beating from members of public. She issued a P3 form to the complainant which was later filled at Longisa County Hospital. The complainant was taken for age assessment and she was found to be over 18 years old.

The appellant testified to the effect that his wife had taken a loan of Kshs.100,000/= from Kenya Women Finance and they disagreed as there were threats of their shamba being sold. He denied the allegations of Incest.

The law, analysis and conclusion

The appellant was charged under S. 20(1) of the Sexual Offences Act which provides:-

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, 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”.

Issues for determination

1. Penetration
2. Age
3. Relationship with the accused

Penetration

The complainant testified to have had sexual intercourse with the accused. The Doctor who examined her genitalia observed that , the hymen was missing(though not recent).

There were numerous epithelial cells. There were bruises on the labia minora. He concluded that there was vaginal penetration.

Age

The complainant was found to be a retarded child after psychiatric examination by PW6. An age assessment was carried and the complainant was found to be over 18 years old.

Relationship

The complainant testified that the accused was her father. The mother of the complainant (PW3) testified that the accused was the father of the complainant.

The accused himself did not deny that the complainant was his daughter.

Identification

The complainant testified that the incident took place in the morning after breakfast. PW2 had gone to the house of her brother in law to borrow a brush that morning. She testified to have seen the thighs of the accused with the trouser and under wear placed nearby on a bench. The accused had told her that the brush was outside. She checked and did not find it. Upon return she met the complainant carrying on her hands her under pants and a biker. The accused was dressing up. She saw the accused put on his under wear outside. Her evidence did corroborate that of the complaint and the Doctor.

I am satisfied that the conviction was safe. The accused was sentenced to 15 years imprisonment. The minimum sentence is ten years. The

accused had been treated as a first offender. The sentence of fifteen years was harsh. It is reduced to ten years imprisonment. The appellant will serve ten years imprisonment from the time of his conviction. The appeal succeeds to that extent only.

Judgment delivered dated and signed this 21st day of December 2018 in open court and in the presence of learned counsel for the prosecution Mr. Wawire. Appellant in person present.

Court assistant – Rotich.

M. MUYA

JUDGE

21/12/18