



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 18 OF 2018

JO.....AMELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Bomet PM's Court Cr No. 34 of 2017-Hon P. Achieng - PM)

JUDGMENT

The appellant was convicted and sentenced to 15 years imprisonment for the offence of attempted incest C/s 20 (2) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 26th day of October 2017 in Chepalungu Sub-County within Bomet County intentionally attempted to cause his penis to penetrate the Vagina of CC a child aged 10 years who to his knowledge was his daughter.

Being dissatisfied with the conviction and the sentence, the appellant has logged this appeal which is premised on these grounds.

The conviction was against the weight of the evidence adduced by the prosecution witnesses.

That the evidence of the PW1 was untruthful and uncorroborated. That the court did not draw an adverse inference for the prosecutions failure to call PW1's sister and one Zeddy.

That the sentence of 15 years was harsh and excessive.

This is the first appellate court. It has a duty to evaluate and consider a fresh the evidence on record so as to arrive at its own conclusions bearing in mind that it did not have the opportunity to observe the demeanour of the witnesses.

BRIEF FACTS

After a **voire dire** examination the complainant testified that she is aged ten years old at the time and was in class 4. That on the 26th day of October, 2017 she was asleep on the floor of their room with her sister AC aged eight years. Her mother had been chased away and was not staying with them. Her two brothers were sleeping on a bed but on the same room. Their father was sleeping on a chair at the sitting room. She woke up only to find her father lying on the top of her. He had removed her petticoat, biker and pants. She further told the court that there was no light as they had put them off. She screamed and her father told her to put on her clothes. He hit her on the left shoulder and told her to keep quiet lest she wakes up the other children. She was asked by her sister why she was crying but she did not say anything.

She further told the court that the accused was wearing some clothes when he did bad manners to her. She further told the court that he removed his thing and put it into her private parts.

He later went and sat on his chair. In the morning she went and borrowed a mobile phone from one Zeddy a neighbour and called her mother and reported to her of what had taken place. Her mother reported the matter to the area chief. She was taken for examination and treatment at Sigor Hospital.

Ken Korir (PW2) is the clinical officer who examined the complainant on 2/11/2017. Upon examination the hymen was intact. No lacerations was noted, the vulva was essentially normal.

There was no discharge seen. No blood stains. Urinalysis test was done and nothing unusual was detected. High vaginal swab showed no

presence of spermatozoa. Upon cross examination by counsel for the accused, the witness told the court that there was no proof of attempted defilement.

In his defence, the accused told the court that he had differences with his wife in the month of April 2017 and she left the matrimonial home. Later she caused him to be arrested for something he had not done.

The appellant was charged and convicted for the offence of attempted incest C/S 20(2) of the Sexual Offences Act.

S. 20(1) of the act provides:-

1. "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 offences termed incest and is liable to imprisonment for a term of not less than ten years".

2. If any male person attempts to commit the offence specified in subsection (1) he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years".

A perusal of the evidence by the clinical officer shows that there was no evidence of attempted defilement.

The complainant's clothes were not torn, they were not stained. Examination on the genitalia revealed no lacerations, vulva was normal hymen was intact, urinalysis conducted showed nothing unusual.

The evidence by the complainant is that the accused lay on top of her had her clothes removed and inserted his male thing into hers and she cried a lot. There is no evidence to the effect that there was an attempt at penetration. What the prosecution was required to prove was an attempt at penetration not necessarily penetration itself as that would amount to another offence having been committed.

The complainant testified to have been asleep with her sister aged eight years when the incident took place. She also testified that her two brothers were asleep on a bed in the same room. The court was not informed of the ages of the brothers but at least her sister who was aged eight years could have been called to testify as to what transpired that night.

The evidence of the doctor is at variance with that of the complainant.

Upon a careful evaluation of the evidence on record, I am not satisfied that the offence of attempted incest was proved beyond reasonable doubt.

The conviction was not safe the sentence was not lawful. I quash the conviction and set aside the sentence. The appeal succeeds.

The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this 18th December 2018 in the presence of Miss Kariuki learned counsel for the prosecution learned counsel for the defence Mr. Kadet holding brief Koske

Court Assistant.

M.MUYA

JUDGE

18/12/18