



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 86 OF 2017

(Being an appeal arising from conviction and sentence Kitale Chief Magistrate's Court in Criminal Case No. 179 of 2015 delivered by V.O. Adet Senior Resident Magistrate on 2/11/2017)

S I M.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Incest contrary to Section 21 as read with Section 20(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on diverse dates between 1st January 2013 and 4th October 2015 at [particulars withheld] village in Trans -Nzoia County, being a male person caused his penis to penetrate the vaginas of AJ and NJ female persons who were to his knowledge his daughters aged 13 years and 14 years old respectively.**

2. The alternative charge was **Indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the diverse dates between 1st January, 2013 and 4th October 2015 at [particulars withheld] village within Trans-Nzoia County, intentionally caused his conduct between his genital organ namely penis and genital organ namely vaginas of AJ a child aged 13 years and NJ a child aged 14 years.**

3. The appellant was convicted and sentenced to 10 years imprisonment hence this appeal. The grounds of appellant as presented together with his submissions include the fact that the prosecution failed to call key witnesses, the doctor who examined the complainant did not testify and the age of the complainant was not established.

4. The summary of the evidence as presented during trial is as follows.

PW1 John Koima the clinical officer from Kitale County hospital examined the complainant whom she found that the hymen was torn and old looking and there were no bruises.

5. **PW2 Pharis Silali** from Kitale County hospital, dental department produced the dental age assessment report which showed the complainant to be 16 years old.

6. **PW3 the complainant** testified that the appellant was her father. Together with her sister A they and her younger brother, they were left together with the appellant by their mother who seemed to have relocated to Saudi Arabia.

7. Between 1/01/2013 and 4/10/2015, she testified that they lived in a single room. The appellant would occasionally and repeatedly defile her together with her sister in turns. He threatened to kill them if they reported to anybody. He would defile them at night.

8. On 20/10/2015, after her sister refusing his advances, she gathered courage and informed one Mama H. They were then taken to one Mama T who in turn took them to the police station. They were taken to the hospital and examined.

9. **PW4 S C S** testified that she knew the appellant as they stay in the same compound. She said that A came to her house crying. She said she was sick and the complainant herein also came. They told them what their father had been doing. They told her that their father had refused to pay their school fees. She took them to school where she requested that they be allowed to do examination. They also told the teacher what had been happening.

10. **PW5 A C R** is a teacher at [particulars withheld] primary school. The complainant and her sister were her pupils. She was in school on 21/10/2015 when the complainant came with PW4 together with her sister and informed them of their appellant's sexual escapades with the girls. She took them to Maili nane police station and later to Kitale District hospital.

11. **PW6 P.C. Kitui Alexander** from Sibanga police base received the report on 21/10/2015 from the head teacher [particulars withheld] primary school who came with the two girls. He referred them to the hospital and P3 forms filled. He recorded statements and preferred charges against the appellant.

12. When put on his defence the appellant gave unsworn defence denying the charges. He said that he had assigned her children that Morning of 20/10/2015 the duty of getting fodder for his cows. They did not and when he came back he was told by the younger child, a boy, that the two were just playing and that they had gone to the house of S. He was not in talking terms with S. The following morning the girls sent S's son for their uniforms. He heard that S had gone to school with the girls. Later he was arrested and taken to the police station and subsequently charged.

Analysis and Determination

13. The duty of this court is to re evaluate the evidence afresh and arrive at independent findings.

(See Okeno Vs Republic (1972) EA 32).

14. The court has extensively perused the proceedings together with the exhibits produced. This court has equally read the submissions by both the appellant and the learned state counsel.

15. What is not in dispute is the fact that the complainant was the appellant's daughter.

16. Secondly, that they lived together in one house and the appellant's wife had gone to Saudi Arabia.

17. The clinical report showed that the complainants had torn and old looking hymen suggesting that the complainant had sexual intercourse.

18. Did the appellant defile the complainant? I have examined the complainant's evidence and those of the prosecution witnesses carefully. The evidence as presented clearly does not show any malice on the part of the complainant. It is not indicated that there was bad blood between the appellant and his wife so as to use the child as a "weapon". Neither was demonstrated any dispute between PW4 (Sophia) and the appellant. It appears that the children went to S as a neighbour and to seek solace. The complainant's sister infact is the first one who reported. Although she was not called to testify, her reporting opened the door for the complaint to inform S too. S then informed the school administration who in turn informed the police.

19. It is not far fetched for the complainant to get scared to report their father's actions based on the real threats and danger they were experiencing. As it were, their only source of hope and their schooling was him. Infact they reported to S to assist them with their schooling as their father had refused to pay their fees.

20. The unsworn evidence by the appellant did not add much. He did not afford the prosecution the chance of cross-examination. It is not possible to ascertain whether he had any difference with S.

21. All in all I do not find any merit in this appeal and I shall proceed to dismiss it. The age of the complainant contrary to what the appellant submitted was proved by the production of the dental report.

22. As regards sentencing the trial court ordered that the same should run from the day the appellant was arraigned in court. For purposes of clarity the 10 years sentence meted against the appellant should run from 22/10/2015.

23. The appeal is otherwise dismissed.

Delivered, signed and dated at Kitale this 18th day of December, 2018.

H.K. CHEMITEI

JUDGE

18/12/18

In the presence of:

Mr. Kakoi for Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.