



REPUBLIC OF KENYA
IN THE HGH COURT OF KENYA IN KITALE

Criminal Appeal No. 119 Of 2014

(Being an appeal arising from the Judgment of Kitale Resident Magistrate C.N. Mugo delivered on 30/10/2014 in Criminal Case NO. 1242 of 2013)

D K NAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

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 **31st day of May 2013 at [particulars withheld] within Trans Nzoia County being a male person intentionally caused his penis to penetrate the vagina of M N K a child aged 8 years a female person who was to his knowledge his half daughter.**

The appellant was convicted and sentenced to 20 years imprisonment hence this appeal.

The evidence at the trial court were that the minor who was aged 8 years old was left behind by her mother PW2 with the appellant early in the morning at around 8 am to fetch water on 31/8/2013. The appellant then proceeded to defile the minor and was caught in the act by PW2. PW1 the minor stated that she felt pain. The mother PW2 then took her to Kitale District hospital where she was treated and age assessment done.

PW2 stated that she found the appellant in the act and she could not scream as he would beat her just as he had been doing. He reported the matter at the chief's office and the appellant was arrested.

PW3 James Njoroge Waweru a village elder said that on 31/5/2013 he met an assistant chief one Susan who told him of the incident. He went to PW2 home and found the child and with her. He took them to Kitale District Hospital. He also organised for the arrest of the appellant.

PW4 Kirwa Labbat the clinical officer produced the P3 form which showed that there was **“no physical injury, on genital examination no bruises on labia, the hymen was already torn, not fresh, no vaginal discharge, no spermatozoa”**

PW5 Sergent Josephine Nabwire testified on behalf of the investigating officer William Andai who carried out investigations and charged the appellant. She also produced the age assessment report by Dr Ndege.

When put on his defence the appellant denied the charge. In his unsworn testimony he said that PW2 his wife had a love affair with another man and when he confronted her she threatened him with unspecified consequences. A week thereafter the whole incident occurred. He said that PW1 was beaten by her so that she could testify against him.

Analysis and Determination

The state conceded to this appeal. I have perused both parties submissions, I find the concession by the respondent proper for the following reasons.

First of all the child on being examined was found to have no physical injury, no bruise on labia and the hymen was missing and was not fresh and no discharge and no spermatozoa. Clearly this can't be of an 8 year old child. Even if the hymen was torn there ought to have been serious injuries. Infact there was no indication by the child that she suffered any injuries. The medics who examined her in the first instance ought to have found evidence of bruises.

Further the evidence on record by PW1 and PW2 does not corroborate what she told the hospital staff, namely that the appellant had been defiling the minor severally. Surely what was difficult in the complaint although a minor explaining to the trial court that she had earlier on been defiled by the appellant. More importantly why would the mother keep quite for such a long time??

In any case why would PW2 take the child for treatment on 3/6/2013 yet the incident occurred on 31/5/2013. She did not offer any explanation at all raising suspicion and therefore buttressing the appellant's defence that there was bad blood between her and him over some marital infidelity.

In the premise I shall allow the appeal and set free the appellant unless lawfully held.

Delivered this 25th day of January 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Appellant – present

Kirong – Court Assistant