



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 52 OF 2015

C M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in **Kitui Senior Principal Magistrate's Court Criminal (S.O.) Case No. 33 of 2012 by Hon. B. M. Kimemia P M on 10/12/14**)*

J U D G M E N T

1. **C M M**, the Appellant, was charged with the offence of **Incest by Male** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on diverse dates between **1st September, 2012** and **6th October, 2012** at unknown time at **[particulars withheld] Village, Kyamatu Sub-Location, Mwitika Location in Kitui County**, intentionally committed an act which caused penetration with **N S** a child aged **11 years** by inserting his penis into her genital organ namely vagina who to his knowledge is his granddaughter.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on diverse dates between **1st September, 2012** and **6th October, 2012** at unknown time at **[particulars withheld] Village, Kyamatu Sub-Location, Mwitika Location in Kitui County**, intentionally committed an act of indecency with **N S** a child aged **11 years** by touching her private parts namely vagina using his hands.

3. He was tried, convicted and sentenced to **life imprisonment**.

4. Aggrieved by the conviction and sentence he appealed on grounds that:

- Evidence that was considered to corroborate the Complainant's testimony was hearsay.
- A crucial witness, the Complainant's father recanted his statement.
- The fact that there was a grudge between the Appellant and PW2 was not considered.
- The defence put up was not considered.

5. Facts of the case were that the Appellant, the Complainant, PW1, **N S** grandfather called her to his house on the **6th October, 2012**. He defiled her amidst threats of killing her. When PW2, **N N** her grandmother returned home she told her what had befallen her. This was the fifth time he was taking advantage of her by sexually violating her. And he would threaten to kill himself if she revealed what he was doing. Her grandmother took her for treatment and reported the matter to the police. The Appellant was arrested and charged.

6. When put on his defence the Appellant stated that he was framed by PW2 because of a grudge that existed between them. She wanted to take his property. That he was injured in **2012** and was using a crutch. During that period PW2 sold his parcel of land. He reported the matter to the Chief and the Clan. He denied having committed the offence because he was injured.

7. At the hearing the Appellant canvassed his Appeal by way of written submissions. He stated that evidence adduced that the Complainant and the Appellant used to live in the same home was contradictory. Citing the case of **Njoroge vs. Republic Criminal Appeal No. 115 of 1982** he stated that it was held that it is a well established rule of practice that a Court of Law does not act on mere assertions, not unless such assertions are proved by evidence before Court. That the Prosecution witness ought to have proved target which does not amount to frame up like in the instant case. That the defence put up was well explained. Evidence adduced by the father of the child contradicted that of PW2. There was neither a P3 form or Birth Certificate adduced in evidence.

8. The State through learned Counsel **Mr. Wanjala** opposed the Appeal. He submitted orally that the Appellant defiled the Complainant at his house and he threatened her with death if she made noise. She sustained injuries in her private parts as a result of the sexual assault. A Medical Officer produced a P3 form to establish the allegation. An age assessment form was produced which established the Complainant's age as **Eleven (11) years**. That the Appellant failed to call evidence to establish the alleged grudge between him and PW2. He concluded by stating that all ingredients of the offence of defilement were proved.

9. This being the first Appeal, I am under a duty to subject the evidence adduced at trial to a fresh scrutiny and make my own conclusion bearing in mind the important fact that I never observed the witnesses who testified at trial therefore I am unable to that extent to assess their credibility or veracity of their evidence. (**See Okeno vs. Republic (1972) EA 32**).

10. This being a case of Incest by Male the Prosecution was duty bound to prove:

(i) Whether sexual intercourse occurred between the Appellant and the Complainant.

(ii) Whether there was a degree of consanguinity prohibited by law between them.

11. In her testimony the Complainant stated that the act of penetration did occur; and during the act she sustained injuries in her genitalia. On examination on the **9th October, 2017** she was found having laceration on the labia minora and labia majora. Her hymen was also broken. This was undisputed evidence of penetration.

12. The Complainant identified the Appellant as the perpetrator of the act of defilement. She stated that she had been engaging in sexual intercourse with the Appellant following his threats. In his defence the Appellant blamed PW2 for what befell him. He argued that there was a grudge between him and PW2 as the later wanted to ensure he was incarcerated in order to take away his property. In a repartee PW2 denied the allegation. She stated that the Appellant her stepbrother was chased away from his biological brother's home by his sister-in-law and she offered him a place to live in her homestead when he returned from **Mombasa** after being involved in a road traffic accident. She stated that indeed she was the one assisting him.

13. The Appellant alleged that PW2 sold a portion of land he was entitled to but he did not deny having been hosted by her. It is in evidence that their father is alive. The allegation that he defiled the Complainant was stated by the Complainant herself. It was not alleged that any grudge existed between them.

14. The Appellant stated in his defence that he would not have committed the offence because he was still using crutches. On cross examination the Complainant stated that by then the plaster cast that was on his leg had been removed such that he was strong enough to commit the act of defilement. The fact that he did not have any plaster cast is confirmed by the officer who arrested him. By then he was still using

crutches but he did not have a plaster cast.

15. In the premises, the trial Magistrate did not misdirect herself by believing that the Complainant was truthful and recording that fact. I therefore find that the Appellant had sexual intercourse with the Complainant.

16. There is an allegation in the ground of Appeal that the father of the Complainant recanted his statement. The father of the Complainant was not a witness. Therefore the allegation is baseless.

17. The Appellant herein was the grandfather of the Complainant. There existed a degree of consanguinity prohibited by the law between them. Therefore the indecent act that was committed was incest. **(See Section 20(1) and 22 of the Sexual Offences Act).**

18. It is argued that the age of the Complainant was not proved. In the case of **Fappyton Mutuku Ngui vs. Republic HCR.A No. 296 of 2010** it was held that:

“..... “conclusive” proof of age in sexual offences does not necessarily mean certificate. Such formal documents might be necessary but other modes of proof are available and can be used in other cases.”

In her testimony the Complainant stated that her age was **twelve (12) years**. The Medical Officer who examined her and filled the P3 estimated her age as **eleven (11) years**. On the **3rd May, 2013** she was subjected to age assessment and found to be **twelve (12) years old**. Therefore at the time of the act she was **eleven (11) years old**. Her age was proved to the required standard. In the premises the sentence meted out was within the law. In the circumstances, the Appeal is dismissed in its entirety.

19. It is so ordered.

Dated, Signed and Delivered at Kitui this 23rd day of August, 2017.

L. N. MUTENDE