



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 11 OF 2016**

**(Being and appeal arising from conviction and sentence in Sexual Offence case no 43 of 2015 delivered by C.N. Mugo Resident Magistrate on 18/2/2016)**

**R K B .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

1. 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 diverse dates between 1<sup>st</sup> January 2012 and 28<sup>th</sup> February 2015 in Trans Nzoia County, intentionally caused his penis to penetrate the vagina of A K a child aged 13 years whom to his knowledge was his daughter.**
2. He was also charged with the alternative count of **committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006**. The particulars of the offence were that **on diverse dates between 1<sup>st</sup> January 2012 and 28<sup>th</sup> February 2015 in Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and genital organ namely vagina of A K a child aged 13 years.**
3. The appellant was convicted and sentenced to 30 years imprisonment hence this appeal. He has raised several grounds of appeal but before looking at them its worthwhile to summarise the events as raised at the trial court.
4. **PW1 the complainant** testified that she was 12 years old and a class 4 pupil at [particulars withheld] primary school. She said that the appellant was her biological father. Her mother disagreed with her father and left in January 2012. By then she was living with the appellant together with her 2 young siblings. They were living in a single room with a partition.
5. She testified that on 3 occasions her father defiled her in the said house and nobody was able to see. Later she told Madam B who in turn told Madam R her teachers. The said Madam R took action by informing the area chief and the appellant was arrested. The complainant was referred to Kitale District hospital where the P3 Form was filled.
6. **PW2 B C** and a teacher at [particulars withheld] primary school testified that the complainant was her pupil in class 2 and 3. She said that on 2/3/2015 the Deputy Head teacher one A K told her to deal with a parent who had issues with her daughter. The pupil explained that she had run away for the father had defiled her. She said that when she was in class 3 during P.E. lesson she was unable to run and was crying

but did not open up to her. The appellant was then arrested and interrogated by the chief Kiminini who took over the matter. The child was then taken to Kitale District hospital.

On cross-examination she denied that the child had been bitten by a dog that is why she could not run.

**7. PW3 Kirwa Labatt** a Clinical officer from Kitale District hospital examined the complainant when she was brought to her. She was told that the father defiled her on 28/2/2015 and 1/3/2015.

He found on examination that she had no bruises on her genitalia but the hymen was broken and that pregnancy test was positive although it needed to be further examined.

**8. PW4 Pharis Silali** produced the dental age assessment report which estimated the age of the complainant to be 13 years old.

**9. PW5 Corporal Solomon Malilo** based at Birunda Patrol Base arrested the appellant on 2/3/15 from school after getting instructions from Chief Anne Chesoni.

**10. PW6 Corporal Felicity Rono** from Kitale police station gender office testified on behalf of one Corporal Kilimo who carried out the investigations. She entirely relied on what her colleague had found. She said that the complainant had been defiled from 2012 to 2015.

**11.** When put on his defence the appellant gave unsworn testimony denying the charge. He said that on 27/2/2015 due to teachers strike he received instructions from his wife to look for private school for her daughter. She came and found that he daughter had gone to her aunt's place. She went to the school to look for transfer but was arrested and accused of defiling her.

### **Analysis and Determination**

**12.** I have perused the entire proceedings herein as well as the written submissions by the parties. The substantive argument raised in the appellant's appeal is the fact that there was no eye witness to the incident and that there were material contradictions to the prosecution witnesses testimony.

**13.** This being a first appeal the court is bound to re-evaluate afresh the evidence with a view of coming to afresh findings with full knowledge that it did not have the opportunity of conducting the trial thus seeing the witnessed demeanor.

**14.** For this offence to be established one ought to prove the relationship between the complainant and the appellant, the age of the minor, the identification of the perpetrator and whether there was penetration.

**15.** In regard to the 1<sup>st</sup> issue I am satisfied that the appellant is a father to the complainant. Both admitted so in the proceedings.

**16.** As to the age of the complainant, I find that the dental age assessment produced as well as the testimony of the complainant corroborated each other.

**17.** As to the identity of the perpetrator I find that if indeed the incident occurred three times as the complainant stated, in their house, then I do not find any difficulty concluding that there was no problem on the question of identity.

**18.** The next big issue is whether the evidence on record indeed suggest that the appellant committed incest against her daughter. As clearly submitted by the appellant there was no eye witness to the incident and thus it was the word of the complainant against that of the appellant.

**19.** The provisions of Section 124 of the Evidence Act Cap 80 are clear and straight forward especially the Proviso thereof. The same states;

**“----- Provided that wherein a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

20. The operative word herein is if the **“victim is telling the truth”**. The complainant stated that the appellant defiled her for 3 days and that was in the year 2012. The information given to the Clinical officer Kirwa Labatt seemed to be contradictory.

He said in his testimony that;

**“She was brought by her teacher on allegations she had been defiled by her father severally from 2012 the last time being 28/2/2015 and again on 1/3/2015. The Teacher discovered the minor was not walking in normal way”**

21. He found that the hymen was old looking and broken. His report was prepared on 3/3/2015. According to the clinical report the complainant went to her aunt’s place on 27/2/2015.

22. If the complainant was defiled on 28/2/2015 and 1/3/2015 why did she not say so. Why did she testify that the three occasions when she was defiled was in 2012? Even more interesting is the allegation that she went to her aunt’s place on 27/2/2015 yet on the same breath she said that she was defiled on 28/2/2015 and 1/3/2015. By this time clearly she was not at home. On his part the appellant contended that on 27<sup>th</sup> February 2015 he was in Embu where he worked.

23. More importantly is the evidence of PW2 her teacher. According to her she saw the child while in class 3 unable to run during P.E. She then related the incident to what she was later to learn when the appellant came to school and the child opened up. From 2012 to 2015 in my view wastoo long. At least I am not persuaded that the complainant was defiled on 28/2/2015 or 1/3/2015 as the child was already in her aunt’s place. Infact perhaps it would have been prudent to have called her aunt as a witness.

24. Then there was a finding by the Clinical Officer that pregnancy test proved positive. If she had been defiled in January 2012 surely there would have been sufficient evidence that she had involved herself in sexual activity.

25. The issue of her father alleging that she had taken Kshs 500 from him did not feature anywhere in the complainant’s testimony.

26. In the premises taking into account the above contradictions and considering the nature of the charge facing the appellant I find that the case was poorly investigated. I respectively do not find any reason why the complainant’s aunt or at least her mother called to corroborate the evidence on record. For the appellant to spent 30 years in prison for the charges which evidence were contradictory in my view would be too harsh. The benefit of doubt ought to go on favour of the appellant.

27. The appeal is hereby allowed. The appellant set free unless lawfully held.

**Delivered, signed and dated at Kitale this 11<sup>th</sup> day of December, 2017.**

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**H.K. CHEMITEI**

**JUDGE**

**11/12/17**

**In the presence of:**

**M/S Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong/Silvia**

**Court: Judgment read in open court.**