



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL CASE NO. 45 OF 2014

(Being an appeal from Judgment of Kitale Senior Resident Magistrate

J.A. Owiti delivered on 21/12/2012 in Criminal Case No. 3437 /2010)

B S J.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged with the offence of **attempted incest contrary to Section 20(2) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 18th day of December 2010 at about 8.00 pm at [Particulars withheld] in Elgeyo Marakwet County intentionally attempted to touch the vagina of C C with his penis who was to his knowledge his niece**.

The appellant was convicted of the charge of indecent act with a child and sentence to 10 year imprisonment hence this appeal. The facts as presented by the prosecution can be summarised as hereunder.

PW1 C J born in 1996 told the court that on the on the said date she was home with her young siblings namely B C aged 12 years, A T aged 11 years and B C and R K. Their mother had gone elsewhere. After taking dinner they went to spent in the kitchen. The appellant who was the brother to their late father went to sleep in the other room which he used to sleep with their mother. At around 11 pm he had someone trying to remove her underpant.

She was surprised but as she woke up she realised it was the appellant who asked her for food. She nevertheless raised alarm and rushed out and she spent at the neighbours. She did not find the appellant when she came back the following morning. She then informed her mother the following day. The appellant became violent when he was confronted and he denied attempting to defile her. He was arrested by the village elder and taken to Kapcherop police station and later charged.

PW2 S C testified that she was asleep that night when she heard the distress call from PW1. She told her that appellant wanted to rape her. She accommodated her that night till the following day when she called the complainant's mother and told her what had transpired.

PW3 R C is the complainant's mother. She said that she was telephoned by one A and told to speak to PW1 who informed her of the incident. She said that the appellant had inherited her after the demise of

her husband. She said that she had entrusted the custody of the children to the appellant.

PW4 P.C. William Manyonge carried out the investigation after receiving report on 19/12/2010 from PW1.

He also produced the immunization card of the complainant which showed that she was born on 14/3/1994. He rearrested the appellant once he was brought by the members of the public.

When put on his defence the appellant gave sworn evidence and stated that on 16/12/2010 he was splitting timber at his mother's place. On 17/12/2010 he was called to pick money at Kapcherop centre but he was told later that he was required at Kapcherop Police Station. He went there and was placed in the cells

On cross-examination he said that he knew the complainant and had even punished her for failing to go to school. He said that he had inherited the complainant mother after the demise of his brother. He denied that he was at the scene that night.

At the hearing of this appeal the learned state counsel submitted that according to him the conviction was not proper as the ingredients of indecent act with a child as anticipated under Section 11(1) of the Sexual Offence Act were not met. This being the case the appeal ought to be allowed.

Before determining this issue the appellant raised a defence of alibi during his evidence. He argued that he was not at the scene at that time. The complainant who appeared credible as per the courts record insisted that the appellant was at the scene. By his own admission the appellant said that he used to spent at the home of the complainant. In any case he ought to have raised such defence at the initial stage of the hearing. I find that the appellant must have been at the scene.

But did the prosecution proof the case against the applicant? The offence of **“Indecent act”** has been defined under Section 2 of the Sexual Offence Act as

“an unlawful intentional act which caused-

(a) any contact between any part of the body of a person with the genital organs, breasts, or buttocks of another, but does not include an act that causes penetration.

(b) exposure or display of any Phornographic material to any person against his or her well”

The applicable definition is (a) above. In this case the state rightfully concluded that there was no conduct of the appellant and the complainant. The mere fact that its alleged he attempted to remove the underpant does not qualify under the above definition.

Consequently and without going into the other merits or demerits of the appeal, the same is allowed. The appellant is hereby set free unless lawfully held.

Delivered this 31st day of October, 2016.

H.K. CHEMITEI

JUDGE

In the presence of;

Kakoi for State

Appellant - present

Kirong – Court Assistant