



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 9 OF 2015

(Being an appeal arising from conviction and sentence of J.A. Owiti Principal Magistrate delivered on 4/2/15 in Criminal Case NO. 1565 of 2013)

JNKAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant was charged with offence of **Incest contrary to Section 20 of the Sexual offences Act No. 3 of 2006.**

The particulars of the offence were that on the **2nd day of July 2013 at [particulars withheld] trading Centre within Trans Nzoia County being a male person intentionally caused his penis to penetrate the vagina of M.N.W. complainant herein a child aged 7 years a female person who was to his knowledge his daughter.**

2. The appellant denied the offence and the prosecution called 8 witnesses to establish its case. The appellant was convicted and thereafter sentence hence this appeal. The prosecution evidence can be summarised as hereunder;-

3. **PW1 John Koima** a Clinical officer at Kitale District Hospital filed the P3 form after examining the complainant and in his opinion there was penetration as the hymen was torn and the injuries were fresh.

4. **PW2 BNW** is the grandmother to the complaint. She went to Sibanga patrol base after being notified of the incident. She interrogated the child who told her that Baba the appellant had defiled her. She also accompanied the minor to the hospital.

5. **PW3 Mary Nasambu Wafula** testified that the minor was a child to her neighbour and she knew the mother and had been left under her custody by her mother. She saw her walking with difficulty and on inquiry she told her that she had been defiled by the appellant in their rented house. She examined her private parts. She then alerted her neighbours and thereafter went to the place where the appellant worked at Sibanga trading centre. They also called the child's mother. They escorted the appellant to Sibanga patrol Base.

6. **PW4 SN** is the complainant's mother. She testified that she woke up at 6 am and went looking for charcoal for cooking. She prepared breakfast and left for her casual work. She left behind the complainant, her brother SBW aged 3 years and the appellant who he was staying with as husband and wife. Later she heard from Mary Nasambu that the child had been defiled by the appellant whom by then

was at the police cells together with the complainant. She interrogated the child and checked her private parts where she saw whitish discharge flowing out of her vagina. The child told her of her ordeal. She said that the complainant was born on 14/8/2006. Apparently the clothes she wore that morning were not traced.

7. **PW5 the minor** testified that she was left behind by their mother that morning who had gone to buy charcoal. The appellant proceeded to defile her and warn her not to tell the mother. She described how the appellant did 'tabia mbaya' to her. She later told some lady of what the appellant had done to her.

8. During cross-examination, she said that the incident took place at night and that she told Mary what had happened during the previous night.

9. **PW6 P.C. George Mandu** carried out the investigation. He testified that a crowd of about 10 people escorted the appellant to the Patrol Base. In the procession was the complainant. She instructed the mother to take her to Kitale District Hospital for treatment. He then placed the appellant inside the cells and later recorded statements from the witnesses and preferred charges against him.

10. **PW8 Faris Silali** produced the dental age assessment report by Dr Ndege who opined that her complainant was aged 7 years and he produced his report.

11. **PW8 Leah Kebenei** examined and treated the minor on 3/7/2013 having been escorted by the grandmother. She found that the hymen was torn, fresh looking and bruises on labia majora, minora and there was vaginal discharge. There was also some infection on her urine as per urinalysis test.

12. Upon putting the appellant on his defence he gave sworn evidence denying the charge and basically explaining how he was arrested on 4/7/2013 and placed in the cells and later charged. He did not call any witness.

Analysis and Determination

13. Having read the entire proceedings and the parties written submissions, the bedrock of the appellants grounds of appeal is inched on the fact that the evidence as submitted by the prosecution could not have satisfied the threshold to warrant a conviction and subsequent sentence. He claimed that the court infact failed to consider his defence entirely and other inconsistencies as per his submissions.

14. This being a first appeal, the court is enjoined to interrogate the entire evidence as presented and reach a new and fresh conclusion .

15. The relationship between the appellant and the complainant was that of a father and a step daughter. The appellant did not dispute this, neither did he dispute that he had stayed with the complainant's mother for a period of about 6 months.

16. There was no dispute even on cross-examination that the appellant had been left behind with the children that early morning. Their mother had earlier on purchased charcoal, prepared breakfast and left them. The minor on cross-examination however stated that she was defiled in the night. In my view whatever time of the night, whether early, middle or early morning there is no doubt that she was defiled and this took place nowhere else except at their house.

17. Nothing was shown that the defilement may have taken place elsewhere except the house. Equally the age of the minor was not disputed, a fact acknowledged in evidence by the appellant.

18. From the record it is clear that it was a good samaritan (PW2) who discovered that the child was not walking well and raised alarm. The appellant in his written submissions has argued that there was a ganging up by the women against him. However a close look at the sequence of events does not in my view show any flaws. The medical evidence produced was fresh as it was done the same day. Since there was nothing to suggest that the child may have been defiled by any other male I do not think the

findings of the trial court could be faulted.

19. There was in my view sufficient identification and recognition of the assailant by the minor. I find her evidence sound and very consistent. She vividly described how she was defiled by the appellant who to her was her father. The description of the room and the related were clear and i do not find any evidence that she had been coached as suggested by the appellant. Her evidence clearly falls under the witness whose evidence is believable as provided by Section 124 of the Evidence Act.

20. In the premises I do not find this appeal meritorious at all. The trial court had the opportunity to see the demeanor of the witnesses and infact the voire dire examination conducted by the trial court shows that the complainant was intelligent enough to speak the truth.

This appeal is hereby dismissed.

Delivered this 9th day of March 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

M/S Kakoi for the respondent

Appellant – present

Court Assistant – Kirong