



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 113 OF 2013

G O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 213 of 2014 in the Senior Principal Magistrate's at Siaya)

J U D G M E N T

1). The appellant herein was charged with the offence of Incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 20th day of March 2012 at [particulars withheld] Sub location in Siaya District within Nyanza Province intentionally caused his penis to penetrate the vagina of L A who is to his knowledge is his niece a child aged 9 years.

2). The alternative charge was Committing Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 20th day of March 2012 at [particulars withheld] Sub location in Siaya District of the Nyanza Province intentionally touched the breast and vagina of L A a girl aged 9 years.

3). From the proceedings herein the original charge against the appellant was Defilement, but was changed to incest in the course of the proceedings. The appellant after a full trial was convicted and sentenced to serve 10 years imprisonment. The trial court apparently found that the prosecution had not established actual penetration thus found the appellant guilty of attempted incest.

4). The appellant has appealed against the sentence only. His argument was that he was a layman hence he is remorseful. The brief facts of this matter is worth reproducing here.

5). PW3 the complainant had been left behind by her grandmother on the material day. She went to fetch water at around 5 pm with one J. On the way she met the appellant who was digging some shamba. He convinced the complainant to go to some thicket where he told her to remove her clothes including her underpants. He then proceeded to defile her. According to the complainant the appellant did not achieve full penetration.

6). In the course of defiling her PW5 Boaz Ooko Owuoche who had seen the two children going to fetch water had forgotten to pick his panga when going to her mother's shamba. He heard some noise in the thicket and on approaching he saw the appellant on top of the minor. He said that when the appellant

saw him he told the minor to wake up and go. The appellant at the time was squatting. He inquired from the complainant what had happened. She told her that the appellant had taken her to the thicket and warned her that he would cut her neck if she refused. PW5 later informed the chief and his mother.

7). **PW4 S A A**, the complainant's grandmother arrived home late at 6 pm. The complainant did not tell her. PW5 however told her of what he had seen and through the prompting by the chief she took the child to Siaya District hospital where she was treated and examined. A P3 form was equally filled.

8). **PW1 Lamwel Sagwe**, produced the P3 form which showed that there were visible injuries on the genital which were reddish in the vagina wall and had bruises. The hymen was intact. He went ahead to produce the same.

9). **PW2 Nyamwembe Simon**, also a clinical officer like PW1 produced the P3 form in respect to the appellant.

10). **PW6 Cpl Godfrey Mukanga**, was the investigating officer who rearrested the appellant when he was brought in the station by the assistant chief. He preferred the charges against the appellant.

11). Having summarised the above evidence, what is clear from the same is that the appellant was an uncle to the complainant and that there was no doubt that they knew each other very well. Further the incident occurred in broad day light and therefore the issue of identity or recognition cannot arise.

12). The appellant's written submission seems to depart from his petition of appeal. He argues that the trial court should have allowed him to recall the witnesses as ordered during the proceedings. From the record it appears that when the charge was changed from defilement to incest, the trial court asked the appellant whether he wanted to recall the witnesses who had already testified. The appellant said:

"I do not wish to have witnesses who had testified recalled".

13). The court then proceeded to hear the remaining witnesses. Later when Honourable Ngetich was transferred, the new trial magistrate Honourable Ochoi asked the appellant whether he wanted the matter to start *de novo* or to proceed from where it had reached. He said that the matter ought to proceed. In the course of trial the court noticed that there was an order to recall PW5, PW4 and PW3 and he decided to order that they be recalled. After a long time PW6 the investigating officer told the court that the said witnesses were not available for recalling and this forced the court to invoke section 146 (4) of the Evidence Act and ordered that the said witnesses be dispensed with.

14). From the above facts it clearly appears that the appellant despite not having the statements from the witnesses, understood the entire proceedings to the extent of telling the court on two occasions that he was ready to proceed with the matter from where it had reached.

16). Did the failure to recall PW3, PW4 and PW5 cause the appellant to suffer any prejudice? I do not think so. Initially he did cross examine them very well and asked them whatever questions he wanted. In any event I am satisfied that from the proceedings the prosecution was able to demonstrate the breadth and length with which they went looking for the said witnesses. Needless to say the appellant's petition of appeal does not form this argument.

17). The state when submitting prayed that this court ought to enhance the 10 years imprisonment to life imprisonment. I have perused the evidence on record and I am satisfied that the trial court was right in reducing the charge to an attempted incest. There was no sufficient evidence of actual penetration and this was confirmed by PW1 as well as the complainant. I do not think that this is a case where the court can invoke the provisions of section 354 (3) (a) (ii) of the Criminal Procedure Code.

18). Consequently, and in the light of the above, this court does not see the reason to interfere with the trial court's findings. There was sufficient evidence on record to support the charge. Were it not for PW5 to appear on the scene at the nick of time the appellant would have achieved his aim of defiling his niece.

I shall therefore dismiss this appeal for being unmeritorious.

Dated, signed and delivered at Kisumu this 25th day of May, 2015.

H.K. CHEMITEI

JUDGE