



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO.7 OF 2014

KITSAO BAYA NYUNDOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the conviction and sentence by Hon.J.M.Kituku, in Garsen Ag.PM Cr.No.116 of 2013)

JUDGMENT

The appellant was charged with the offence contrary to **Section 20(1)** of the sexual offences Act No.3 of 2006. The particulars of the offence were that the appellant, on the 29th May, 2013 at Andakini village Matangeni Sub location Kipini Location Tana Delta District of Tana River County within Coast Province unlawfully and intentionally caused his penis to penetrate into the vagina of N K, a girl aged 11 years who is to his knowledge his niece.

The appellant was convicted and sentenced to serve twenty years imprisonment. The amended grounds of Appeal are that the complainant's evidence was unreliable, the case was not proved beyond reasonable doubt, the minor's age was not proved and that the appellant's defence that was not challenged raised doubt on the prosecution case. The appellant filed written submissions and entirely relied on them. The main issues raised in those submissions are that **Section 36** of the sexual offences Act was not complied with. No samples were taken for testing, that the age of the minor was not established and that the medical evidence did not support the charge. The complainant's hymen was intact.

The state opposed the appeal. Miss Mathangani, prosecution counsel maintains that the complainant's age was indicated to be 11 years and even the trial court conducted a *voire dire* before she testified. The appellant knew that the victim was a minor. The incident occurred on 29th May, 2013 and the P3 form was filled the following day 30th May, 2013. The P3 form showed that there were still white patches on the victims private parts.

The record of the trial court shows that five witnesses testified for the prosecution while three testified for the defence. PWI ZUMA BIBA was a clinical officer at Kipini Health Centre. He examined the complainant on 30th May, 2013. She had no bruises or injuries but had white substances in the vagina. This substances was fluid but not spermatozoa. The complainant's hymen was intact. The appellant was also examined and he was found to be 19 years old. The complainant's urine had epithelial cells which signified an injection. According to PWI, there was no penetration and th epithelial cells do not justify sexual intercourse.

PW2, was the complainant. She testified that the appellant is her uncle. On 29th May, 2013 at about 4.00 p.m she was at home reading a book when the appellant took her to the bedroom. He pushed her on the bed and had sex with her. She did not scream. She later informed her mother PW3. The matter was reported at Kipini Police Station and she was taken to hospital. This was the second time the appellant was having sex with her. PW3 E B is the mother of PW2 and a sister to the appellant. On 29th May, 2013 she went to fetch water and left PW2 alone. On coming back PW2 informed her that the appellant had had sex with her. She inquired from the appellant but he denied. She informed the village elder, PW4.

PW4 ABDALLA HIRIBAE is the village elder of Andakini area. He was notified about the incident on 29th May, 2013 at 7.00 p.m. He took the appellant and PW2 to Kipini Police Station. PW5 P.C.KIMUTAI LANGAT was based at the Kipini Police Station. The case was reported on 30th May, 2013. He took both the appellant and PW2 for medical examination. The appellant was later charged with the offence.

The appellant gave unsworn testimony. He is a younger brother to PW3. On 29th May, 2013 he was told by PW3 to repair a bed. He went there with another sister, M (DW2) and he repaired the bed. On the same day at about 7.30 p.m, PW4 went to his home and arrested him. He was also taken to hospital and examined. DW1, M J is a sister to the appellant. Her evidence is that on the material day she went with the appellant to their sister, PW3's home. She then went to fetch water with the appellant and left them there taking a bath. The appellant then went home. DW2, KADZO BAYA is a midwife she testified that the complainant's was taken to her for examination. She examined PW2 and found her to be normal. She is a duly trained midwife. PW2 had no bruises or blood. There was no spermatozoa.

The main issue for determination is whether the appellant committed the offence of incest. It is clear from the evidence that the appellant is a brother to the complainant's mother. He is an uncle to the complainant. This brings the appellant to the bracket of a relative who cannot engage in any sexual act with the complainant even if she was an adult. The blood relationship between the complainant and the appellant is quite close.

The medical evidence is to the effect there was no penetration. According to PW1, the whitish substance on PW1's private parts was not spermatozoa. The hymen was intact. PW2 was 11 years old. She testified that it was the second time the appellant was having sex with her. She did not scream. PW1 examined her private parts and they were normal. No bruises either inside or outside. Similarly, DW2, a midwife, examined the complainant and found her private parts to be normal. The appellant was equally examined and the P3 form shows that no bruises were noted on his private parts.

Under **Section 8** of the sexual offences Act, the offence of defilement is committed whenever penetration is proved. **Section 2** of the Act defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The offence of defilement is similar to that of incest only that in the latter situation the parties involved are blood relatives It is therefore clear that penetration has to be proved in a case of incest. Under **Section 20** of sexual offences act, the term "an act which causes penetration with a female person" is used.

In the current case, the medical officer categorically stated that there was no penetration. According to the clinical officer, PW2's hymen was intact. This raises doubt on the prosecution case and specifically on the integrity of the complainant's evidence. It is doubtful that the complainant without PW2's hymen interfered with. PW2 was examined soon after the incident and her private parts were normal. I do find that the prosecution evidence still leaves doubt in relation to the entire incident. Further, if there was no penetration as per PW1, then there was no offence committed. The appellant was not charged with the offence of indecent act with a child. The prosecution was expected to prove that who was aged 11 years old could have had sex with the appellant in two different occasions and still had her hymen intact. She did not scream and she never told the court that the appellant held her mouth or threatened her.

From the evidence on record, I do find that the prosecution did not prove its case beyond reasonable doubt. It is not clear how the appellant had sex with PW2 without any spermatozoa detected and there was no penetration. This was not established and its own evidence shows that there was no penetration.

In the end, I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 16th day of September, 2015.

SAID J. CHITEMBWE

JUDGE