



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 237 OF 2011

J L TAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. Sd. S.O. Temu Senior Resident Magistrate delivered on 30/11/2011 in Kajiado Principal Magistrate Criminal Case No. 1284 of 2010)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, J L T, was charged as follows:-

Count I – **Defilement** contrary to **section 8 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 15th day of September 2010 at 9.00 p.m. at **[particulars withheld] village in Loitokitok District within Rift Valley Province** intentionally caused his penis to penetrate the vagina of J N, a child aged 7 years.

Count II – **Incest** contrary to **section 20 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 15th day of September 2010 at **[particulars withheld] village in Loitokitok District within Rift Valley Province**, intentionally touched the vagina of J N with his penis who was to his knowledge his niece.

Count III – **Committing an indecent act** with a child contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 15th day of September 2010 at **[particulars withheld] village in Loitokitok District within Rift Valley Province** intentionally touched the vagina of J N a child aged 7 years with his penis.

2. When the Appellant was arraigned in court, he pleaded not guilty. After a full trial, the Appellant was convicted in Count II for the offence of incest and sentenced to life imprisonment.

3. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

v **That the sentence of life imprisonment was manifestly excessive.**

v **That the trial magistrate disregarded the evidence on record.**

v **That the burden of proof was shifted to the Appellant.**

4. During the hearing of the appeal, the learned counsel for the Appellant submitted that the Appellant was convicted on hearsay evidence; that the complainant's age was not ascertained; that the medical report was not produced by its maker but was instead produced by a Clinical Officer and that the sentence was harsh.

5. The appeal was opposed by the learned counsel for the State. It was submitted that the complainant's evidence is that of recognition of the Appellant as her uncle; that the evidence reflected the age of the complainant as seven years; that the P3 form was produced by the Clinical Officer under **section 77** of the **Evidence Act**; that the prosecution case was proved and that the sentence was not excessive.

6. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.

7. The case for the prosecution was that on 14/9/10 PW2 **A S** went for a seminar, leaving her children who included the seven year old complainant, PW1 **J N** under the care of her sister-in-law. When PW2 returned home, she found the complainant walking with difficulty. Upon inquiries being made, it turned out that the complainant had been defiled. The Appellant who was an uncle and lived in the same compound was named by the complainant as the one who had defiled her.

8. The complainant was taken to **Rombo Heath Centre** for treatment where it was confirmed that the complainant was defiled. The matter was reported to **Rombo Police Station** and the complainant issued with a P3 form. The complainant was examined at **Oloitoktok District Hospital** and the P3 form filled in. The Appellant was subsequently arrested and charged with the offence herein.

9. In his defence, the Appellant gave unsworn evidence. No witnesses were called. The Appellant denied the charges and stated that on the material day he was in his house which is outside the main compound.

10. The complainant (PW1) gave evidence after the trial court carried out a *voire dire*. However, the said examination is very scanty and lacks details upon which the trial court arrived at the conclusion that the minor did not understand the meaning of oath. It is also noted that the minor's evidence was not subjected to cross-examination. This was after the trial court observed that the minor was not able to tell what had happened. The trial court then arrived at the conclusion that the minor's evidence be adduced through the mother. The trial magistrate therefore erred in his judgment when he relied on the minor's evidence which he had abandoned before the minor was cross-examined. If the intention of the trial court was to proceed with the evidence of the minor as a vulnerable witness in terms of section 31 of the **Sexual Offences Act**, then the trial court ought to have fully complied with the said provision.

11. Although **section 31** of the **Sexual Offences Act** allows the reception of evidence through an intermediary, the mother's evidence failed to bring out details regarding how the complainant knew the Appellant or where the Appellant lived and how often the child used to see him. There is no evidence to show whether the offence took place during the day or during the night. The evidence of identification is therefore unreliable.

12. Although the evidence of the mother and the Clinical Officer, PW3 **Francis Nana** established that the complainant was seven years old and was defiled, there is no proof that the Appellant was the culprit. It

was the prosecution’s burden to prove their case. The Appellant ought to have been given the benefit of doubt.

13.Nothing turns on the issue that the P3 form was produced by the Clinical Officer who was also not the maker of the same. **Section 33** of the **Evidence Act Cap 80 Laws of Kenya** allows such production of a document made in the ordinary course of duty. The Clinical Officer was a competent witness to produce the P3 form. Under **section 48** of the **Evidence Act; The Court of Appeal** in the case of **Kavoi Kiilu – vs- Republic (2010) e KLR** had this to say on the issue:-

“Under section 2 of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act.....”

Section 7(4) of the Act States:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

The Act goes further to provide that such officers may engage in private practice *“in the practice of medicine, dentistry or health work for a fee.”* It follows that the clinical officer did testify in this case on his area of competence.”

14.It is noted that the Appellant was charged with three counts arising out of the same transaction against the same complainant. This was duplex and the prosecution ought to have preferred the charges of either defilement or incest with the charge of committing an indecent act with a child being an alternative count.

15. The appeal has merits and is successful. Consequently, I allow the appeal, quash the conviction and set aside the sentence. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 18th day of February 2014.

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B. THURANIRA JADEN

JUDGE