

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 86 OF 2013

B A O APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with the offence of incest contrary to **section 20(1)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant *between 26.1.2013 and 1.2.2013 in Muhoroni District within Kisumu County, intentionally and unlawfully caused the penetration of his genital organ namely penis into the genital organ namely vagina of a child N K knowing her to be his niece.*

The appellant was convicted and sentenced to serve 10 years' imprisonment. His grounds of appeal are that he did not plead guilty to the charge, the trial was unfair as he was not provided with relevant information by the prosecution, the case was not proved as required, the evidence of PW1 was unsafe, the medical evidence did not indicate that he was the one who committed the offence and the sentence is harsh.

During the hearing of the appeal the complainant **N K** filed an affidavit indicating that she has forgiven the appellant. She was sworn by the court and informed the court that she has willingly forgiven the appellant and she has not been paid any money. She was put under pressure by family members to pursue the matter. Mr. Oroni, State Counsel, opposed the appeal and relied on the evidence on record.

The trial court shows that the complainant **N K** testified as PW1. She informed the court that she was 17 years old. On 26.1.2013 the appellant took her to Kisumu promising to have her employed. She was a Standard 8 pupil then. She was taken to the appellant's brother in Kisumu and they stayed there in one room. The appellant had sex with her for three days. They went to church together. On the 4th day the appellant got a tip-off that people were searching for him and he escaped. She stayed there for 10 days. On the 10.2.2012 he went back and gave her money to go home. The appellant is related to her. On the 11.2.2013 her mother reported the matter to the police. The appellant's brother is married to PW1's mother.

PW2 M K M is the mother of PW1. Her evidence was that PW1 disappeared from home from 26.1.2013. She got information that she was seen with the appellant at Koru and she notified the police. The appellant was arrested and charged with the offence. **PW3 WEKUYI JOHN** is a clinical officer who was based at Butere District Hospital. He attended to the complainant on 19.3.2013 and concluded that the complainant had been defiled as her hymen was missing. He also attended to the appellant and did not notice anything abnormal. HIV tests were conducted to both of them and they were negative. **PW4 WELLINGTON ASHAEMBI** is a Community Health worker. He assisted PW2 to have the appellant arrested.

PW5 PC SUSAN CHESERION was based at the Butere police station. She investigated the matter and had the appellant arrested and charged with the offence. She organized for the complainant to be medically examined and produced a P3 form. The appellant was put on his defence but denied committing the offence. He was arrested on the 15.3.2013 at about 4.00 a.m. by APs from Shiatsala

centre. He was later charged with the offence.

The prosecution evidence shows that the complainant disappeared from home from the 26.1.2013. It is clear that it is the appellant who was with the complainant. The complainant informed the court that she has forgiven the appellant and she was only put under pressure by clan members to pursue the case. She has reconciled with the appellant and does not wish to have him serve the 10 years imprisonment. The appellant is about 21 years old according to the P3 form produced in court. He is related to the complainant. Since the complainant is willing to reconcile with the appellant I do not see any reason why I should let the appellant suffer in prison. I will accept the complainant's plea that the appellant be released in the spirit of reconciliation.

In the end I will allow the reconciliation between the parties and order that the appellant be released from prison unless otherwise lawfully held.

DATED AT KAKAMEGA THIS 18TH DAY OF SEPTEMBER 2014

SAID J. CHITEMBWE

J U D G E