



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 25 OF 2017

BHO APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Maseno (Hon. D. A. Okundi SPM) dated the 3rd April 2017 in Maseno SPMCCRC SOA No. 5 of 2016]

JUDGMENT

The Appellant was convicted for the offence of **INCEST** contrary to **Section 20 (1)** of the **Sexual Offences Act**. He was then sentenced to Life Imprisonment.

1. In his appeal he has raised 4 issues.
2. He asserted that the prosecution failed to call essential witnesses. In particular, the Appellant believes that the persons with whom his mother was staying until the time when she heard that the Appellant had been arrested, ought to have testified.
3. To place that submission in context, it is necessary to point out that the Complainant is a daughter to the Appellant.
4. The Complainant lived within the same compound as the Appellant, but initially they lived in different houses. The Appellant lived in his house, whilst the Complainant spent her nights in her grandmother's house.
5. According to both the Complainant and **PW3**, (the grandmother), the incident took place after the Appellant had forced **PW3** to move out from her house.
6. The evidence adduced by the prosecution was that **PW3** moved out, and she lived with a neighbour for a couple of days.
7. She only learnt about what had been happening, when the Complainant had confided in her class teacher (**PW2**). The said teacher then sent for **PW3**, to go to the school where the Complainant was a pupil.
8. When **PW3** got to the school, she was shocked to learn about what her son had been doing to the Complainant.
9. In my understanding of all the evidence adduced, I find that there was absolutely no role that the neighbour played in the matter at hand.
10. The neighbour was neither at the scene of crime at the material time, nor at the time when the Appellant was arrested.
11. The Appellant complained that the witnesses who testified were his blood relatives, with whom he had had a conflict.
12. It is not entirely true that all the witnesses were members of the Appellant's family.
13. **PW1** was the Complainant, who was the Appellant's daughter. The Appellant confirmed that relationship when he gave evidence.
14. **PW2** was a teacher at [Particulars withheld] Nursery School, where the Complainant was a pupil. **PW2** had no blood relations with the Appellant.
15. **PW3** was the Appellant's mother; and therefore a grandmother to the Complainant.

16. When cross-examining her, the Appellant suggested that there was a dispute between the 2 of them, over land. **PW3** categorically denied the existence of any such dispute.
17. Indeed, **PW3** stated that she would never think of involving her grand-daughter in anything like that, if it had existed.
18. **PW4**, was a Senior Clinical Officer based at the Emuhaya Sub-County Hospital. He was not a relative of the Appellant.
19. When he examined the Complainant, he found her hymen missing. She had a foul-smelling discharge from her vagina, and the “*mouth*” of the vagina was wide open, which was not normal for a 6 year old child.
20. The conclusion, made in the **P3** Form was the Complainant had undergone Repeated Defilement, resulting in a change in her walking gait.
21. **PW5** is a police officer, who was based at the Luanda Police Station at the material time.
22. She was at the station when the Complainant arrived, in the company of her grandmother and her teacher (**PW2**).
23. Her investigations revealed that the Appellant hounded his mother from her house, by calling her a witch. He then took the Complainant from her grandmother’s house, to his house, where he defiled her.
24. I have said enough to show that there is no merit in the Appellant’s contention regarding the absence of witnesses who were not members of his family.
25. I also find that the evidence tendered by the Senior Clinical Officer was sufficient proof of penetration of the Complainant’s vagina.
26. The Appellant confirmed that the Complainant was his daughter. His mother and the Complainant also confirmed the relationship between the Appellant and the Complainant.
27. The evidence about the relationship indicates that the case before me was one of recognition.
28. The perpetrator of the offence was recognized. Given that fact, and the proof of penetration, there was no requirement that the Appellant should undergo medical examination, with a view to linking him to either the offence or to the Complainant.
29. As regards his Defence, the Appellant was right to say that he did not have the burden of proving it.
30. I note that the Appellant denied committing the offence, and insisted that his mother had coached the Complainant, so as to get rid of the Appellant from the land left behind by his father.
31. The learned trial magistrate who had the benefit of observing the witnesses when they gave evidence, noted that the Complainant had the demeanour of a truthful witness.
32. The trial court held that the Complainant was not coached, as had been alleged by the Appellant.
33. I find no reason to disagree with the trial court’s assessment of the Complainant’s demeanor.
34. Furthermore, the evidence tendered by the Clinical Officer was real. It was not picked out from the air.
35. The medical evidence corroborated the evidence of all the other prosecution witnesses; and the totality of the evidence was that it proved beyond any reasonable doubt that the Appellant had committed the offence of incest against his daughter.
36. As regards the sentence, I find that when the Appellant committed the heinous act against his own daughter, who was 6 years old; and when he tried to justify removing the child from her grandmother’s house by calling his own mother, a witch, the sentence of Life Imprisonment is not excessive.
37. I find no merit in the appeal: it is therefore dismissed.

DATED, SIGNED and DELIVERED at KISUMU This 12th day of February 2020

FRED A. OCHIENG

JUDGE