



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 78 OF 2017

(Being an appeal from the decision of Hon. G. Sitati in Case No. 80 of 2016)

GW.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

GW.....ACCUSED

JUDGEMENT

1. 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 **on the 12th day of June, 2016 at [particulars withheld] Estate within Trans-Nzoia County, being a male person caused your penis to penetrate into the vagina of FAW a female person who was to your knowledge your daughter aged 10 years.**
2. The alternative count was **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 charge were that **on the 12th day of June 2016 at [Particulars Withheld] Estate within Trans-Nzoia county intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of FAW a child aged 10 years.**
3. The Appellant was convicted and sentence to 10 years' imprisonment hence this appeal. The veracity of the grounds raised in the petition are general attack on the entire decision by the trial court and in particular that there was insufficient evidence to convict the appellant and that the burden of proof shifted to the Appellant
4. The summary of the evidence as presented during trial merits consideration. **PW1** the complainant said that she stayed with the Appellant who was her father at [particulars withheld] area together with her other siblings who are younger than her. On the material night her mother was not around and after they had eaten their supper they went to sleep in a different room and the appellant also slept in another room.
5. In the cause of the night, and since the door had not been locked pursuant to the Appellant's instructions, he entered their room armed with a torch and a knife. He proceeded to undress her with a warning not to raise any alarm or he would harm her. He then defiled her and she felt a lot of pain and she bled. Afterwards the appellant told her to take a bath and he threw her bloodstained clothes into a pit latrine.
6. The following day she went to school though in pain and one Regina told her to go and report at the chief's office which she did. He was arrested and she was taken to Kitale District hospital for treatment.
7. The Appellant though granted a chance to cross examine the complainant failed to do so saying that he wanted the real Complainant.
8. **PW2 MERCY OYIEKO** the dentist from Kitale District hospital produced the age assessment report on behalf of her colleague **DR MUYIRA** who found that the Complainant was aged about 16 years.

9. PW3 DAVID KIMUTAI RONO a Community Gender Based Activist said that on 17/6/2016 he received a call from CPC. **FELICITY RONO** from Kitale police station to take the Complainant to Kipsongo hospital as she had been defiled which he did. He said that he did not know the Appellant.

10. PW4 BRAMWEL KITUYI MAKOHA is the Assistant Chief [particulars withheld] area. He testified that the complainant went to his office on 14/6/2016 while dressed in uniform and reported that she had been defiled on the night of 12/6/2016 and 13/6/2016 by her father. He then sent two of his village elders to arrest the Appellant. He admitted that the complainant was his daughter and he then handed him over to Kitale Police station.

11. PW 5 PC MARY UMAZI from Kitale Police station was the Investigating Officer who recorded statements from the witnesses and preferred charges against the appellant. She said that she went to scene but there was not much to assist in the investigations though she saw the one room with and a mattress therein. She also took the Complainant for age assessment as well as the filling of the P3 form.

12. PW5 KIRWA LABATT from Kitale District hospital examined the Complainant and filled the P3 form. He found that the Complainant's hymen was broken and fresh looking, redness of vagina and bruises on the labia. He concluded that there was penetration.

13. When placed on his defence the appellant gave unsworn evidence denying the charge and stated that he had not seen the Complainant. According to him he had been arrested for an offence of taking changaa and not the charges that were facing him.

ANALYSIS AND DETERMINATION.

14. This court has perused the proceedings carefully as well as the written submissions on record both by the Appellant and the learned state counsel. As stated earlier the grounds raised in the petition of appeal herein are general in nature although the Appellant's submissions have delved into other areas not necessarily within his grounds.

15. The ingredients of the charges herein are clear, namely, the age of the victim, the identity of the perpetrator, whether there was penetration and the relationship between the accused and the Complainant.

16. In regard to the question of the complainant's age, the dental age assessment report produced clearly indicated that she was 16 years' old which went contrary to the contents of the charge sheet. This nonetheless did not prejudice the trial in any way.

17. The question of whether there was penetration in my view and as found by the trial court was positive. The complainant explained clearly what transpired that night and despite being given a chance repeatedly by the trial court to cross examine the Complainant the Appellant chose not to.

18. The narration by the Complainant placed the Appellant at the scene and the issue of the identity was well answered. It was stated by the complainant that the Appellant went to her room while armed with a knife and he threatened her not to raise any alarm. After he was through he ordered her to take a bath which she complied. He then took her blood stained cloths and threw them in a pit latrine.

19. This line of evidence in chief was not challenged by the Appellant at all. The complainant in the estimation of this court was truthful and believable and should thus benefit from the provisions of Section 124 of the Evidence Act.

20. The relationship between the Appellant and the Complainant was that of a daughter and a father. She may have been a step sister to the other siblings but the bottom line was that she was the Appellant's daughter a fact which he did not deny.

21. In the final analysis, I do not think that this appeal is meritorious. The Appellant was the only male who was with the children that night. Even if the wife was the complainant, a person whom he kept on insisting during trial that she must come, there was nothing stopping him from calling her during his defence case.

22. Needless to state that the appellants defence was persuasive as it was unsworn and thus not subjected to cross examination. Whether he was arrested because of changaa incident cannot be verified.

23. The upshot of this is that the case was well proved beyond any shadow of doubt. The medical evidence clearly indicated that the Complainant was defiled. There was nothing to suggest malice on the part of the Complainant.

24. On sentence, the court notes that the Appellant was not granted bond and thus the ten-year period meted by the trial court should run from 20th June, 2016 when he was arraigned in court. The appeal is otherwise dismissed.

Dated, signed and delivered in open court at Kitale this 17th day of February, 2020.

H. K. CHEMITEI

JUDGE

17/2/2020

In the presence of:-

Mr Omooria for Respondent

Appellant present

Court Assistant – Kirong

Judgement read in open court.