



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 85 OF 2010

(Being an appeal from the decision of Hon. Odera (SRM) in Criminal Case No.3132 of 2008)

JSM.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

JSM.....ACCUSED

J U D G E M E N T

1. The Appellant was charged with the offence of **Incest by a male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 18th day of November 2008 in Trans-Nzoia West District within Rift Valley Province by use of your genital organ namely pennies intentionally and unlawfully caused penetration onto the genital organ namely vagina of KM a girl aged 7 years who was to your knowledge your daughter**.

2. The Appellant after full trial was convicted and sentence to life imprisonment hence this appeal. The Appellant has raised several grounds of appeal which this court shall analyse them but suffice at this juncture to summarise the evidence as they were presented during trial.

3. PW1 the Complainant told the trial court that she was asleep with her father in their house on the night of 17th November, 2008. The Appellant had chased away her mother. He then woke her up and told her that they should go and find her mother. She went with him up to some bush near [particulars withheld] primary school where he proceeded to defile her. She said that the Appellant was armed with a knife and a panga and he threatened to harm her. He then proceeded to undress and defiled her. She screamed but he threatened to harm her as well as her mother.

4. They then went back home and he told her to call one Mama S to confirm if her mother was there. She knocked at her door but she did not open although she told her that her mother was not in the house. In the morning her mother came and told her that she had slept at the banana farm belonging to mama S. She told her what had transpired and the appellant took a rope and he wanted to hang himself. He nevertheless failed to do so as he removed the rope from his neck.

5. Her mother then took her to the hospital where she was treated and the p3 form issued by the police was filled. She said that her mother went to Uganda on the day she was taken to the hospital.

6. On cross examination she said that that was the 4th time the appellant had defiled her although she had not told her mother about the same. She said that there was moonlight and she was able to identify him.

7. **PW2 FRANCIS BARCHEBO** from Kitale District hospital examined the Complainant and filled the P3 form which he also produced. He concluded that there was penetration as the hymen was torn and old looking. There was also abnormal discharge which suggested venereal disease. On cross examination by the appellant he said that the child was walking with some difficulty.

8. **PW3 P.C WILLIAM ANDEI** testified on behalf of one P.C ODUOR who carried out the investigations and preferred charges against the Appellant.

9. When placed on his defence, the Appellant gave sworn evidence denying the charges. He said that on the 16th November, 2008 at around 8.30 pm his wife who used to come home drunk picked a quarrel with him as she used to give out the complainant to neighbours to work for them. He then went ahead to explain how he was arrested on the 20th November, 2008 and taken to Kitale police station and charges preferred against him. He said that he had differed with his wife who was later married by the vigilante who had arrested him.

10. On cross examination he said that the Complainant was his step daughter and the evidence of the Medical Officer was hearsay.

ANALYSIS AND DETERMINATION

11. The court has perused the submissions by the Appellant which formed part of his grounds of appeal. There were no submissions by the Respondent though.

12. The grounds for this nature of offence are now clear, namely the age of the victim must be determined, the relationship with the Complainant, the identity of the perpetrator and whether penetration was proved.

13. The age of the Complainant although it was not proved by production of any documentary evidence was nonetheless not in dispute. The P3 form produced by PW2, the Clinical Officer estimated her age to be about 7 years. The Complainant during voir dire examination by the court stated that she was 7 years old. The Appellant on his part during trial did not doubt that the Complainant was of tender years.

14. This in my view was taken care of by the trial courts finding that she was unable to testify on oath despite being intelligent. The voir dire examination on record covered much of the grounds and removed any doubt surrounding her age. Further Section 2 of the Children Act defines a child of tender years to be a child under the age of 10 years.

15. On the question of the relationship between the Appellant and the Complainant it has been alleged by the Appellant during his cross examination by the Respondent after his evidence in chief that the Complainant was his step daughter. On the other hand, the minor all along referred the Appellant as her father. Whichever way, the Appellant still remains the father to the Complainant and he did not establish otherwise.

16. Was there penetration? The evidence by the minor although it had some few contradictions remain in my view credible. She was able to explain how the Appellant defiled her that night near Sango primary school and later came back with her to the house. She explained that this was the 4th time the appellant was defiling her. On the other occasions she did not inform her mother or anybody else.

17. The said PW2 testified that when she came for examination she was walking with some difficulty which lends credence to the fact that she had been defiled.

18. Was the evidence of the Complainant believable taking into account that she was a single identifying witness as provided by Section 124 of the Evidence Act especially the proviso thereof?

19. I have carefully read her evidence including cross examination and she appears believable. This court does not see the reason why she fixed her father who seemed to have perennial problems with her mother. There was no evidence leading to the conclusion that she had been coached. Her mother it was admitted left for Uganda and she was unwilling to come and testify.

20. In terms of identification, the Complainant said that there was light from the moon which aided her. The intensity of the light was not explained but the fact that there were close relations with the Appellant made it easier to identify. At any rate the Complainant was forcefully taken from her house by the Appellant.

21. The defence by the Appellant did not amount to much for the simple reason that the same was a denial and laying blame on his wife whom she had differed with.

22. The Appellant has alleged in his grounds among others that the essential witnesses especially his wife was not called. It was the position of the Respondent that the wife could not be traced as she had gone to Uganda and she was unwilling to come to court. Whether this was the position or not did not water down the Respondent's case as the evidence on board was sufficient to convict the appellant.

23. This appeal is therefore dismissed.

24. On the issue of sentencing though, the decision of the Supreme Court of Kenya in the case of **Francis Karioko Muruatetu & another vs. Rep (no 15 and 16 of 2015)** merits consideration herein. Although the appellant was rightly sentence as per the law established, the same can be interfered by this court in line with the Supreme Court's decision above.

25. The court of appeal in the case of **Jared Koita Injiri Vs. Republic (2019) eKLR** expressed itself while referring to the Muruatetu case(supra) expressed itself thus;

“In this case the appellant was sentence to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.”

26. The court went ahead to note that the appellant committed a heinous offence and in my view the same applies to the matter at hand. Nonetheless in view of the decision and reasoning by the Supreme Court this court shall interfere with the sentencing herein. It is noted that the appellant was given a chance to mitigate where he blamed his estranged wife.

27. In the premises, the sentence of life imprisonment is hereby set aside and substituted with a custodial sentence of 20 years' imprisonment from 11 November, 2008.

28. Orders accordingly

Dated, signed and delivered in open court at Kitale this 4th day of March, 2020.

H. K. CHEMITEI

JUDGE

4/3/2020

In the presence of:-

Ms Kagakli for the Respondent

Appellant – present

Court Assistant – Kirong

Judgement read in open court