



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 85 OF 2017

(FORMERLY ELDORET HCCRA NO. 110 OF 2016)

DKK alias T.....PPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court

at Eldama Ravine Cr. Case no. 593 of 2015 delivered on the 23rd day of August, 2016

by Hon. R. Yator, SRM]

JUDGMENT

1. The appellant appeals from the original conviction and sentence for the offence of incest contrary to section 20 (1) of the Sexual Offences Act, the particulars of which were that he had “on the 13th day of June 2015 within Baringo County committed an act which caused the penetration of his penis into the vagina of JPN, a child aged six years who to his knowledge is half sister.”

2. The DPP did not oppose the appeal and in submissions before the Court urged as follows:

“DPP

Appeal was not opposed.

Appellant is convicted of incest contrary to section 20 (1) of Sexual Offences Act and sentenced to serve 10 years imprisonment.

Evidence of record and especially medical evidence is contradictory. The appellant is half-brother within the meaning of the Act as having shared a father.

The complainant testified that on the material day she and her younger brother were playing at the grandmother place when the appellant came and pulled her to his place and defiled her. In her evidence she testified that the appellant defiled through the anus as he lay on top her.

Pw3 is a minor who allegedly saw the appellant defiling the complainant and testified that he saw the complainant on top of the appellant.

Pw6 is the doctor who testified on behalf of the doctor who filed the P3 form. The evidence on the injuries complained is contradictory. He testified that on examination, the vaginal wall was inflamed, hymen was intact and there were no bruises at paragraph 24 line 9.

At the same paragraph line 15 he stated that the nature of the offence is attempted defilement.

In PRC Form it is stated that patient complained that inflammation around the labia minora and there were bruises. Hymen inflamed but intact.

Treatment notes that on anal examination there were no bruises. The evidence of Pw6 indicated that there was defilement finding.

The Medical Evidence is contradictory as it is not clear whether the defilement was through the vagina or anus of the complainant. The P3, PRC and treatment notes all refer to examine of the complainant but have different results.

Despite Pw1 testifying that she was defiled through the anus, there was no abnormality noted. P3 Form showed there was attempted defilement but treatment notes and PRC show that there was defilement.

These contradictions ought to have been used for the benefit of the appellant. Despite the appellant being convicted for incest, he was sentenced to 10 years which was illegal as Pw1 was a minor aged 6 years.

The evidence was unsafe to convict the appellant and I pray the court to allow the appeal.

3. Upon considering the evidence before the trial Court as required of a first appellate Court, I would agree with the DPP that the contradictions relating to the organ of the child allegedly penetrated by the appellant and medical evidence on examination of the complainant raises a doubt as to commission of the offence, the benefit of which must be given to the appellant. Moreover, the unsworn evidence of the complainant minor required corroboration and the same could not be corroborated by the evidence of her minor brother Pw3 whose evidence also required corroboration.

4. Pw3 was clear that he had seen, while sitting beside the door to the appellant's house, the appellant doing "*bad manners to J on the buttocks (points out) at the house of T as I was at the house of T and T was sleeping on his bed and J was sleeping also on R and I was sat beside the door at the house of R.*"

5. Medical Evidence by Dr. Kamau Pw6 for Dr. Rutto who prepared the P3 form indicated that:

"On examination she was found to have vaginal wall which was inflamed and hymen was intact and no bruises. She was diagnosed to have been defiled/sexual assault. No spermatozoa was found and urinalysis tests were normal."

On cross-examination, Pw6 said:

"The patient was examined on the vagina and on urinal examination it reads normal. Once hymen is broken it cannot be normal and patient's hymen was intact. Penetration is beyond hymen but it was intact, however, her vagina was inflamed. Swelling on can depend on extent of force. Date of the offence was 13th June 2016 and from treated on 28/6/15 more than 14 days, depending on extent of injury or any complication such as infection hence could take more than 14 days."

On re-examination, the doctor said:

"Infection indicates extent of injury and can take more than 14 days to be normal."

6. The reliability of the medical evidence collected 14 days after the alleged incident is also low. The P3 form in addition concluded a case of attempted sexual defilement and not defilement. Treatment Card dated 28/6/15 showed "*no bruises on anal region.*"

7. Accused/appellant herein stated he was 17 years in 2015 at the time alleged offence and trial before the trial Court. The trial Court did not establish the age of the accused, and the accused was unrepresented. Pw2, the appellant's step-mother and mother of the complainant indicated that the "*accused herein who is my stepson and I live with him at home and when I was married he was in class five and I had lived with him for eight years.*" This was the only evidence of the probable age of the accused, and he may well have been a minor in 2012 at age 17 as he stated in his submission before the Court.

8. The trial Court should have sought to establish the age of the appellant in view of the fair trial guarantee of legal representation under section 186 (b) of the Children Act. The accused conducted his own trial without legal representation and, if he was a minor, the trial was nullity for breach of the right to legal representation accorded to minors who are charged with having infringed any law.

9. The accused/appellant had been in custody since arrest on 2/7/2015, for 3 years, 9 months. It would not be in the interests of justice to order a retrial even if the trial was held to be a nullity for reason of lack of legal representation of the appellant as a minor during trial.

Orders

10. Accordingly, for the reasons set out above and noting the DPP's intimation that it did not support the conviction, I quash the conviction of the appellant for the offence of incest contrary to section 20 (1) of the Sexual Offences Act and set aside the sentence of imprisonment for 10 years imposed on him by the trial Court.

11. The appellant shall, consequently, be released from custody forthwith unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.