



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 293 OF 2014

CWK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru Chief Magistrate's Criminal Case No. 164 of 2014 imposed by Hon. Amayi (R.M.) on 13th day of June, 2018

J U D G M E N T

INTRODUCTION

1. The appellant was charged with the offence of **Incest Contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006**. Particulars are that on the 13th day of April 2013 at Lanet in Nakuru District within Nakuru County, being a male person caused his penis to penetrate the vagina of **LAK** female child aged 13 years who to his knowledge is his step sister. Alternative charge to count one is of **Indecent Act with a child contrary to section 11 (1) of the sexual offences Act No.3 of 2006**. Particulars are that on the 13th day of April 2013 at Lanet in Nakuru District within Nakuru County, the appellant touched the buttocks of **LAK** child aged 13 years.

2. Count 2 is the offence of **Attempted Suicide Contrary to Section 226 as read with Section 36 of the Penal Code**. Particulars are that on 16/17th April 2013 at [particulars withheld] in Nakuru District within Nakuru County, appellant attempted to kill himself by taking poison.

3. The trial magistrate found him guilty of the main charge in count 1 and count 2; for count 1 he was sentenced to life imprisonment and 2 years imprisonment for count 2. The appellant being aggrieved of the conviction and sentenced filed this appeal on the following summarized grounds:

- a. That the learned magistrate erred in fact and law by convicting the appellant on the basis of insufficient evidence
- b. That the learned trial magistrate erred by failing to find that the charge was defective as the charges were not proved by evidence adduced
- c. That the learned magistrate erred in fact and law by failing to consider his defence that there existed a grudge

APPELLANT'S SUBMISSIONS

4. The appellant relied on submissions filed. In his submissions, he restated grounds of appeal. He submitted that as stated by the complainant there is no dispute that crime was committed on the day mentioned but he was not one of the perpetrators.

5. On ground 2 the appellant submitted that the complainant contradicted herself in her own testimony by saying that he called her while she was washing utensils outside then later he went to her while armed with a cane contradicting her own testimony to the effect that the appellant grabbed her while in the house.

6. Appellant further submitted that the complainant's mother informed court that she reported to her that the appellant attempted to defile her meaning she was not defiled. He submitted that he was wrongly charged with the offence of incest yet the evidence adduced is in respect of the offence of defilement. The appellant questioned how the complainant's hymen was broken as per medical officer's evidence if it was an attempted defilement.

7. Appellant submitted that the case was fabricated with intention of removing him from the family. He pointed at evidence of PW2 who is his stepmother where she said that the appellant had threatened to kill his father if he failed to buy him a motor cycle. He said that this case

was brought up after he disagreed with his father. He questioned why his father failed to attend court to testify and has been on the run up to today if this matter was not fabricated. He submitted that even the two prosecution witnesses PW1 and PW2 were forced to testify; that they had to be arrested and locked in cell before they testified. He added that his father who was crucial witness by virtue of having made first report at the police station was not called to testify.

8. In respect to count 2 the appellant submitted that prosecution failed to produce poison in court and therefore failed to prove that he attempted to commit suicide.

9. On charge being defective, the appellant submitted that evidence adduced did not support the offence. He said occurrence book indicate that the offence was committed on 20th April 2013 while the complainant said she was defiled on 13th April 2013; further the charge is incest but evidence adduced was that of defilement.

10. In conclusion, the appellant submitted that, he was a victim of circumstances; that he never the alleged offence but was framed up due to family conflict.

RESPONDENT'S SUBMISSIONS

11. Mr. Kihara for the state opposed the appeal. He confirmed charges against the appellant in the trial court and sentence imposed. He submitted that the victim was aged 13 years at the time of the offence and is a stepsister of the appellant. He submitted that report was made to police who referred the complainant to Nakuru Provincial General Hospital where the complainant was examined and defilement confirmed. He added that the doctor took samples from the appellant to prove count 2; that the analysis confirmed that there was corrosive substance in the appellants body consistent with the charge in count 2

12. State counsel further submitted that it was clear from evidence adduced that the complainant was 13 years at the time of the offence and the appellant was therefore rightfully charged under Section 20(1) of the Sexual Offences Act; sentence was therefore lawful. In respect to count 2 he submitted that 2 year imprisonment is sufficient in the circumstances. Counsel submitted that in his defence the appellant never raised issues he had with his father and bringing it up in the appeal is an afterthought. He urged court to uphold conviction and sentence in both counts.

13. In response, the appellant submitted that it is the father who took the complainant to hospital but never testified. He added that the complainant's mother and the doctor are talking of 2014 while he was arrested in 2013. He reiterated his earlier submissions and added that his father and step mother framed up charges with the intention of removing him from his home.

ANALYSIS AND DETERMINATION

14. This being the first appellate court the appellant is entitled to reevaluation of evidence adduced in the trial court and independent determination made by this court. This I do while minded of the fact that I did not hear witnesses first hand and did not getting opportunity of observing their demeanor. I will therefore give due allowance.

15. On perusal of record of appeal, I note that prosecution availed 5 witnesses, the complainant (PW1), her mother (PW2), 2 doctors (PW3 &PW5) and investigating officer (PW4).

16. It is not disputed that the appellant is a stepbrother to the complainant. This he confirmed in his submission. Complainant testified that she went to the house after appellant threatened her with a cane. That is when he grapped her by the neck and dragged her to the floor, removed her biker & pant then had carnal knowledge of her after locking the house from inside. She said appellant left and later defiled again. She said she reported to her mother when she arrived; her mother informed complainant's father who took her to Nakuru provincial General Hospital. Complainant said he had not come to court because she was unwell but no one had asked her not to come to court.

17. PW2 testified that her husband went into hiding when he learned that he was required in court to adduce evidence. She confirmed that her husband and his first wife sired the appellant and that she has been staying with him since she got married. She produced immunization card in court, which confirmed that the complainant was born on 15th may 2000 and the father was TK who is appellant's father. She said the appellant attempted to commit suicide on learning that the incident had been reported at police station. She said she took the complainants torn biker and pant to the police station.

18. In cross examination, PW2 said complainant informed her the appellant had attempted to defile her. PW3 the doctor found that the complainant's hymen had been broken and had inflammation on the opening of her vagina with whitish discharge; he confirmed that she had been defiled

19. PW4 a police officer testified after report of defilement by complainant and her father, the appellant attempted to commit suicide and was admitted in hospital for 2 days. He said the container of substance consumed by appellant in attempt to commit suicide was not found. He added that the witnesses in this case were not cooperative; that they went into hiding prompting him to apply for summons and warrants of arrest. In cross-examination PW4 said, he could not tell what poison the appellant took. He confirmed that defilement took place on 13th April 2013 and that the appellant pleaded guilty to the second count.

20. PW5 a doctor assessed the age of complainant and found that she was between 12 and 13 years at the time of the offence.

21. In his defence the appellant said his father called him on 17th April 2013. On reaching his house, he found food on the table which he took; and shortly, he started feeling stomach pains and later lost consciousness after taking food given to him by his father and his step mother (PW2). He said he was discharged from hospital on 20th April 2013. He said the doctor infirmed that the cause of his ailment was

poison. In cross-examination he admitted being in the locality of the scene of crime. He said he lived with complainant for 2 years and denied having had any grudge with her.

22. The appellant talked of contradiction in evidence adduced. The complainant was alone and she is the one who had first-hand information of what happened. She talked of the appellant having carnal knowledge of her twice the same day. The doctor confirmed broken hymen and inflammation of her vagina. His evidence corroborates complainant's evidence.

23. Evidence of attempted defilement is stated by PW2 in cross-examination. She is not eyewitness. This evidence does not poke holes on evidence adduced by complainant who experienced the occurrence of offence personally and the same confirmed by a doctor through examination. There is also no dispute that appellant is stepsister of the appellant. Unlawful penetration of a minor by sibling amount to incest. I do not therefore see reason to interfere with finding on conviction in respect to count 1.

24. In so far as count 2 is concerned, I have not seen any medical report confirming that the appellant took poisonous substance. Count 2 was not therefore proved beyond reasonable doubt.

FINAL ORDERS

1. Appeal on count 1 is dismissed
2. Appeal on count 2 is allowed. Conviction in respect to count 2 and sentence are hereby set aside.

Judgment Dated, signed and delivered at Nakuru this 13th day of May, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jared Court Assistant

N/A Counsel for Appellant

Mr. Chigiti for State