



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 63 OF 2014

(Being an appeal arising from the judgment of Resident Magistrate P.W. Wasike delivered on 29/5/2014 in Criminal Case No. 1238 of 2013)

K K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

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 Offense was that on the **2nd day of June 2013 at [particulars withheld] within Elgeyo Marakwet County being a male person caused his penis to penetrate the vagina of M J a female person aged 7 years who was to his knowledge his sister.**

The appellant was convicted and sentenced to life imprisonment hence this appeal.

The facts of this case are that PW1 the complainant was left to take care of their sheep by their mother . The appellant her step brother told her to take a tin (**[particulars withheld]**) to him. He then forcefully grabbed and defiled her. According to her this was not the first time he had done so. He threatened to kill her if she screamed. She then told one Mama C who told the complainant mother. The appellant was then arrested and taken to police station while the minor was taken to hospital.

PW2 S C M was called on 2/6/2013 by one C P her uncle and told of the incident. She found the child had been brought to the health centre. She saw the child who was in pain and had fresh tears and walking with difficulty. The appellant pleaded that the matter should not be reported. He was however reported and later charged.

PW4 P.C James Kiarie of Kapcherop police station rearrested the appellant when he was brought by the complainants aunt and other villagers. He carried out the investigations and charged the appellant. He also took the minor to the health centre for examination.

The appellant gave unsworn evidence denying the charge when put on his defence. He said that on the material Sunday he went to the river to wash his clothes and when he came back in the evening he was arrested and put in the cells. He denied the charge.

Analysis and Determination

Having perused the entire proceedings as well as the written submissions by the appellant do find that there is no doubt that the relationship between the appellant and the complainant is that of step brother and sister. The minor although young was clear on what it transpired. It is true however that her evidence ought to have been corroborated as per the provisions of Section 124 of the Evidence Act.

This evidence was not corroborated by any medical documentation. No treatment documents were produced by the prosecution. No P3 form was produced.

Neither did any doctor or for that neither clinical officer testify to ascertain that she was sexually assaulted.

This was fatal. From the record, the prosecution was granted several adjournments to allow them call the clinical officer. The court hands were tied and the prosecution forced to close its case.

On the basis of this however the court proceeded to convict the appellant based on the evidence available. As much as the minors evidence may have been believable it was imperative that medical evidence ought to have been adduced to buttress or corroborate the same.

Penetration as defined by Section 2 of the Sexual offences Act No 3 of 2010 is defined as

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

This could only be conclusively prove by adduction of medical evidence.

In the premises and having anxiously weighed the evidence on record, this appeal ought to succeed only on that ground. The offence facing the appellant was serious and prevalent. However justice hits both ways. It was the business of the prosecution to avail their witnesses especially a critical witness like the doctor or the clinical officer. The appeal is therefore allowed. The appellant set free unless lawfully held.

Delivered this 25th day of January 2017.

H.K. CHEMITEI

JUDGE

In the presence of :

Kakoi for state

Appellant present

Kirong – Court Assistant