



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 113 OF 2014

(Being an appeal arising from the judgement of kitale Resident Magistrate C.N. Mugo delivered on 9/10/2014 in Criminal Case No. 3276 of 2013)

W O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of **Incest by Male contrary to Section 20(1) of the Sexual Offence Act No 3 of 2006.**

The particulars of the offence are that on the **3rd day of December 2013 at [particulars withheld] estate within Trans Nzoia County, being a male person caused his penis to penetrate the vagina of B A a child aged 4 years who was to his knowledge his daughter.**

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 are that on the **3rd day of December 2013 at [particulars withheld] estate within Trans Nzoia County intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of B A a child aged 4 years who to his knowledge was his daughter.**

The appellant was convicted and sentenced to 10 years imprisonment. He has filed this appeal citing several grounds. The Respondents on the other hand have applied for the enhancement of the sentence.

The summary of the facts herein are that the minor who was aged 4 years although no records were produced testified that she was left behind by her mother who had taken a child, the brother to the hospital. The appellant her father then took his "panya" penis let her play with the same. She went further to state that she inserted the panya into her vagina. Her mother then arrived and found them in the act but the appellant took off.

PW2 Salome M W is the complainant's grandmother and the mother -in -law to the appellant. She testified that her daughter N informed her of the incident and when she came she saw that the minor had discharge and was torn on her private parts and there was blood and semen. She then took her to Kitale District hospital.

PW3 John Kipkorir Koima produced the P3 form which according to his conclusion showed that the

hymen was broken and there were bruises but no discharge. He opined that the minor had been defiled.

PW4 P.C. Michael Muchira took over the matter from one P.C. Yator where he had investigated this matter and concluded that the appellant did defile her daughter left behind by his wife as she went to shop. The wife found the appellant having unzipped his trouser and the daughter was playing with his penis. The wife then reported the matter and the appellant was arrested. The said witness was however unable to produce the clinic card showing the age of the minor.

When put on his defence the appellant gave unsworn evidence stating that the whole incident was a frame up by his wife as he was unable to provide for her. That on the material day they had slept hungry but on 4/12/13 he went to work and at around noon he send Kshs 300 to her . He was however later arrested and charged with the offence. He complained that the wife did not infact testify showing that the whole incident was fabrication.

Analysis and Determination

I have perused the written submissions by the parties herein. There is no doubt that the complainant was the appellants daughter and she was indeed a minor even though no documents were produced to ascertain her age.

Her testimony was brief punctuated with playing as observed during trial. There was no eye witness to the incident and thus it was the word of the father and daughter. The child stated that her father removed his penis and she was playing with it. She said that

“ My father put his panya (pointing at penis and put it 'hapa' pointing at her vagina, he removed “panya' in his trousers.” The child on cross-examination said

“nilitupa panya, nikachoma (child laughing now and playing)

You removed panya here “points confidently at vagina) you remove panya like this “shows court) I usually play with panya.”

From the above piece of evidence I do not find the child stating that she felt any pain when the father put his 'panya' in the vagina. I obviously take judicial notice of the fact that this child was of tender age. If the appellant had penetrated her she would have felt pain and I do not find any difficulty in her explanation to the court.

My above observation is buttressed by the fact that the incident took place on 3rd December 2013. The child was examined on 4/12/2013. The appellant arrested on 5/12/2013 and brought to court on 6/12/13 when the proceedings began. Is it probable that within the three days a child of such tender age would have forgotten the pain she felt? I don't think so.

PW2 the grandmother in her testimony in chief states as hereunder;

“B had discharge and she was torn . There was blood and semen. We took her to Kitale District Hospital.”

Is it possible that even with her private parts being torn the child could not have told the court the pain she went through?

PW3 the clinical officer stated that;

“ The child was in good health and was playful. On examination, her private parts were normal. The hymen was broken, there were bruises, no discharge all laboratory tests were normal as she had been counselled.”

On cross-examination by the appellant the said witness stated that:

“ On the private parts the hymen was broken and there were bruises. There was no discharge, the hymen can be broken by something else other than sexual intercourses. The child was not in pain the child was walking normally.”

This contradicts PW2, the grandmother who stated that the child was having blood, semen and some discharge. Further and of more importance the child was walking normally. I find that if there was such defilement by the time the examination was being undertaken the child would not have been walking normally, leave alone playing in court during proceedings.

I have further perused the treatment notes marked as Exhibit 3 dated 5/12/2013. Contrary to the findings by the clinical officer there is nothing to suggest that there were tear or bruises though the hymen was missing.

The P3 form which was filled on 3/12/2013 shows the general history which indicates that even at that time the child was in good health, playful and in good mood.

Apparently the child was taken to the hospital by the mother.

The million dollar question is why did the mother, the appellants wife failed to testify in court. That question was raised strongly by the appellant which lends credence to his line of defence namely that the whole saga was fabricated so that she could remarry. Be it as it may, her evidence was clearly very crucial. She is the one who found the appellant on the act and raised the alarm. She is the one who told PW2 her mother of the incident. She is the one who took the child to hospital. Frankly speaking she ought to have corroborated what her child stated. There is nothing to indicate that there was such difficulty in tracing her.

Section 124 of the Evidence Act (Cap 80 Laws of Kenya) provides that:

“Notwithstanding the provisions of the oath and statutory Declaration Act, where the evidence of a child of tender years is admitted in accordance with that Section on behalf of the prosecution in proceeding against any person for an offence, the accused shall not be liable to be convicted unless it is corroborated by other material evidence in support thereof implicating him.”

The evidence of the clinical officer cannot be held to be conclusive. It is on record that the hymen can be broken by something else other than Sexual intercourse. That cannot corroborate the evidence of the victim.

In ***Said Awadhi Mubarak Vs Republic Criminal Appeal No 212 of 2012 at Kakamega*** the court held as follows;-

“... Very crucial witnesses were not called by the prosecution to testify in this case. There were the people who arrested the appellant. These crucial witnesses would have explained the circumstances and reasons for the arrest of the appellant. Since they were not called to testify, we do not know the circumstances and reasons of the arrest of the appellant. In the case of Bukenya Vs Uganda (1972) E.A 549, the Court of Appeal held that a failure to call crucial witness by the prosecution entitles the court to make an adverse conclusion against the prosecution ...”

In the absence of the appellant wife's evidence it is there fore probable that her evidence would have been prejudicial to the prosecution case. This as found in ***Bukenya*** case (Supra) must be concluded in favour of the appellant.

The appeal in my view is meritorious. The same is hereby allowed. The appellant set free unless

lawfully held.

Delivered that 25th day of January 2017.

H.K. CHEMITEI

JUDGE

In the presence of :

Kakoi for state

Appellant – present

Kirong – Court Assistant