



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 29 OF 2014

{Being an appeal arising from conviction and sentence of J.A. Owiti Ag. Principal magistrate delivered on 11/12/2013 in Criminal case No. 2841 of 2012}

B S KAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. 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 offence are that on **diverse dates between 1st day of May 2012 and 13th day of November 2012** at [particulars withheld] within **Trans Nzoia County being a male person, intentionally caused his penis to penetrate the vagina of L N W a child aged 7 years who was to his knowledge his daughter.**
2. The appellant was convicted and sentenced and he has therefore appealed against the entire conviction. The prosecution called 6 witnesses to back up their case whose evidence can be summarised as hereunder;
3. **PW2 Dr Ken Ndege** a dentist conducted a dental age assessment upon the minor and concluded that she was 7 years old.
4. **PW3 Kirwa Labatt** a clinical officer produced a P3 form as well as the treatment form in respect to the minor and the conclusion was that she had been defiled as the hymen was torn and old looking. She had no swellings or pus cells in the vagina.
5. **PW1 the minor** gave sworn testimony . She said that she was defiled during daytime by the father when her mother had gone to the garden. She reported the incident to her mother who in turn told one Mama C. She said that she was injured in her vagina. That Mama C took her to hospital.
6. **PW4 Linus Ligare** a clinical officer did examine and treated the complainant. He told the court she was defiled at intervals when she went to fetch water. He concluded that the hymen was torn though old looking.
7. **PW5 J M** the complainants mother and wife to the appellant testified that she was called by the complainant's school teacher on 13/11/12 that she was required in school. She went the following day and the said teacher told her that the child had been defiled and that she should conduct the complainant.

The appellant came home on 17/11/12 and she informed him. Apparently by that time the complainant had informed the neighbour. On 18/11/12 the appellant was arrested and beaten up by the members of the public. She said on cross examination that the period in which it is alleged that she defiled the minor the appellant was away at [particulars withheld] working.

8. PW6 PC William Andai carried out the investigations after receiving the minor and her mother at the station. One Charles Lusweti the community policing officer escorted [1]the appellant to the station. He issued the P3 form to the minor where the same was filled and he preferred charges against the appellant.

9. When put on his defence the appellant denied the charges in his sworn testimony. He said that on 18/11/14 he went to the house of one M at 8.00 am to demand his debt. M then came with people and roughed him up and he reported the matter before the chief. He was placed in the cells and later charged. He further on cross-examination states that one S owed him 6 iron sheets which she had not returned.

Analysis and Determination.

10. This being a first appeal this court is enjoined to analyse the evidence afresh and come up with a fresh finding taking into consideration that it did not have the benefit of seeing the witnesses first hand like the trial court. The appellant has raised several issues in his appeal which he has backed up with his written submissions.

11. He has inter alia petition that the entire prosecution evidence was full of contradictions inconsistency and fabricated and that he ought to have been acquitted. That the real culprit who defiled the minor was not napped; that essential witnesses were not called and that the evidence of the appellant's wife was not taken into consideration. The relationship between the appellant and the complainant was not disputed that she was the appellant's daughter. Secondly the age of the minor was not in dispute. Dr Ndege's dental age assessment was clear on this.

12. The big question is whether the minor was really defiled. The evidence of the two clinical officers namely Mr Labatt and Ligare seemed to suggest that she was defiled although the same was old looking. For a child of such tender years it is not indeed difficult to easily conclude that she had been defiled or that the hymen was torn. What was common was that the same was old looking.

13. The next big question is whether it was the appellant who defiled the minor his daughter. The nature of the charge facing the appellant was serious and consequently there ought not to be any lapse in the prosecution case. In other words the same ought to be proved beyond a shadow of doubt.

14. Having said this, it is important to analyse the evidence presented by the witnesses. The minor testified that she was defiled by the father during daytime when the mother went to the garden. She went further to state that one B M was at home. She said that she told her mother when she came back in the evening. She further stated that her vagina was injured.

15. On the other hand she told PW4 that she was defiled at intervals whenever she went to fetch water at the river. Apparently PW4 was the first person she informed except her mother and one Mama Clinton and her teacher.

16. Her mother testified that she was called by the school teacher and informed of the incident. By the time the appellant came home the minor had already informed the neighbour who pounced on him and started beating him up. The minor for some reasons was free with her neighbour who included Mama C and one Sharon who did not come to testify.

17. It appears at the same time that the appellant did not stay home but was working at [particulars withheld] and that is where he was when the incident occurred.

18. The question therefore is when and where was the minor defiled and by who? PW4 Linus Ligare, who examined her wrote in his notes that the minor was defiled when she went to fetch water at the river. While at the same time she said that she was defiled by the father while at home and when the mother goes to the garden. She even said that she was injured in her vagina. What then was difficult in the mother noticing that she was in pain even if she had not been told? Why wait until called by the teacher at school?

19. More significantly, the said teacher did not come to shed light on how she discovered that the minor was defiled. If she was defiled repeatedly, surely, nothing was too difficult in my view for the mother to have noticed.

20. Equally, the village elder Mr Lusweti, mama C, S or B M were never called to testify. One could not rule out the fact that the couple could shield each other and thus the investigating officer ought to have ensured that other independent parties were called to back up the minors evidence.

21. Whereas there was reasonable suspicion that the appellant defiled the minor I am unable to ascertain the place whether the house or the river. Moreover the key witnesses were not called to testify. Beside this the appellants defence seemed to centre on the fact that it is the neighbours who were his debtors who ganged up against him and coached the minor. Those neighbours ought to have been called to dispell any such notion.

22. I note that the offence was serious and stiff penalty meted against the appellant as prescribed under the Act. However, whenever there is inconsistencies in the evidence as presented herein benefit of doubt ought to be in favour of the appellant.

23. I therefore find that the prosecution did not tie up its evidence sufficiently. The doubt ought to go in favour of the appellant.

He is hereby set free unless lawfully held.

Delivered this 9th day of March, 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

M/S Kakoi for respondent

Appellant – present

Kirong – Court Assistant
