



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 31 OF 2012

{Being an appeal arising from conviction and sentence of Principal Magistrate T.A. Odera delivered on 20/2/2012 in Criminal Case No. 2239 of 2010}

GWMAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

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

The particulars of the offence were that on the **17th day of August 2010 at [particulars withheld] Kwanza District within the Rift Valley province intentionally caused his penis to penetrate the vagina of TNM who was to his knowledge his sister.**

2. 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 were that on the night of the **17th day of August 2010 at [particulars withheld] Kwanza District within Rift Valley Province intentionally caused his penis to come into contact with the vagina of TNM a child aged 17 year.**

3. The second count was **Assault causing actual bodily harm Contrary to Section 251 of the Penal Code.** The Particulars were that on the **17th day of August 2010 at [particulars withheld] Kwanza District within Rift valley Province unlawfully assaulted TNM thereby occasioning her actual bodily harm.**

4. The appellant was convicted and sentenced to life imprisonment in the first count hence this appeal .

Before addressing the substance of the appeal its worth summarising the evidence as presented during trial.

5. **PW1** the complainant said that she was aged 17 years and was at home reading on the material day at around 10 pm. Her mother **PW2** had gone to a funeral. As she went to sleep someone came and knocked the door and as she opened someone started assaulting her. He then proceeded to remove her clothes and defiled her. In the first instance she said that she did not recognise her but after being put in custody for 7 days she changed her mind and stated that it was the appellant who defiled her.

6. She then reported the incident to her mother the following morning. Her mother then reported the

incident the following day and the appellant arrested and the complainant taken to the hospital for treatment and the filling of the P3 forms.

7. PW2 Lydia Nanjala the mother of the appellant as well as the complainant testified that she had gone for a funeral that evening. The appellant equally came later in the night and told her that there was nobody at home that night. She came home at 1.30 am and slept. The complainant then went to school and as she arrived she was crying and inquired whether the appellant was his brother. She told her of the incident that night. She then took her to the hospital and had the appellant arrested.

8. PW3 Linus Ligare the clinical officer who examined both the appellant as well as the complainant produced the two P3 forms. He concluded that the complainant hymen was torn and tender and there was injury mark on her left buttocks.

9. PW4 PC Wendy Mukhubi carried out the investigations. She issued the P3 form to the complainant and accompanied her to Kitale District hospital. According to her the accused arrived home drunk and defiled the sister.

10. When put on his defence the accused in his unsworn stated that he went to drink alcohol and went home and took food and thereafter went on a drinking spree again. He found himself sleeping but denied having defiled the complainant.

Analysis and Determination

11. I have perused the entire proceedings and in particular the submissions by the learned appellant counsel in support of the grounds of appeal. The substantive ground which was raised by the petition of appeal dated 29th February 2012 is whether the evidence as presented by the complainant was through coercion. The second one which I consider germane is whether the age of the complainant was actually determined.

12. On the first ground which the counsel for the appellant has vigorously attacked it appears from the record that the complainant did give her evidence in chief and in the process the prosecution stated;

“The witness is refusing to talk. I pray she remains in custody for 8 days”

Order

“PW1 is stood down she is remanded in custody for 7 days as she refuses to testify herein. mention on 1/12/2010”.

13. On 2/12/2010 when the matter came up for hearing the prosecution stated

“ I am ready with PW1 she is now ready to testify.”

Accused: I am ready.”

14. There is no basis for the action taken by the court in remanding the complainant. I do agree with the appellant counsel that there is nothing to suggest that she was a hostile witness or for that matter nothing was recorded to indicate she refused to talk.

15. I also note that this was a school going child. Is it possible that she was scared to testify against the brother? Was she threatened in anyway. Significantly, the matter was done in an open Court and thus there was every possibility that the witness had some fears.

What the court was doing was coercing the witness to testify. Infact when she came back on 2/12/2010, she went straight to testify that it was the appellant who had defiled her.

16. When faced with such a situation where the witness refuse to testify or do any such act **Section 152 of the Criminal procedure Code** provides that

“Whenever a person, appearing either in obedience to a summons or by virtue a warrant, or being present in court and being verbally required by the court to give evidence:

a)

b) **Having been sworn refused to answer any question put to him; or -----**

Without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding 8 days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.”

17. In this regard there is nothing to suggest that the prosecution pleased any question to the witness and she refused to answer. Neither did the court record any sufficient or any reasons why the witness was incompetent. It is therefore not farfetched to conclude that the complainant was coerced into testifying adversely against the appellant.

18. More importantly the evidence of the complainant ought to have been corroborated. In the absence of such corroboration the prosecution could not benefit from the proviso to **Section 124 of the Evidence Act** which states

“-----provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.”

19. With the contradictions of the evidence already by the complainant namely that in the first instance she did not recognise the intruder then on the second part after serving 7 days in custody she admitted it was the appellant. One can clearly read the contradictions and therefore she cannot be trusted.

20. The other issue which I consider important in this appeal is the age of the minor. Nothing was produced to demonstrate that she was actually 17 years. The investigating officer stated that she claimed to be 15 years but the age assessment showed she was 17 years. No evidence was led to that effect a fact which was fundamental more particularly in sentencing.

21. Nor am I persuaded that the prosecution proved the relationship between the appellant and the complainant. The mere fact that the complainant stated that he was his brother was not sufficient. In fact after coming from school the following day she wanted to know from the mother whether indeed the appellant was her brother.

22. PW2, the mother did not help things either. In such cases it is not enough to simply state that the accused is my son or daughter for that matter. One has to lay clear basis to demonstrate to the trial court and if necessary through documentary evidence showing the relationship. To simply say that he is my son is too simplistic in such grave charges.

23. I think I have stated enough to show that this appeal ought to succeed.

The same is allowed. The appellant is hereby set free unless lawfully held.

Delivered on this 9th day of March 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

M/S Kakoi for Respondent

Ngeywa for the Appellant

Kirong – Court Assistant