



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NUMBER 16 OF 2015
CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 1116 of 2013 the Principal Magistrate's Court at Kimilili)

D W N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

D W N, the appellant herein was sentenced to serve life imprisonment for an offence of Defilement contrary to section 8(1) (2) of the Sexual Offences Act no. 3 of 2006.

The particulars of this offence are that on the 28th day of July, 2013 at [particulars withheld] of Bungoma County, the Appellant intentionally caused his penis to penetrate the vagina of F N, a child aged 8 years.

The prosecution case is that A S the PW-2 in this case is the mother to the complainant. The complainant was born in the year 2004 and as on 11.2.2014 when PW-2 gave evidence she was 10 years old. The appellant got married to PW-2 when the complainant was 8 years old. He is therefore a step-father to the complainant.

On 28.7.2013 PW-2 went home at 4.30pm. She asked the complainant for water. The complainant served her with water. The appellant got home. He instructed PW-2 to tell the complainant to go to the posho mill. PW-2 did so and the appellant left with the complainant. The appellant was working in a maize store of a person called B. They went there. After he fed the cows he called the complainant in the store. He removed her pant and also removed his pair of trousers. It is then he penetrated her vagina with his penis. He warned her not to tell anyone, saying if she did he will beat her and cut her into pieces. She was then given maize and they went back home. The complainant did not report the incident to the mother.

On 1.8.2013 the mother asked the complainant for water. The complainant said she was sick. The mother noted that she had swollen private parts. She pulled out a stick and threatened to beat the girl so as to state what happened. The complainant told the mother that D had defiled her. She had discharge and had bruises. The mother took her for treatment. The appellant went home. PW-2 questioned him about it. He denied and threatened the complainant as well as the mother. He threatened to cut them. She reported the matter at Kimilili Police Station. She was referred to Kimilili District hospital where she was examined and the P-3 form filled. The Dr noted that complainant had pinch marks on the thighs. The vagina was bruised. There was discharge and the hymen was absent. It was concluded that she had been

defiled. The P-3 form was thus filled. Her age was assessed as 8 years.

The appellant was then arrested and charged. In his defence, the appellant stated that he is a cane cutter. On 3.8.2013 he went home from his place of work. The police went and arrested him. He was told he will be informed of the charge in court.

The appeal is founded on the following grounds:-

- 1. That the appellant's constitutional rights were infringed during the trial.**
- 2. That a decision was arrived at without proper analyzation of evidence.**
- 3. That the evidence on record was not properly weighed.**
- 4. That the law was misinterpreted.**
- 5. That there was inordinate delay in the trial.**

The state opposed the appeal on the grounds that it is in want of merit; the trial was properly conducted; conviction was proper; the ingredients of the charge were established and were supported by documentary evidence.

I have weighed the evidence in the file and the position of both parties on appeal. There is no doubt in evidence that the appellant had lived with the complainant as his step father, and with PW-2 as his wife for a period of a year. He was therefore very well known by both. On the material day of the alleged offence he is the one who organized for the complainant to leave home. He left with her to give her maize to take to the posho-mill. The evidence of the complainant shows he defiled her at his place of work. The evidence is buttressed by that of PW-2 who noted that her private part was swollen. PW-4 equally did so when she noted her vagina was bruised, had discharge and the hymen was absent. These facts when considered together leaves no doubt that she was penetrated. The appellant was with her as she went back home. When he was questioned by PW-2 about it he threatened to cut them, just the same way he had threatened the complainant after the incident while warning her not to report. I have no doubt that he was well recognized as the culprit. The girl's age was assessed as 8 years at the time of the examination. The mother said she was born in the year 2004. On 28.7.2013 she was either 9 years or 10 years old depending on the date she was born. There is no doubt she was below 11 years old. Life imprisonment was therefore a right sentence for the offence.

I do agree with the state prosecutor that the appeal lacks merit and is accordingly dismissed.

Judgment read in the presence of the state counsel, court assistant and the appellant this 17th day of July 2017.

S. M. GITHINJI

JUDGE