



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 46 OF 2011

S C N..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 764 of 2009 of the Principal Magistrate's Court at Kilifi – A.M. Obura, SRM)

JUDGEMENT

The appellant appellant was charged with the offence of incest by male person contrary to Section 20(1) of the sexual Offences Act No. 3 of 2006. The particulars are that the appellant, on 26.8.2009 at *[particulars withheld]* in Kilifi District within Coast Province intentional and unlawfully committed an act which caused penetration of his genital organ namely penis into genital organ namely vagina of D K C alleged victim aged 16 years.

The trial court convicted the appellant and sentenced him to serve twenty (20) years in prison. The grounds of appeal are that the prosecution evidence did not support the charge, that no medical evidence was produced, that there was grudge which caused the case that the prosecution did not

prove its case and that his defence was reasonable. In his written submissions, the appellant submits that the charge sheet did not provide sufficient information. There is no evidence on the age of the complainant other than her statement that she was sixteen (16) years. He mother testified that she was 17 years. It is further submitted that no medical evidence was produced. The complainant was alleged to be eight (8) months pregnant but no D.N.A. tests were conducted. No medical officer was called to testify. There is mention of a village elder but he was to called to testify.

The prosecution opposed the appeal and relied on the record. The record of the trial court shows that four witnesses for the prosecution. PW1 was the complainant. She testified that on 26.8.2009 the appellant took her to Kilifi town. He alleged that he had received an anonymous letter that the complainant had slept with two brothers. The appellant is a step brother to her father. The appellant reported to the chief who advised them to report to the police in Kilifi. That is why they went to Kilifi. It was late and the appellant booked her at a lodging. It is her evidence that the appellant had sex with her. In the morning they went to the police station and the appellant produced the letter. The police told them they would investigate.

PW1's further evidence is that after leaving the police station, the appellant took her to a witchdoctor who was to give her medicine. On their way back, the appellant had sex with her in the bush. He told her not to tell anyone. Three weeks later, he told his grandmother. She was taken to hospital and examined.

PW2 S K is PW1's mother. On 17.9.2009 she was at home. Her daughter, N (PW3) informed her that on 16.9.2009 while PW1 and PW3 were going to the river, the appellant followed and threatened them. Later, the appellant picked a quarrel with PW2 and he started beating her together with PW3. The following day she reported the matter to the village elder. PW2 told her that the appellant had even defiled her and taken her to a medicine man. She informed the court that PW1 was 17 years old. The appellant is her brother-in-law. She normally goes to Mombasa for business and leaves the children with the appellant. The appellant has been assisting her. Her husband has not been at home for a longtime.

PW3, N K, is a sister to PW1. She was 16 years old. Her evidence is that on 16.9.2009 she was asleep with PW1 when the appellant called PW1. He took her out and she returned after some time. The following day their mother returned and he informed her. The appellant started beating her and PW2. PW3 further testified that she knew the appellant defiled PW1 as she took long before returning to their room. PW4 APC DANIEIL was based at the Vitengeni A.P. Camp. K On 22.9.2009 at 7.30 am the appellant was taken to the camp by some elders. He arrested the appellant and took him to Kilifi police station.

In his unsworn evidence the appellant denied committing the offence. He stated that he was arrested by two village elders in 2009. PW1 is his niece. He takes care of the family as her father ran away for many years. He took over the responsibility of taking care of his children. He reported PW1's husband to the children's office. He was arrested and detained but released after one week. He incited his wife and PW1 to lay the charges.

The main issue for determination is whether the prosecution proved its case against the appellant. The appellant was initially charged with the offence of defilement of a 16 years old girl. The charge was amended to incest. It is clear from the record of the trial court that no exhibits were produced. PW4 only arrested the appellant at the A.P. Camp and took him to Kilifi police station. No police officer from Kilifi police station testified. the prosecution voluntarily closed its case without producing any exhibit or the investigating officer testifying.

The evidence does not show when the case was reported. PW1 testified that she was taken to hospital but was told that it had taken long to report. That did not deter the police from issuing a P3 form to PW1. That P3 form could have indeed confirmed whether PW1 was pregnant. PW1 did not inform the court that she was pregnant. She also did not tell the court that apart from the alleged defilement in Kilifi, she was also defiled on 16.9.2009 at night. This line of evidence was brought up by PW3. PW3 only assumed that the appellant had defiled PW1 as she took long to return to their room. PW1 did not tell PW3 that she had been defiled.

The evidence on record shows that it is the appellant who used to stay with PW1 and PW3. PW2 testified that the appellant built a hut for her at his compound and is assisting her. It could be possible that appellant defiled PW1. However, being a criminal case, the matter has to be proved beyond reasonable doubt. PW1 did not inform the court that she was pregnant. Its only her mother who stated so. PW1 testified in May 2010 while the alleged offence occurred in August 2009. If indeed PW1 was pregnant, she could have told the court that she became pregnant due to the defilement. There is also the allegations that the defilement continued on 16.9.2009. However, PW1 did not testify to that effect.

No medical officer testified in this case. No P3 form was mentioned or produced. No treatment notes or document proving the age of the complainant. Although the charge was that of incest, the age is crucial as if the complainant is under 18 years, life imprisonment is the provided sentence. No police officer testified as to how investigations were conducted. The defence evidence was to the effect that it is PW2's husband who had disappeared for a long time who is causing the problems.

Given the evidence on record, I do find that the prosecution did not prove its case beyond reasonable

doubt. The appeal is merited and is hereby allowed. the appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 10th day of March, 2016.

S. CHITEMBWE

JUDGE