



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 54 OF 2012**

**(An appeal from judgment in original Kitale CMCR Case NO. 2644/2010 delivered on 6/3/2012 by E.A. Obina Resident Magistrate)**

**D K S.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant was charged with the offence of **Incest contrary to Section 20(1) of the Sexual Offence Act No. 3/2006**. The particulars of the offence are that **on the 30<sup>th</sup> day of September 2010 at [particular withheld] village within Trans -Nzoia County intentionally penetrated the vagina of G K with his penis who was to his knowledge was his daughter aged 10 years.**

The Second count was also **Incest contrary to Section 20(1) of the Sexual Offences Act NO. 3/2006**. The particulars of the offence were that **on the 28<sup>th</sup> day of September 2010 at [particulars withheld] village within Trans-Nzoa County intentionally penetrated the vagina of L K with his penis who was to his knowledge was his daughter aged 12 years.**

The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. The prosecution called a total of 6 witnesses whose evidence can be summarised as hereunder.

**PW1 G K** aged 10 years told the court that the accused was her father.

That on 28/9/2010 at 10 pm he came into the room she was sleeping together with her sister. He started by defiling her elder sister PW2 then thereafter he defiled her. She said that PW2 protested but he did not heed. The following day he came back again at night and defiled her.

Later Madam Judy came to their rescue and were taken to hospital for treatment.

The P3 form were filled and the matter reported to the police.

**PW2 J NW** is a teacher at W Primary School.

She said that on 30/9/2010 she noticed that the 1<sup>st</sup> complainant was not walking well and her performance had deteriorated. She spoke to her and she told her how her father had defiled her. They reported the matter to the Education Officer and later Kitale police who began carrying out investigations. She said that the accused wife had left and he was staying with the 2 girls. When cross-examined the witness

denied that the accused owed her Kshs 20,000.

**PW3 L K** is the second complainant also a child and gave unsworn evidence. She narrated how the appellant on 28/9/2010 defiled her in their room. She confirmed that they were staying together with the appellant who was their father. She reported the matter to PW2 who took her to hospital for treatment.

**PW4 W N** is the Deputy headteacher at W Primary School. He said that on 30/9/2010 he saw the complainant herein walking with difficulty. He called the Area Education Officer( EAO) and the area chief together with the school management. The accused was then arrested and taken to Kitale police and the minors taken to hospital for treatment. He confirmed that they were staying with the complainants.

**PW5 Dr Jonathan Kiprop** produced the age assessment report which showed that **G K S** was aged 9years and **L K S** aged 12 years.

**PW6 Linus Ligare** a Clinical Officer produced the P3 forms which showed that both complainants had been defiled. Their hymens were torn and were old looking.

**PW7 P.C. William Andayi** said that when the Aps from Kiminini brought the appellant he put him in the cells and commenced his investigation. He recorded statements from the complainants as well as the two teachers and referred the complainants for medical assistance. He then charged the appellant with the offence of incest.

When put on his defence the appellant gave unsworn evidence denying the charge.

He said that PW2 had given him maize to sell in Kakamega worth Kshs 20,000. After the sale the said amount was stolen but his wife told PW2 that the appellant had squandered the cash.

He further said that he had worked for PW2 for 6 months yet he had not paid him Kshs 16,000/-. He said that his wife went away leaving her with the children.

**DW2 David Masinde** is a village elder. He testified on behalf of the appellant. He said that the appellant has never been accused of any offence and that he had seen the appellant with the children at home.

**DW3 Rosemary Nasambu Baraza** is a neighbour to the appellant . She testified that before she bought her place the appellant was her landlord for over 2 years. She said that she had never heard anything bad against him and was surprised about the defilement charge.

**DW4 Roseline Auma Onyango** is a close neighbour to the appellant. He said that the children were close to her as the appellant would even leave them with her. Infact at the time of his arrest he had left the keys with her.

The state supported the findings of the trial court arguing that there was sufficient evidence to prove that the appellant had defiled the minors. The learned state counsel argued that penetration was clearly proved by the production of the P3 forms. That the age of the minors was clearly defined.

On his part the appellant said that he had differed with his wife and thats how he was staying with their children.

He said that all this was well planned by his wife.

### **Analysis and Determination**

This being an appeal this court is enjoined to

**“ ----- reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as if court dealt with any**

**questions of law on the appeal.”**

**Okeno Vs Republic (1972) EA 32**

The question of the relationship between the appellant and the complainants is not in dispute. The appellant was the father of the minor girls and he stayed with them after their mother left. The appellant in his “home made” petition of appeal suggested that there was contradictory evidence presented by the witnesses in attempt to prove the case. It appears that the only direct evidence is that of the 2 minors. I have carefully perused the same and I do not find anything to suggest that they were coached to testify. Both graphically stated what they saw and although there was a slight variation by PW3, as to whether they were defiled twice but in cross- examination she said that the appellant went to their room on another occasion. This court is alive to the fact that their evidence was unsworn but still the appellant had the opportunity to cross-examine them which he did.

Secondly the appellant blames this on PW2 the minors teacher on account of some KSHS 20,000/- belonging to the said witness which got lost in Kakamega. He also said that he used to work for her and he had not been paid Kshs 16,000/- being the 6 months salary.

That came during the prosecution case as well as at the defence stage. The court by virtue of the **provisions of Section 150 of the Criminal Procedure Code** recalled PW2 who on cross-examination by the court and the appellant elicitate nothing to support the appellant's allegations.

Further the prosecution evidence (p3 form) produced clearly suggested that the minors were defiled. There is no suggestion that the said children were defiled elsewhere. The incident occurred on 28 and 29<sup>th</sup> and the teacher PW2 was able to realise on 30<sup>th</sup> that PW1 was not normal. All along its not disputed that the appellant was with the children.

The appellants witnesses did not help issues that much save to suggest that the appellant was a person of good standing in the society and that he stayed well with the children. None of the witnesses especially the women for the matter ware able to tell the court whether they interviewed the minors.

The sum total of this findings is that there is no merit in this appeal. The findings of the trial court was sound and I do not think

that there is any need to disturb.

The appeal is hereby dismissed.

Delivered this 6<sup>th</sup> day of October 2016.

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of;**

**Ms Abele for prosecution**

**Accused present**

**Kirong – Court Assistant**