



**REPUBLIC OF KENYA**  
**IN THE HIGHCOURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL APPEAL NO. 23 OF 2014**

**C N ALIAS K..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

(From the Original Conviction and Sentence in Criminal Case No. 16 of 2013 of the Chief Magistrate's court at Malindi – C.M. Nzibe, RM)

**JUDGEMENT**

The appellant is charged with offence of attempted incest contrary to section 20 (2) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence are that the appellant on the 28.10.2012 in Malindi District within Kilifi County, intentionally and unlawfully attempted to cause his penis to penetrate into the vagina of ZC a girl aged 15 years who was to his knowledge his niece.

The appellant was convicted and sentenced to serve 15 years imprisonment. The grounds of appeal are that the trial court erred in law and facts by convicting him on a charge which was defective, that the burden of proof was not discharged, that the witnesses were from the same family and that the appellant's defence was not considered. He filed written submissions. It is submitted that the trial court relied on the evidence of the victim, her mother and his father. All the witnesses came from the same house. The victim testified that members of the public and neighbours went to the scene. None of them was called to testify. The complainant alleged that she wrote a letter to her headmaster but he was also not called to testify. The element of attempted defilement was not proved. No medical evidence to show that the complainant sustained injuries was proved as a sign of struggle if there was any attempt. The prosecution did not prove its case beyond reasonable doubt. In his defence the appellant informed the court that the complainant's father is his brother who wanted to take his land and also wanted the appellant to go by his rules. The appellant was framed. He wanted to punish the complainant but was later accused of the offence.

Mr. Fedha, prosecution counsel, opposed the appeal. Counsel submit that the ingredients of the charge are clear as per the charge sheet. The victim knew the appellant. The appellant was armed and was properly identified. The victim was fifteen years old. Her evidence was corroborated by that of PW2 and PW3. The appellant was at the scene of the offence.

Being the first court to handle the appeal, it is my duty to interrogate the evidence before the trial court and make my own findings. The complainant was PW1. She testified under oath. She informed the court that she was fifteen years old and a class seven pupil. On 28.10.2012 at about 3.00 pm she reached home from church. There was no one at home. She started to prepare food. The appellant who is his

uncle went there carrying a panga. He told her that she had not kept her promise to him. He said that she would keep the promise that day. She understood what he wanted as he used to seduce her. She saw that he had an erection. She had no peace at all and the appellant used to tell her that he wanted to have sex with her. She had even informed her parents but no action had been taken. She had written a letter to her head teacher about it. The appellant took her to a bed and told her to climb on. She held on to the bed. She screamed and her mother pushed the door and found the appellant in the room. He ran outside and met PW1's father outside the house. There were police officers at a neighbour's house attending a meeting. They were advised to report the matter to the police station. The appellant was later arrested. He had been taunting her for a long time. Family meetings were held to warn the appellant but he would not listen. Whenever the appellant would see her with any boy he would beat him.

PW2 KCM is a village elder and a grandfather to PW1. On 28.10.2012 at 3.00 pm he was attending a meeting with elders. PW1's father went there and told him to go to his house. He went there and found the appellant who is a brother to PW1's father. He was informed that the appellant wanted to have sex with the PW1. PW1 was there. He reprimanded the appellant. That was not the first time the appellant had attempted to have sex with PW1. On 25.11.2012 he received the same information and he advised the family to report to the authorities.

PW3 CSK is PW1's father. He testified that PW1 was sixteen years old. On 28.10.2012 he was at work when his son G told him that the appellant was causing problems at home. He rushed there and found that the appellant holding a panga. PW1 was crying. PW4, his wife, informed him that the appellant had attempted to defile PW1. PW3 tried to take panga from the appellant but he was violent. He went to the bazar where he found the sub chief who informed police officers who were on another mission. The appellant ran away. On 15.11.2012 the appellant returned home. On 19.11.2012 the family held a meeting. On 3.1.2013 he was given a warrant of arrest by the police. The appellant is his brother and he had told him that he wanted to marry PW1. That was not the first time the appellant had tried to defile PW1. He had managed to get a girl for the appellant as his wife but they parted ways.

PW4 MC is PW1's mother. She testified that PW1 was seventeen years old. On 28.10.2012 at about 3.00 pm she was approaching home from church when she heard PW1 screaming. She entered her house and found the appellant holding PW1 on the bed. The appellant appeared startled on seeing PW4 and woke up from the bed. He became agitated. It is PW4's evidence that that was not the first time the appellant had tried to defile PW1. The appellant told her that he wanted to marry PW1. The appellant has been warned several times. He has been giving money to PW1 and PW1 has been passing over the money to her. It is her further evidence that the appellant has been buying clothes and inner wear for PW1. The appellant wanted to give her dowry for PW1.

PW5, AP Corporal ERNEST MWENDA was attached to the Kakuyuni AP post. On 4.1.2013 at 10.00 am PW3 went there with a letter from the OCS Malindi instructing the APs to arrest Charo Ngala. An informer led them to Kavunyalalo Village where they saw the appellant in a farm. They arrested him and took him to the AP post. The investigating officer then went for the appellant. Caused the appellant to be charged with the offence.

PW6, P.C. SAMUEL MUTUA was stationed at the Malindi police station, gender desk. He investigated the matter. On 20.11.2012 at around 3.30 pm he was instructed to investigate the case. PW1 was at the station with her parent. He was given the original birth certificate which indicate that the complainant was born on 4.6.2997. PW1 narrated to him how the appellant had attempted to defile her. The appellant denied committing the offence. PW6 caused the appellant to be charged with the offence.

In his unsworn defence, the appellant testified that he used to work as a watchman in Mombasa. The complainant asked him to move back home. He felt such love for her. She deeply respected him. He bought her school uniform. Her father had no money. He gave her Kshs.200/= to go for school competition in Kakuyuni. It is his evidence that PW3 became upset with the appellant's close relationship with his daughter. His brother also wants his shamba. His brother wanted him to marry a wife of his choice and the appellant refused.

On the material day, he had a panga and went to the shamba. He returned at 3.00 pm and found PW1 washing clothes. He asked her if she wanted soap and she insulted him. He beat her. People went to their home including PW3. He still had the panga and axe he was using in the shamba. He explained to his brother that he had beaten PW1 because she had insulted him. He beat her. People went to their home including PW3. He still had the panga and axe he was using in the shamba. He explained to his brother that he had beaten PW1 because she had insulted him.

This is a first appeal. The court is required to re-evaluate the evidence and come to its own conclusion. The charge relates to an attempted incest. No sexual act did take place. It is the evidence of PW1 that the appellant pulled her to a bed. She noticed that the appellant was having an erection. She held on to the bed and screamed. All along the appellant had wanted to have sex with her. He was armed with a panga and told her that she was going to keep her promise that day.

It is the evidence of PW4, Mariam Cosmas that she found the appellant holding PW1 on the bed. The appellant woke up from the bed. PW1 had declined to climb over the bed. The appellant was startled upon seeing PW4.

The appellant's defence is that he had beaten PW1 for having insulted him. That line of evidence did not come out during cross-examination. Similarly, while cross examining his brother, PW3, the issue of land did not come out. The appellant confirms that he had a panga but he was from the shamba. The witnesses did not mention the axe the appellant referred to.

The charge was brought under section 20 (2) of the Sexual Offences Act. Section 20 (2) provides for the offence of attempted defilement and also prescribes the punishment for such offence. The particulars of the offence are clearly stated on the charge sheet. There is no defect on the charge sheet as alledged.

The appellant also contend that the witnesses were from the same family. It is true that the witnesses were family members. The appellant is part of the family. Although neighbours went to the scene, no neighbour testified. However, this aspect does not raise doubt on the prosecution case. PW4 arrived at the scene on time to curtail the incident. She was a crucial witness. She is PW1's mother. She had to testify. PW3 is the father of PW1. He was called from his place of work at a nearby school. He found the appellant at the scene holding a panga. He is also a crucial witness.

On the issue of burden of proof, it is evident that the incident occurred during the day. PW1 knew the appellant. The appellant is PW1's uncle. The appellant knows that fact. In his defence, the appellant testified that he felt he loved PW1 as she deeply respected him. If that was the case, the allegations of the appellant having been insulted by PW1 cannot arise. PW1 was 15 years old. Her birth certificate was produced. She was born on 4.6.1997. The appellant knew very well that PW1 is his brother's daughter. The evidence of PW4 that the appellant used to give PW1 money and even buy her clothes including underwear is confirmed by the defence evidence. The appellant testified that he used to give money to PW1 as her father had no money. He even bought her school uniform.

From the evidence on record, it is established that the appellant has been stalking PW1. It is evident that the appellant felt in love with PW1. On 28.10.2012, he found PW1 alone at her home and felt that the big day for his long wait had reached. Since he was armed with a panga, he thought that it was the correct moment to fulfil his dream. PW1 noted that the appellant was already erect and pulled her towards the bed. PW4 arrived just on time to interrupt the incident. The appellant became startled and did not expect the interruptions. No intercourse took place but the intention was there. The prosecution did prove that indeed the appellant had attempted to commit incest with PW1 who was barely 15 years. The lust for a brother's daughter cannot be explained. The appellant is an adult who knew very well that PW1 was a minor and his brother's daughter. That foolish urge to sleep with a brother's daughter led to the commission of the offence. The allegations of a dispute in relation to land is not proved. The appellant simply wanted to fulfil his urge to sleep with PW1 whom he loved.

In the end, I do find that the prosecution proved its case beyond reasonable doubt. Section 20 of the Sexual Offences Act includes a niece as one of the people falling under the offence of incest. The

appellant knew that PW1 was his niece yet he loved her and attempted to have sex with her. The appeal lacks merit and is hereby disallowed.

Section 20 (2) provides the minimum sentence as 10 years imprisonment. The appellant is a first offender. He was sentenced to 15 years imprisonment. I do find that the minimum sentence of 10 years is sufficient in the circumstances. The complainant will be over twenty (20) years by the time the appellant completes his sentence unless he is acquitted by the Court of appeal.

The appeal lacks merit and is dismissed. The sentence of 15 years is set aside and replaced with ten (10) years imprisonment.

**Dated and delivered in Malindi this 7<sup>th</sup> day of November, 2016.**

**S.J. CHITEMBWE**

**JUDGE**