



REPUBLIC OF KENYA.

IN THE HIGH M COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 13 OF 2014.

K RAPPELLANT.

VERSUS

REPUBLIC..... RESPONDENT.

(An appeal from the original conviction and sentence of R.M. Washika – AG. PM. In Criminal Case No. 92 of 2013 delivered on 9th July, 2013 at Kapenguria.)

J U D G M E N T.

1. The appellant, **K R J**, appeared before the Principal Magistrate at Kapenguria charged with attempted incest by male contrary to section 20 (2) of the Sexual Offences Act, in that on the 26th January, 2013 in West Pokot he attempted to commit a sexual act with E S, his own mother. In the alternative, he faced a charge of assault causing actual bodily harm contrary to section 251 of the penal code, in that on the 26th January, 2013, he unlawfully assaulted E S thereby occasioning her actual bodily harm.

2. After a full trial, the appellant was convicted on both the main and alternative counts and sentenced to ten (10) years imprisonment on the main count and four (4) years imprisonment on the second alternative count. Both sentences were to run concurrently.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis of the grounds in the petition dated 10th February, 2014 and filed herein on 13th February, 2014.

3. The appellant appeared in person at the hearing of the appeal and relied on his written submissions in support of his case.

The state/respondent opposed the appeal through the Learned Prosecution counsel, **Mr. Kakoi**, who orally submitted that the complainant (PW1), mother of the appellant testified on how she was stripped naked by the appellant who then attempted to rape her.

That, the evidence of the complainant was unchallenged and the evidence of PW2 was corroborated by that of PW1.

4. Learned Prosecution Counsel further submitted that PW1 and PW2 were never cross-examined by the appellant and that PW3 produced a P3 form showing that the complainant was injured. That, the appellant said nothing in his defence and although he stated in his submissions that there was no evidence against him, the evidence of PW1 and PW2 was sufficient. That, at the time of the offence and during his conviction the appellant was not a minor. In any event, the issue of his age was raised herein as an afterthought. The Learned Prosecution counsel urged this court to dismiss the appeal.

5. Having considered the grounds of appeal in the light of the rival submissions, the duty of this court was to re-visit the evidence and arrive at its own conclusions bearing in mind that the trial court had the advocate of seeing and hearing the witness.

In that regard, the evidence by the prosecution witnesses (PW1 to PW4) was duly considered against the evidence of the appellant in his defence.

6. The complainant **E T (PW1)** and **J T (PW2)**, are mother and father respectively of the appellant.

Emmanuel Kapeltum (PW3), was the medical officer who examined the complainant and completed the necessary P3 form while **Cpl. Jeremiah Muli (PW4)**, was the officer who investigated this case.

7. Under section 20 (1) of the Sexual Offences Act, any person of the male species who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of the offence termed incest.

8. In this case, the offended person (i.e. PW1) is the biological mother of the appellant. No dispute arose with regard to that relationship.

Under section 20 (2) of the Sexual Offences Act, if any male person attempts to commit incest, he is guilty of the offence of attempted incest and liable to imprisonment for a term of not less than ten (10) years.

9. Herein, the particulars of the main count indicated that the appellant attempted to commit an act of penetration (i.e. sexual act) against the complainant.

In her evidence, the complainant (PW1) stated that she was spreading the bed when the appellant jumped on her, held her back and tore her clothes thereby leaving her naked.

Such act in this court's opinion, demonstrated an act of indecency rather than penetration.

10. But, under the Sexual Offences Act, an indecent act means an unlawful intentional act which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

There was no indication from the complainant (PW1) that any part of her body came into contact with the genital organ of the appellant or that he exposed his genital organ with the intention of coming into contact with her.

11. In the circumstances, it could not be said that the appellant attempted to commit incest with the complainant. If anything, the appellant abused the modesty of his mother and, in the process assaulted and caused her bodily injuries as indicated by the medical report (P3 form) computed by the medical officer (PW3) after examining the complainant.

12. Therefore, the appellant's conviction by the trial court on the main count was not sound and proper. What was proved against the appellant was the alternative count of assault causing actual bodily harm for which he was also convicted hitherto erroneously since a conviction had already been entered on the main count thereby rendering the alternative count obsolete.

13. In the end result, the entire conviction of the appellant by the trial court on both the main and alternative counts is hereby quashed and sentences passed in respect thereof set-aside.

This court now finds the appellant guilty of the alternative count of assault causing actual bodily harm contrary to section 251 of the penal code and convicts him accordingly. He shall serve three (3) years imprisonment for the offence from the date of the previous conviction by the trial court (i.e. 9th July, 2013).

Ordered accordingly.

[Delivered and signed this 12th day of March, 2015.]

J.R. KARANJA.

JUDGE.