



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 146 OF 2013

S D O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 61 of 2011 in the Senior Principal Magistrate's court at Siaya)

J U D G M E N T

1). The appellant was charged with the offence of Incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 19th day of November 2010 at [particulars withheld] estate in Siaya County being a male person caused his penis to penetrate the vagina of J A a female juvenile aged 10 years who was to his knowledge his daughter.

2). The other count was committing an Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 19th day of November 2010 at [particulars withheld] estate in Siaya County within Nyanza Province intentionally touched the breasts and vagina of J A a child aged 10 years.

3). The appellant was convicted and sentenced to 20 years imprisonment hence this appeal.

4). Briefly the facts of this case are that PW1 J A told the trial court that on 19-11-2010 at 7 pm he was with her elder sister S A at home together with the appellant who is their father. Their mother had gone to the market. While inside the house the appellant called the two girls and told them to remove their clothes. They obliged but the elder sister ran away to the neighbours. The appellant then proceeded to defile the complainant, PW1 and ordered her to put on her clothes. She then told her mother. She was later taken to hospital for treatment and examination. According to her this was not the first time.

5). **PW2 S A**, told the court that on the material day she was at home with S, J, A and J(PW1) together with their mother. The appellant who was also at home went to the bedroom with PW1 but she denied seeing the appellant defiling PW1.

6). **PW3 C A**, is the appellant's wife. She sells mandazis. She came home on 19th and after cooking for the children, went for a kasha. She left the children with their father. She went to work suppose on 20th, but when she arrived back she was told of the incident. On attempting to inquire from the appellant he

became harsh and denied. She then went to the police who gave her a P3 form to be filled at the hospital.

7). **PW4 Simon Nyamwembe**, is the clinical officer who produced the P3 form which had been filled by Francis Ngetich. He found the genitalia to be normal except that the hymen was not intact. He concluded that there was no penetration.

8). **PW5 Godfrey Munyanga**, was the investigating officer. He said that PW3 came with the child to report the incident. She reported that the child had been defiled on 19-11-2010. He later arrested the accused in his house at 3 am and preferred the charges.

9). When put on his defence, the appellant gave unsworn evidence. He denied the charge and attributed the whole incident to a misunderstanding between him and his wife. According to him the children had been coached to lie.

10). Having heard the parties, perused the proceeding as well as the judgment of the court, together with the appellant's written submissions, this court is enjoined to reevaluate the evidence afresh with a view of reaching an independent conclusion. See **Okeno -VS- Republic [1972] EA 32**.

11). The issues raised by the appellant in his petition dated 19-8-2013 are basically that the evidence on record as adduced by the prosecution witnesses were not weighty enough to have warranted a conviction. According to him the complainant was well coached by PW3 the mother so as to satisfy the grudge she had with the appellant.

12). For the offence of incest to occur, the first ingredient is to determine the relationship between the parties. I have no doubt based on the above facts that PW1 is a daughter to the appellant. Secondly, there is no dispute as to the age of the complainant based on the oral evidence on record as well as the production of the baptismal card. This was not challenged by the appellant either.

13). The big question however is whether the appellant defiled the minor, his daughter. The evidence of PW1, PW2 and PW4 here are very critical. PW1 said that the appellant called her and PW2 and told them to remove their clothes; she said:

“I was with my elder sister S A. My mother was selling at the market. She went at 5 pm. My father while inside our house lying in a mattress sleeping or resting. He came and ordered us to remove our clothes together with my sister. We removed our clothes. My sister ran and went to our neighbours. I removed my skirt and blouse and underpant”.

14). PW2's evidence is worth reproducing partially. She told the court:

“On 19-11-2010 I was at home with S, J, A and J (PW1). I was washing utensils. The others were helping our mother. We were with J. J was cleaning bedroom. My father was present. I saw him going to the bedroom where J was. We normally sleep at the neighbours. J and S normally sleep on the sitting room on the floor. I never saw my father do anything..... I never saw my father defile the girl”.

15). From the above evidence, one can easily deduce various contradictions between the two witnesses. First it is not clear whether on the material day there were other children as well as the mother at the scene. If it is true that the rest of the family members including the mother were present then it would be very strange and absurd for the appellant to have defiled PW1.

16). Secondly, PW1 said that the appellant told her and PW2 to remove their clothes. This was never raised by PW2 and neither did she testify that she saw the appellant defile PW1. Further, PW2 did not say that she ran to the neighbours after being told to remove her clothes by their father.

17). Significantly, PW2 got the information after two days. However, according to PW1 she told her mother on the same day when she arrived home at 9 pm. Why then did PW3 testify that she got the

information after two days?

18). PW4's evidence did not help things either. According to the finding, the clinical officer found that:

“She alleged that she was defiled twice one attempt. 2nd defiled. The 1st incident was on 19-11-2010 and the 2nd incident was 19-1-2011. On examination on 2nd incident she found a normal genitalia. No tears hymen was intact. It may conclude or show a sperm defilement. The lab test was normal. On conclusion the 2nd incident showed no penetration”.

19). From my understanding of PW4's evidence it appears that the charges facing the appellant relates to the 1st incident of 19-11-2010. There is no sufficient evidence however to support the fact that the complainant was defiled on 19-11-2010. All that PW1 attempted to show was the defilement on 19-1-2011.

20). Having carefully analysed the evidence herein I don't think it shall be safe to sustain the conviction of the applicant. There are material contradiction in the evidence of the prosecution witnesses. I do not think that section 124 of the Evidence Act Cap 80, aids PW1 herein. In short I do not find her a believable and truthful witness. Neither do I find her mother believable. PW2 in my opinion appears truthful save that her evidence was not corroborated. Equally, the appellant's defence would have been relatively sound if he had established the level of grudge between him and his wife which according to him was the genesis of the problem.

In the premises I shall allow this appeal. The appellant is set free unless lawfully held.

Dated, signed and delivered at Kisumu this 4th day of May, 2015.

H.K. CHEMITEI

JUDGE