



REPUBLIC OF KENYA

High Court at Kitale

Criminal Appeal 45 of 2011

E S..... APPELLANT.

VERSUS

REPUBLIC RESPONDENT.

(Being an appeal from the original conviction and sentence of R.M. Washika – RM. in Criminal Case No. 433/2010 delivered on 7th February, 2011 at Kapenguria.)

J U D G M E N T.

The appellant, **E S**, appeared before the Resident Magistrate at Kapenguria charged with attempted incest contrary to section 20 (2) of the Sexual Offences Act. It was alleged that on the night of the 27th/28th April, 2010, at **[particulars withheld]** village W. Pokot, did attempt to cause penetration of his male sexual organ into the sexual organ of D I, a girl aged seven (7) years whom he knew to be his daughter.

There was an alternative count of indecent act with a child contrary to section 7 of the Sexual Offences Act.

The appellant entered a plea of not guilty for both counts. He was tried and convicted on the main count. A sentence of ten (1) years imprisonment was imposed upon him but being dissatisfied with the conviction and sentence, he preferred the present appeal on the basis of the grounds contained in his petition of appeal filed herein on 4th April, 2011.

Basically, the appellant complains that he was held in police custody for thirty (30) days and that he was framed by his fiancée who was involved in a love affair with the arresting officer in this case. He also complains that the evidence by the doctor did not establish any case against him.

At the hearing of the appeal, the appellant appeared in person and relied on his written submission in support of his case. The learned prosecution counsel, **Mr. Chelashaw** appeared for the state/respondent and opposed the appeal on the basis that the evidence of the complainant was admissible even without corroboration in accordance with section 124 of the Evidence Act. Further, and in any event, the complainant's evidence was corroborated by that of the doctor and PW3 and was found to be sufficient and truthful.

On the alleged long stay in police custody, the learned prosecution counsel contended that the issue was never raised during the trial and because it was raised in this appeal it should be regarded as an afterthought. In any event, the appellant may sue the state if he is acquitted. The learned prosecution

counsel contended that there was sufficient evidence to convict the appellant and called for the dismissal of this appeal.

All considered, the duty of this court is to revisit the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

In that regard, this court has revisited the evidence adduced against the appellant by the four (4) prosecution witnesses including the complainant.

DI (PW1), a daughter of the accused and aged seven (7) years old at the time, a clinical officer, **Jeremiah Kissang (PW2)**, who produced a P3 form showing that the complainant was not defiled, a social worker, **Alice Wekesa (PW3)**, who was the accused's neighbour and who raised the red flag that the accused could have been involved in sexually molesting the complainant and a police officer, **Cpl. Peter Terer (PW4)**, who preferred the present charge against the appellant after recording statements from the other witnesses.

The defence raised by the appellant was also considered by this court. It was basically a denial and a suggestion that the appellant was arrested and charged without good cause.

From the entire evidence, it is apparent to this court that there was insufficient or no evidence at all to prove that the appellant defiled his own daughter. The suspicion cast upon him by his neighbour (PW3) was not adequately supported by cogent evidence and in particular the evidence of the clinical officer (PW2) which showed that the complainant was not at all defiled.

Nonetheless, there was sufficient evidence from the complainant (PW1) showing that she was constantly subjected to acts of indecent assault by her father, the accused. The acts did not however extend to defilement and/or attempted defilement.

In the circumstances, this court would find the appellant guilty of the alternative count of indecent act with a child rather than the main count of attempted incest on which he was convicted by the trial court.

In sum, the appeal would succeed only to the extent of substituting the conviction of the appellant for attempted incest with conviction of the appellant for indecent act contrary to section 7 of the Sexual Offences Act.

The sentence of ten (10) years imprisonment shall however remain intact since section 7 and section 20 (2) of the Sexual Offences Act provides for the same sentence.

[Delivered and signed this 7th day of May, 2013]

J.R. KARANJA.

JUDGE.