



REPUBLIC OF KENYA
IN THE HIGH COURT OF KAKAMEGA
HCRA NO. 123 OF 2010
E A :::::::::::::::APPELLANT
V E R S U S
REPUBLIC::::::::::RESPONDENT

(Arising from the judgment of Hon.H.O.Oyugi in Criminal case No.199 of 2011 at Senior Principal Magistrate's court Butere)

J U D G M E N T

1. E A the appellant herein was charged of the offence of incest by male contrary section 20 (1) of the Sexual Offences Act No. 3 of 2006 . The particulars were that the appellant on the 29th day of March 2010 at [particulars withheld] in Butere District within Western Province being a male person , caused his penis to penetrate the vagina of L A aged 10 years a female person who is to his knowledge his niece.

Alternative charge committing an indecent act with a child contrary section 11(1) of the Sexual Offences Act No. 3 of 2006 . The particulars were that the appellant on 29th day of March , 2010 at [particulars withheld] in Butere District within Western province , intentionally touched the buttocks and vagina of L A aged 10 years with his penis , who was to his knowledge his niece.

2. The appellant denied the charges and the matter proceeded to hearing with the prosecution calling a total of seven (7) witnesses while the appellant gave an unsworn defence without calling any witness. The appellant was convicted and sentenced to serve life imprisonment.

3. Being aggrieved by the judgment he filed this appeal citing the following grounds :

- i) That he was not accorded a fair trial as stated in article 50 of the Constitution of Kenya, 2010.
- ii) That he was not supplied with the prosecution evidence materials to enable him equip himself in his defence throughout the trial .

4. When the appeal came for hearing the appellant relied on his written submissions , in which he states that his rights under article 50 (2) of the constitution were violated . He claims that he was never supplied with witness statements , copies of the P3 form, copy of the baptismal card and copies of other medical evidence . Basically his submission is that failure by the prosecution to give him in advance the evidence they intended to use against him , was unfair to him.

5. The State through Mr. Juma opposed the appeal . He relied on the evidence on record saying the appellant fully participated in the trial and was not prejudiced at all. That the issue of the charge sheet

should have been addressed by the trial court.

6. A summary of the prosecution case is that the appellant is a paternal uncle to the complainant (PW1) who was aged 9 years of age .

She testified that on 29th March , 2010 at 4 pm she was at her paternal grandmothers' home.Her grandmother was in the shamba as PW1 and the appellant's child' A were watching the fire as the grandmother's food cooked. The appellant then came and called her to his house which was 50M from the grandfather's house . The appellant carried her to his bed, wanting to have sex with her .

7. She cried but the appellant removed his trouser and applied some oil on his penis . Thereafter he raised her dress ,and inserted his penis in her vagina . She had not worn pants that day . She cried for help as she felt a lot of pain. Pw2 her other uncle (E's father) rushed to the scene and the appellant left her. She was bleeding .PW2 took her out of that house and took her to her mother (PW3). The appellant was left in his house .

8. PW2 F E is a brother to the appellant .He testified that he heard PW1's cries from the appellants' house .He rushed there and called out the appellant who responded. On being asked about PW1 he told him she was not at his house . He did not believe him and so dashed inside the appellants' bedroom where he found PW1 lying on her back and the appellant was standing there. He called their mother and PW1's mother who came and PW1 explained to them what had happened.

9. PW1 was taken to hospital and the matter reported to Butere Police Station . The appellant was arrested and both him and PW1 were taken for medical examination.

PW6 Dr. Stafford Ochango is the medical doctor who examined both PW1 and the appellant. He confirmed that there was sexual penetration as PW1's vagina had bruises and the hymen was missing . He produced the P3 as EXB2 . PW4 Patrick Kimulwa Superntendent of Police recorded a statement from the appellant .

10. The appellant in his defence gave an unsworn statement . He stated that on 29th March , 2010 he was at the shamba in the morning and returned home around 3 pm . He cooked and as he ate his son and PW1 came but at different times . Before long his brothers and mother came to his house crying out . They alleged that he had defiled PW1.He denied committing the offence saying there was a family grudge behind all this .

11. This is a first appeal and I have a duty to re- evaluate and reconsider the evidence and arrive at my own conclusion see **Okeno vs R 1972 E.A 32, Kiilu & Another v R (2005) 1 KLR 174.**

I have also to bear in mind that I did not see nor hear the witnesses. I have considered the record , grounds of appeal and the submissions by both sides.

12. I have perused the record and it is nowhere indicated that the appellant requested for a copy of the charge sheet or witness statements , and was not given the same .The charges were read to him and he responded , and participated in the proceedings .

13. I find nothing to suggest that he was prejudiced during the hearing . The testimonies were given in Kiswahili language . The appellant has not said he did not understand Kiswahili language he has used in this appeal . I am therefore satisfied that there was no violation of the appellants' rights as provided under article 50(2) of the Constitution .

The issues that fall for determination are:-

- i. Whether the appellant is related to PW1 .
- ii. Whether PW1 was aged below 18 years of age as at 29th March , 2010 .

iii. Whether there was penetrative intercourse on PW1 .

iv. Who caused the penetration complained of ?

14. In defining what incest by male persons is , Section 20 (1) of the Sexual offences Act No. 3 of 2006 provides :

“ Section 20. (1) Any male person 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 an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person”.

Issue no (i) **Whether the appellant is related to PW1 .**

15. All the prosecution witnesses have confirmed that the appellant is a younger brother to the father of PW1 .PW1 is therefore a niece to the appellant . The appellant has not disputed this.

Any male person committing an act causing penetration or an indecent act with his niece commits an offence called incest by male persons

Issue no (ii) **Whether PW1 was aged below 18 years of age as at 29th March , 2010 .**

16. PW3 N W who is the complainants mother testified that PW1 was born on 7th January, 2001. She produced a baptismal card (EXB1) confirming that . This confirms that PW1 was below eighteen (18) years of age as at 29th March , 2010 .

Issue No. iii **Whether there was penetrative intercourse on PW1 .**

17. PW3 examined her daughter (PW1) and saw some whitish stuff on the girls' vagina, which also had some jelly .She was taken to hospital . Treatment notes (EXB1 (a), and a P3 form (EXB2) were produced by the doctor (PW6) who examined PW1. He confirmed to the court from his findings that PW1 had been defiled meaning she was sexually penetrated .

Issue no(iv) **Who caused the penetration complained of?.**

18. The scene of this incident was a homestead . PW1 was at her grandmother's with the appellant's child . It was broad daylight . The appellant called PW1 (his niece) and she went . Due to the pain she went through the minor was crying and her cries attracted her uncle (PW2) who is the appellant's brother.

19. PW2 rushed to the appellant's house and found him in his bedroom standing as PW1 lay on the bed . The appellant had initially told PW2 that PW1 was not at his house. The appellant was arrested on the same day by his brothers and others.

20p. PW4 recorded a statement under inquiry from the appellant(exb4) . It was produced in court as an exhibit without any objection from the appellant.

The statement confirms what PW1 stated to the court, and even gives more details :

21. The appellant denied the charge and said there was a family dispute which was the cause of all this .

He did not cross examine any of the witnesses on the alleged family dispute . Had there been anything like that he would have questioned the witnesses about it. He chose not to as there was nothing .

22. The evidence by the prosecution is so overwhelming and it has not been shaken at all. I am satisfied that the learned trial magistrate arrived at the right determination.

I find no merit in the appeal which I dismiss and confirm the conviction and sentence .

Orders accordingly .

Delivered , signed and dated this 31st day of August,2017 at Kakamega

H.I. ONG'UDI

JUDGE