



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 22 OF 2020**

**NAN.....1<sup>ST</sup> APPELLANT**

**KABS.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against judgement, conviction and sentence of the Resident Magistrate Hon. D.W. Waweru in the Chief Magistrate's Court at Garissa Criminal Case No. 338 of 2020 delivered on 10<sup>th</sup> July, 2020)**

**JUDGEMENT**

1. The victim IA was at the time of commission of the offence against her aged 4 years. She is an orphan and at the time was living with an aunt, her mother's sister NAN and her husband KAB within Garissa township.
2. The case against NAN 1<sup>st</sup> Appellant and KABS, is that between the 9<sup>th</sup> of May 2020 and 20<sup>th</sup> of May 2020 at Bula Sambul area they caused grievous harm on the child. They also each faced a separate second count, the 1<sup>st</sup> Appellant faced the offence of failing to protect the child whereas the 2<sup>nd</sup> Appellant was faced with the offence of subjecting the child to cruel punishment.
3. They were both found guilty and convicted on Count 1 & 2 respectively. They were imprisoned to 7 years on Count 1 and fined 20,000/= each or 2 years imprisonment the terms to run consecutively.
4. Being dissatisfied with the conviction and sentence the Appellants preferred an appeal through Paul Mugwe Advocate stating that the trial court erred in relying on the evidence of PW2 though it had ordered that she should testify through an intermediary; the court erred in dismissing the plausible defence offered by the Appellants; the sentences were too harsh and all in all the evidence did not meet the required threshold.
5. The Appeal was objected to by the state as it supported both the conviction and sentences meted out.
6. Both parties filed written submissions.

As for the Appellants it was argued that the court failed to consider the plausible defence of the Appellants. It was submitted that the injuries sustained by the victim and though there was an admission by the 1<sup>st</sup> Appellant of having canded the victim and inflicting some injuries the punishment meted out was too harsh. It was also argued that the evidence before the trial court in the absence of the victim's testimony was circumstantial, and failed to meet the necessary threshold. Further counsel submitted that even if this court were to find the Appellants guilty the sentence was too harsh in the circumstances.

7. On its part the State objected to the appeal on grounds that the Sexual Offences Act does make provision on how vulnerable witnesses may testify through intermediaries.

As regards the defence, the State submitted that the 1<sup>st</sup> Appellant admitted having assaulted the victim though denying that she broke the arm of the victim, further the state urged that the 1st appellant failed to produce evidence of any medial record to prove her case.

It was also urged that the 2<sup>nd</sup> Appellant confirmed the assault by the 1<sup>st</sup> Appellant.

The state also submitted that as the two Appellants took in the victim as their child, they acquired parental responsibility over her and owed her a duty of care and protection.

8. The State referred the court to Section 234 of the Penal Code, & Section 13(a) and 18(1) of the Children's Act in supporting the sentences.

9. This Court being the first appellate court, it has a duty to consider the evidence afresh examine and analyse the same in order to arrive at an independent opinion bearing in mind that the trial court had the benefit of seeing and hearing the evidence first hand. See the case of **Okeno versus Republic 1972 E.A at 32**

10. The victim was aged 4 years at the time of the incident. She was unable to speak and an intermediary simply introduced her to the court. The court therefore relied on circumstantial evidence to arrive at its finding.

11. The child whose relationship with the two Appellants is not very clear lived with the Appellants as her parents. It matters not that the 1<sup>st</sup> Appellant was her biological mother or an aunt who together with her husband the 2<sup>nd</sup> Appellant took over parental responsibility. The victim at age 4 was vulnerable and the 2<sup>nd</sup> owed her a duty of care to love and protection under the law and certainly morally.

12. The evidence before court and which the Appellants agree with is that the victim had injuries all over her body. Some of the injuries were a few weeks old and some fresh.

**13. PW1 Jeremiah Mosbei** a clinical officer at Garissa County Referral Hospital informed the court that on the 26<sup>th</sup> of May 2020 he examined the victim who had been escorted to the hospital by the police. He further testified without details that the victim identified her assailant. In examining the victim, he found that she had fresh septic lacerations, redness across the nasal bridge extending to the left cheek; wounds on both her ears, on her thigh and abdomen multiple healed whip marks, fresh lacerations on the lower chest wall and abdomen; redness and tenderness and fresh septic bruises at the back and on her buttocks, swollen deformed elbow and arm, and bruises interior knee. The fracture was several months old.

**14. PW3 Dekow Mahamud Ahmed** the chief of the Iftin East had been summoned by the pharmacist where the 1<sup>st</sup> Appellant had gone to seek medical help for the victim. On arrival he found the child with the 1<sup>st</sup> Appellant and the child accused the 2<sup>nd</sup> Appellant of having inflicted injuries on her although the 1<sup>st</sup> Appellant informed him that she is the one who had assaulted the child. He witnessed the injuries.

**15. PW4 Zaitun Aden Hassan**, a Gender Based Violence Officer testified too that she visited the hospital where the child was getting treatment and witnessed the child had injuries on the face, swollen left elbow and swollen buttocks, injuries sustained from a beating. It was her testimony too that the child mentioned Sigat, the 2<sup>nd</sup> Appellant as the person who inflicted the injuries.

**16. PW5 Sgt Zeinab Hassan** accompanied the child to the hospital She too witnessed the injuries sustained and learnt that the injuries were inflicted by the 2<sup>nd</sup> Appellant.

17. In her brief testimony the victim identified the 2<sup>nd</sup> Appellant as S the name she kept referring to and the 1<sup>st</sup> appellant as well. She was unable to testify further.

18. On the part of the defence the 1<sup>st</sup> Appellant maintained that she is the one who beat the child with a broom stick because the child had the habit of defecating on herself daily and the action was meant to discipline the child. She denied that the 2<sup>nd</sup> appellant beat the child and stated further that the child had come with the injuries from where she stayed before.

19. On his part the 2<sup>nd</sup> appellant denied having beaten the child and blamed the 1<sup>st</sup> Appellant for the beating. He admitted that the fresh wounds were inflicted at his house.

20. Having considered the evidence before court I form the opinion that whether the child had injuries or not is a non-issue. The evidence and extent of the injuries are open and very clear and indeed admitted by the Appellants save that the child had previous injuries from elsewhere.

21. The state failed to prove that the older injuries were inflicted by the appellants. However, the evidence on the fresh wounds pointed directly at the appellants. The victim sustained very serious injuries from canning from persons who ought to have protected her from harm.

22. The victim spoke to 3 persons who have no interest in the matter and identified the person who inflicted injuries on her as being the 2<sup>nd</sup> Appellant. The court finds the 3 independent witnesses to be truthful and honest with no intent or ulterior motive.

23. The court further forms the opinion that the 1<sup>st</sup> Appellant had intend to coverup for her husband, she opted to shield him from blame for some reason despite evidence from the victim whom the court believes that the injuries were inflicted by the 2<sup>nd</sup> Appellant. None the less the 1<sup>st</sup> Appellant clearly failed in her duty either as a person who took parental responsibility to protect the victim from physical harm.

24. To say that the injuries inflicted on the child were from simple assault is to trivialise the serious injuries inflicted on the poor soul by adults who ought to know better.

25. I therefore find as the trial court to the extent that the 2<sup>nd</sup> Appellant is guilty of the 1<sup>st</sup> count; inflicting grievous harm on the child and

convict him accordingly.

As for the 2<sup>nd</sup> count against the 2<sup>nd</sup> Appellant I am of the view that the same cannot be sustained as to do so will amount to punishing the 2<sup>nd</sup> Appellant twice for the same offence. I therefore acquit him of the said count.

26. For reasons stated above I am of the view that despite the 1<sup>st</sup> Appellant's admission of having assaulted the victim I find the admission to be merely a protection mechanism and I acquit her of the said count.

I However find the 2<sup>nd</sup> Appellant guilty of the 2<sup>nd</sup> count of failing to protect the child from physical harm and therefore in agreement with the trial court.

27. Having noted the mitigation and remorsefulness by the two Appellants I find the 7 years imprisonment meted out on the 1<sup>st</sup> count being excessive. I will therefore set aside the sentence meted on count 1 and in its place fine the 2<sup>nd</sup> Appellant the sum of Ksh. 75,000/= in default 3 years imprisonment.

As for the 1<sup>st</sup> Appellant I will sustain the fine of Kshs.20,000/= or 2 years imprisonment in default imposed upon her. The same is reasonable.

**DELIVERED AND SIGNED AT GARISSA THIS 17<sup>th</sup> DAY OF MARCH, 2021.**

.....

**ALI-ARONI**

**JUDGE**