



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E013 OF 2020

BETWEEN

JKS.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O 20 of 2019 in the Principal Magistrate's Court at Nkubu by Hon. J.Irura (PM) on 01.10.2020)

JUDGMENT

The Trial

1. **JKS (Appellant)** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (**the Act**). The appellant was also charged with attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006 **the Act**. The offences were allegedly committed on 21.06.2029 against LK and EK children aged 12 and 10 years respectively.

Prosecution case

2. The prosecution called a total of six (6) witnesses in support of its case. PW2, LK, the complainant in the 1st count stated that she was 11 years old. She stated that on the material date, she was walking back home with EK the complainant in the 2nd count when they met the Appellant who was their neighbor and he took them into a bush, undressed them and defiled them starting with EK.

3. PW3 EK on the hand stated that she was 9 years old and that Appellant was married to her sister. She reiterated that she was going home with PW2 when they met the Appellant who took them into a bush where he undressed them and defiled them starting with her then PW2. Upon arriving home, she reported the matter to her mother PW4 IK who in turn informed PW1's mother PW5 GK on 23.06.2019 after which they reported the matter to police and escorted the children to hospital where they were examined. Appellant was handed over to PW6 PC Cylene Mweni on 23.06.2019 who upon completing investigations caused him to be charged.

Defence case

4. The Appellant denied the charges. He said he was framed by PW4 who is mother to his wife. His wife who is PW4's daughter and PW2's sister stated that her mother framed Appellant because she did not approve of their marriage.

5. In a judgment dated on 01.10.2020, Appellant was convicted of both counts and sentenced to serve an imprisonment terms of 20 and 10 years respectively.

The appeal

6. Aggrieved by this decision, the appellant lodged the instant appeal. From the supplementary grounds and written submissions filed on 30.04.2021, Appellant raises grounds that:

1. There was no evidence of lighting at the scene of crime committed at 8.00 pm

2. He was convicted on the evidence of PW3 who was neither sworn nor cross-examined

3. The defence was not considered

4. The sentence is harsh

7. The state opposed the appeal and submitted that the prosecution case was proved and the sentence lawful.

Analysis and Determination

8. It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**).

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and on behalf of the state.

10. In dealing with this appeal, I will deal with these issues:

1. **Age of complainants**
2. **Penetration**
3. **Cross-examination of the witnesses**
4. **Identification of the assailant**
5. **Sentence**

Age of complainants

11. In the case **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).

12. The trial magistrate found as a fact that the ages of LK and EK were proved to be 12 years and 10 years as evidenced by age assessment reports tendered in evidence as PEXH. 9 and 10 respectively.

Penetration

13. Section 2 of **the Act** defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

14. The P3 form in respect of LK which was tendered as PEXH.4 shows that she had bruises on the vulva and hymen was broken which according to the clinical officer, PW1 was evidence of penetration. On the other hand, P3 form for EK tendered as PEXH. 5 reveals that she did not have any injuries and her hymen was intact.

15. From the foregoing, I find that the trial court rightly found that penetration of LK had been proved.

Cross-examination of the witnesses

16. Article 50 of the Constitution underscores the right to a fair hearing and provides that:

(2) Every accused person has the right to a fair trial, which includes the right—

(k) to adduce and challenge evidence

17. The court record reveals that the PW3 EK who is the complainant in the 2nd count and PW4 IK who is mother to the 1st complainant were not cross-examined.

18. In the case of **Nicholas Mutula Wambua V. Republic, Mombasa Criminal Appeal No. 373 of 2006**, It was held: -

“..... There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.....It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is obvious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.” That thinking is expressed in Section 208 of the CPC which govern hearing of Criminal proceedings in the Magistrate’s courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The Trial Courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission.”

19. By the fact that PW3 EK and PW4 IK were not cross-examined, I find that their evidence is no probative value and there was a mistrial in respect of count two.

20. Failure cross examine is however not an automatic licence to acquittal and the court has to evaluate the other evidence independently without that of PW3 and PW4 who were not cross examined and make its own finding.

Identification of the assailant

21. Appellant is married to LK’s sister. He was not a stranger to LK. The trial magistrates finding that Appellant had been positively identified was therefore well founded. I also find that the defence in respect of the 1st count was rightly rejected and the conviction well founded.

Sentence

22. Appellant was neither sentenced to the mandatory minimum or maximum sentence and the principles of **Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR** are therefore not applicable,

23. From the foregoing, the Appeal partially succeeds and it is hereby ordered:

1. The conviction in count 1 is confirmed and the 20-year sentence substituted with 15-years’ imprisonment term that shall run from 23.06.2019 when Appellant was arrested

2. The conviction on count 2 is quashed and the sentence set aside

DATED AT MERU THIS 20TH DAY MAY 2021

T. W. CHERERE

JUDGE

Court Assistant - **Mr. Kinoti**

Appellant - **Present in person**

For the State - **Ms. Mbithe**