



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E019 OF 2021

BETWEEN

MWENGERWA LELEI alias Sanjo.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Tigania Principal Magistrate's Court S. O Criminal Case No. 25 of 2018 by Hon. P.M. Wechuli (SRM) on 26th November, 2020)

JUDGMENT

The Trial

1) **MWENGERWA LELEI alias Sanjo (Appellant)** was charged with the 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 offence was allegedly committed on 05.08.2018 against **GM** a child aged 13 years.

Prosecution case

2) The prosecution called a total of three (3) witnesses in support of its case. **PW1 GM**, the complainant aged 13 stated that on the material date at about 9.00 pm, she went to sleep with her siblings but left the door unlocked expecting her mom would lock it as she normally did after picking the youngest child. She was awoken by some pain in her vagina and upon lighting a torch she saw Appellant whom she referred to as Sanjo. That she screamed and Appellant was arrested by her aunt M. Complainant's mother upon receiving complainant's report escorted complainant to the police station and later to hospital for examination. Complainant was examined by Kenneth Kimathi, a clinical officer who found her with bruises on the labia minora as shown on the P3 form PEXH. 1.

Defence case

3) Appellant in his sworn defence denied the offence but confirmed that PW1 had sent him to collect water for her on the material night. He stated that he was framed so that he could not inherit PW2's husband's land.

4) *In a judgment* delivered on 28.11.2020, Appellant was convicted and sentenced to 10 years' imprisonment.

The Appeal

5) Aggrieved by the conviction and sentence, Appellant lodged the instant appeal. In his supplementary grounds of appeal filed on 30.04.2021, Appellant raised the following grounds:

1. **There was possibility of mistaken identity**
2. **Sentence was harsh**
3. **Section 333(2) of the Criminal Procedure Code was not complied with**

Analysis and Determination

6) The duty of an appellate court is 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).

7) **I have considered the evidence on record, the appeal and submissions filed on behalf of both parties.**

8) Section 9 of the Act under which Appellant was charged provides as follows:

1) **A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.**

2) **A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.**

9) Section 2 of the Children Act, Chapter 141 of the Laws of Kenya defines a “child” as: -

“any human being under the age of eighteen years;”

10) That complainant was 13 years and therefore a child when the offence was committed was confirmed by her mother PW3.

11) There is no dispute that the Appellant was well known to the complainant having been working for her mother. The possibility of mistaken identity would not have arisen especially considering that Appellant confirmed went to the house that was the scene of crime on the material night.

12) Section 388 of the Penal Code defines “*attempt*” as follows: -

“388 (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

13) The above section brings out the two main ingredients of an attempted offence; the *mens rea* which constitutes the intention and the *actus reus* which constitutes the overt act towards the execution of the intention.

14) 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.”

15) The P3 form PEXH. 1 in respect of complainant demonstrates that she had with bruises on the labia minora. Although the hymen was intact, the injuries confirm that there was partial penetration and in terms of Section 2 of *the Act*, the Appellant ought to have been convicted for defilement under section 8(1) as read with section 8(2) of *the Act*.

16) I have agonized on whether the sentence ought to be enhanced and I am reminded of the Court of Appeal decision in J.J.W V. R. (2013) eKLR which reminds appellate courts of the importance of informing an Appellant of the possibility of the sentence being enhanced. It stated:

“In this appeal, the prosecution did not urge enhancement of sentence and did not file cross appeal to that effect. The court did not warn the appellant of that possibility or in any case there is no record of such a warning if any was issued, yet all of a sudden, in the judgment, the learned judge enhances the sentence from seven years to ten (10) years. The need for prior information to be given to the appellant in such a situation is to enable him to prepare and argue his side of the case as regards such intended enhancement. In this case, the enhancement of the appellant’s sentence to ten (10) years was done without affording him opportunity of persuading the court against such a proposal. We have perused the Memorandum of Appeal that was before the first appellate court and we note that save for a small part in passing, the appellant did not specifically appeal against sentence in that court and hence the need to inform him of the possibility of enhancing the sentence.”

17) From the foregoing, I find that this court would act unjustly if it enhances sentences without prior warning to the Appellant.

18) Having said that, I am not persuaded that the sentence imposed on the Appellant is harsh in the circumstances of this case.

19) The court record demonstrates that Appellant was arrested on 06th August, 2018 and remained in custody throughout the trial.

20) Under the proviso to section 333(2) of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya), the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence.

21) From the foregoing, the Appeal fails except that the 10-year sentence imposed on the Appellant shall commence from 06.08.2018 when he was arrested.

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**