REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.7 OF 2015

JULIUS LEKIMENCHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 72 of 2014 of the Chief Magistrate's Court a Isiolo by Hon. R.G Mundia – Resident Magistrate)

JUDGMENT

JULIUS LEKIMENCHU, the appellant, were convicted for the offence of defilement contrary to section 8(2) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 14th February 2014 at Archers Post in Samburu County, intentionally caused his penis to penetrate the vagina of **J K**, a child aged five years.

The appellant was sentenced to life imprisonment. The appeal is against both conviction and sentence.

The appellant was in person. He raised six grounds of appeal that I have summarized as follows:

1. That the learned trial magistrate erred in law and in fact by not according him a fair trial.

2. That he was not supplied with witnesses' statements.

3.That sections 212 and 302 of the CPC were violated.

4. That he was convicted on the basis of the evidence of a single witness.

5. That the learned trial magistrate erred in law and in fact by failing to consider the defence of the appellant.

The state opposed the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

The complainant was walking with other children when the appellant grabbed her and took her to his house where he defiled her.

In his defence the appellant contended that he was framed up for the complainant's mother was his former

wife.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

Although the appellant claimed that he was not given a fair hearing, he did not cite a specific instance. My perusal of the record did not reveal any. This ground lacks merit.

On 25th April 2014, the court made an order that the appellant be supplied with copies of statements. The court was to meet the cost. This was before the hearing commenced. The only other complaint he made was on the charge sheet which the prosecutor offered to supply in court and on a copy of P3 form. It is not true to allege that he was not supplied with copies of statements.

Section 212 of the Criminal Procedure Code states:

> ***If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.***

I do not comprehend what was the appellant's complaint regarding this section. The prosecution never applied to call any new evidence.

Section 302 of the criminal Procedure Code is on cross examination of the witnesses called by the prosecution by an accused person. This is what the section says:

> ***The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution.***

The record shows that the appellant was never denied a chance to cross examine the prosecution witnesses. His complaint therefore has no basis.

Apart from the complainant, there was evidence of **E K** (PW2) and that of **E J M** (PW3) who were in company of the complainant at the time of the offence. Their evidence corroborated that of the complainant on what the appellant did. Though these two were minors, they testified that the appellant released the complainant when they intervened. The learned trial magistrate had more than the complainant's evidence.

The defence of the appellant was that he was framed up by the complainant's mother with whom he had cohabited for three months before they separated. When **Z G N** (PW4) testified, the appellant did not confront her with this issue. He only raised it in his defence. The learned trial magistrate was entitled to dismiss this line of defence and rightly so.

In the case of **FAPPYTON MUTUKU NGUI vs. REPUBLIC [2012] eKLR** the ingredients of defilement were enumerated as follows:

> ***Going by this definition of defilement, I agree on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the appellant.***

In the instant case the complainant testified that the appellant took her to his house and did what she called **tabia mbaya** after removing her panty. **E K** testified he saw the appellant remove the clothes of the complainant and lying on her while **E J M** testified that the complainant was screaming while inside the complainant's house and left it while holding her panty in her hands.

When Mohamed Duba (PW5), a clinical officer, examined the complainant on 15th February 2014 he found her with swollen external genitalia, broken hymen and pus cells.

The birth certificate of the complainant was produced. (Prosecution exhibit 2) It indicates her date of birth as 19th October 2008. She was five years old at the time of the offence.

I am satisfied that all the three ingredients of defilement were proved to the required standards. The conviction of the appellant was based on cogent evidence on record.

Section 8 (2) of the sexual Offences Act prescribes the sentence as follows:

> ***A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

Life sentence is the only legal sentence for the offence the appellant was charged with and convicted for.

The appeal is therefore dismissed in its entirety.

DATED at **MERU** this **28th** day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE