



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL 94 OF 2009

YEKO LEMOI :::::::::::::::::::::::::::::::::::::::APPELLANT

=VERSUS=

REPUBLIC :::::::::::::::::::::::::::::::::::::::RESPONDENT

(Appeal from the decision of Hon. H. Nyaga ESQ. Senior Resident Magistrate delivered on 10th February 2009 at the Senior Resident Magistrate's Court at Kabarnet in Kabarnet SRM No. 201 of 2008 on conviction and sentence)

J U D G M E N T

1. Background

1. The Original Accused Appellant in this appeal spoke in the Pokot Language. He was charged in the subordinate Court with the offence of:-**Attempted Defilement of a Child Contrary to Section 9(2) of the Sexual Offences Act 2006.**

The Particulars being

On the 8th May 2008 in East Pokot District within the Rift Valley Province attempted to defile Child C.C. aged 3 years old.

2. Plea not guilty entered.

3. The facts of this case being that the Appellant lives on the same compound as CC a minor aged 3 years together with her parents. CC has nine siblings. The Appellant had a wife who left him and Children whom his mother took away to look after.

4. CC and her three siblings were left behind in the compound by their mother P.W.2. She had gone to the trading centre to look for work.

5. CC informed the Court that the Appellant called her but sent her siblings to go and bring flour for him. He then removed her red skirt (she had no underpant) and he laid on her.

Neighbours (P.W.4) saw the Appellant ran away and the minor child having sperms all over her thighs.

6. The Appellant was not immediately traced but CC was taken to hospital. The Clinical Officer there confirmed that there was no penetration but there indeed was found Spermatozoa all over the minors child's thigh.

7. The Appellant once arrested was charged with attempted defilement in absence of penetration.

8. In his defence he claimed that he had been drinking with his friends went home. The following day looked after a herd of animals and was arrested.

9. He denied the offence had been committed by him.

10. The Trial Magistrate convicted and sentenced the appellant to 20 years imprisonment. Not being satisfied with this the Appellant filed an appeal to this High Court, on the 16th June 2009. This was filed out of time but this Court is made to understand that leave to file appeal out of time was granted vide Misc. Application 32/2009.

II. Petition of Appeal

11. The Appellant in Petition of appeal filed stated generally that:-

- i). The prosecution had not proved a case beyond any reasonable doubt**
- ii). No trial was held. What was held was a hearing at the village centre.**
- iii). The Trial Magistrate stopped the trial and asked witnesses to arrange themselves.**
- iv). Witnesses were in Court**
- v). He was unfamiliar with Court Procedure.**

12. When submitting before Court through a Pokot interpreter, the submission being read to him, the Appellant stated that the charge sheet was defective, the key witnesses were never called and he was referred to as one Laningori when infact that was not his name.

13. This submissions was different from the petition of appeal filed and was presented to Court on the date called out for hearing.

14. In reply the State informed the Court that there was evidence showing the Appellant carrying the minor CC to his house. There was testimony constituting the Clinical Officer who examined the minor.

15. A sentence of 20 years imprisonment imposed was not illegal and was in order.

III. Opinion

16. The Appellant herein had attempted to defile CC, a minor aged 3 years old. He laid on her and the only reason the offence was called "**attempted defilement**" was that no penetration was done to the minor by the Appellant.

17. CC was taken immediately to the hospital. Evidence further showed she was covered with sperms.

18. The Appellant was seen rushing away from the scene. He was known to the Complainant.

19. An allegation was made that the Trial Magistrate arranged the Court namely “**stopping the trial and ordered witnesses to re-organize themselves**” after a complaint alleged he had done nothing to her. This was not submitted to. The Court does note that a trial Magistrate has powers vide the Evidence Act Cap 80 Laws of Kenya Section 146 (4) that permits the Court to call and or recall witnesses to give evidence.

20. I would reject the Appellant’s appeal on conviction.

21. As to sentence the minimum sentence is 10 years imprisonment. The sentence of 20 years imprisonment is within the law. This sentence of 20 years imprisonment is upheld. If there had been penetration a child of 3 years, the imprisonment term would be life imprisonment. To this end the sentence be and is hereby upheld.

DATED THIS 6TH DAY OF JULY 2010 AT ELDORET.

M.A. ANG’AWA

JUDGE.

Advocate

1. *Mr.Oluoch, State Counsel instructed by the Attorney General for the State – Present*
2. *Appellant in person – Present*