



REPUBLIC OF KENYA



**KENYA LAW**  
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**WS v Republic (Criminal Appeal 40 of 2020)  
[2023] KEHC 19072 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19072 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL 40 OF 2020  
HK CHEMITEI, J  
JUNE 21, 2023**

**BETWEEN**

**WS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgement of Hon. A Mukenga (SRM)  
in Criminal Case No. 28 Of 2019 at Molo. Dated 24th June 2020)*

**JUDGMENT**

1. The appellant was charged with the offence of incest contrary to Section 20(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were that on the 22<sup>nd</sup> day of February 2019 in Molo subcounty within Nakuru county being a male person caused his penis to penetrate the vagina of JE a female juvenile aged 9 years who was to his knowledge his daughter.
2. The second count was similar. The particulars of the offence were that on the 22<sup>nd</sup> day of February 2019 in Molo sub county within Nakuru county being a male person caused his penis to penetrate the vagina of JA a female juvenile aged 6 years who was to his knowledge his daughter. The 3<sup>rd</sup> count was similar as well and the particulars of the offence were that on the unknown day of October 2018 in Molo sub county within Nakuru county being a male person caused his penis to penetrate the vagina of FA a female juvenile aged 6 and 1/2 years who was to his knowledge his daughter.
3. The alternative charge was Indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were that on unknown day of 2018 in Molo sub county within Nakuru county intentionally touched the vagina of FA a girl aged 6 and 1/2 years.
4. The alternative charge as well was Committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) no 3 of 2006. The particulars of the charge were that on the 22<sup>nd</sup> day of



- February 2019 in Molo sub county within Nakuru county intentionally touched the vagina of JE a girl aged 9 years.
5. The other third alternative charge was that on the 22<sup>nd</sup> day of February 2019 in Molo sub county within Nakuru county intentionally touched the vagina of JA a girl aged 6 years.
  6. The appellant after full trial was found guilty in all the charges and sentence to serve 20 years' imprisonment hence this appeal.
  7. The appellant has raised three grounds in his appeal which basically centres around the medical evidence tendered by the respondent. He in particular raised the issue fact that the same did not support the charge, there was no spermatozoa or any seminal fluids seen or at all.
  8. When the matter came up for hearing the court directed that the same to be determined by way of written submissions. At the time of writing this judgement, the only submissions on record are those of the respondent.
  9. The learned state counsel has supported the findings by the trial court. He submitted that the medical evidence produced especially the p3 forms clearly established that the minors had been defiled and the approximate time of the incident was about one day and four hours.
  10. That the said report had indicated the injuries sustained by each minor at the time of the defilement which ran contrary to the defence offered by the appellant which in any case was not convincing at all. He prayed that the appeal be dismissed.

#### **Analysis and Determination.**

11. The courts duty at this juncture was well spelt out in *Okeno v Republic* 1972 EA 32. It is essentially supposed to reassess and re-evaluate the evidence afresh noting that it did not have the advantage of seeing the witnesses and their demeanour something which was only accorded the trial court and come up with an independent finding.
12. The ingredients of the offence herein are the age of the victims, the relationship with the perpetrator and whether there was defilement and if so who was responsible.
13. The age of the three minors was well established by the production of the certificates of birth as well as the age assessment report for pw3. All of them were clearly minors.
14. The relationship between the appellant and the said minors was that of a father in the African sense of the word. He was actually a step father to them as far as PW4 their mother was concerned but the minors considered him as a father.
15. The p3 form produced for each of the minors seem to indicate that they were defiled. All of them point out to the appellant as the perpetrator. Clearly they knew him as he lived with them. In his defence however the appellant while being cross examined said that they were not living with them but with their grandmother.
16. The appellant has placed special emphasis in his grounds of appeal on the medical evidence produced. The court will now proceed to analyse the same vis a vis the minors evidence. It must be noted that though they were all minors the trial court after voir dire examination found them capable of giving sworn evidence.
17. PW1 testified of a day when she took lunch to the appellant in the forest where he was herding some cows and after eating the lunch proceeded to defile him by lying on top of her and removing her clothes. He thereafter warned him not to tell anyone.



18. She said that she went home and told E, H and L. She also told her grandmother, S who in turn told one MN. MN took her to the hospital where she was treated.
19. PW2 testified that on February 2, 2019 the appellant defiled her and warned her not to tell anyone. She said that the appellant had defiled her sometimes in Western. She said that the appellant defiled her while at home and she did not tell anyone as he warned her. She said that she was taken to hospital by MN.
20. PW3 testified that one night when her mother had gone to Nairobi the appellant defiled her by penetrating her anus. He warned her not to tell anyone. She however told E and her grandmother. She was also taken to hospital by MN.
21. PW4 MMS the wife to the deceased was not around when the incident occurred as she had gone to Nairobi on February 21, 2019 and left the children with E. She was called by her neighbours CW, MN as well as one David who told her of the incidents.
22. When she arrived home she found that the appellant had been arrested and the children taken to the hospital and she confirmed that the children had been defiled.
23. When cross examined by the appellant she denied that she had any love affair with D and that she had even built a house for the appellant's mother through some loan she had taken.
24. I have critically examined the oral evidence by the minors as well as the evidence of PW5 SK the clinical officer who examined the minors and produced the three sets of p3 forms.
25. What runs across all of them is that the injuries occasioned upon the minors were about "one and 4 hours old".
26. For FA the medical history reads that;

“...the child was brought in the facility accompanied by neighbour with history of having been defiled by a person well known to her on 21/2/2019 at night while at there(sic) house, she reports it was the 3<sup>rd</sup> incident being defiled by the same person”
27. For JA the same states like the above save to add that;” she reports to have been defiled by same person now it was the 4<sup>th</sup> incidence”
28. For JE the history is the same save to add that;” child reports it was third incident being defiled by the same person.”
29. I have looked at the evidence of PW1 FA and nowhere does she say that she was defiled at the house but instead she said that she was defiled by the appellant while she had taken lunch to him when he was grazing cows at the forest. Secondly the minor does not indicate anywhere else even on cross examination or re-examination that she had been defiled by the appellant on any other day.
30. On the other hand, JA states that she was defiled on February 2, 2019 and not February 21, 2019 as contained in the p3 form. She however states that she was defiled at home.
31. JE in her evidence states that she was defiled at home during the night when her mother had gone to Nairobi. She said in her evidence that she was defiled in her anus. she said “he did bad things to me. On my buttock-my anus.”



32. On cross examination she said;
- “you did bad things to me on my anus. I told E. I was taken to hospital”
33. The p3 form incidentally does not indicate anywhere that the minor was sexually assaulted on her anus. The same basically states;
- “bruises over the labia minora, whitish per vaginal discharge, slight perineal tear, hymen broken(torn)”.
34. My general assessment of the medical evidence above does not tally or agree with the evidence of the minor. She was very categorical that the appellant defiled her anal and not her vagina.
35. Further taking the sum total of the evidence by the minors, the same were contradictory in nature and this court would have been more considerate had they not given sworn evidence. The grounds by the appellant that the medical evidence did not march that of the minors in my view is plausible.
36. It cannot be true that all the minors were defiled on February 21, 2019 as the clinical officer was informed. As a matter of fact, the 3<sup>rd</sup> minor (PW3) seemed to have been defiled in 2018 but there was no evidence to that effect. In her case she was defiled vide her anus but as indicated above there was no medical proof.
37. I respectfully do not think that the minor was not able to distinguish the two private organs. The clinical officer was in a better position to discover this evidence.
38. More importantly the evidence of four people namely MN, also known as CW, E who was a caretaker to the children, their grandmother Sabeti and David were crucial and essential.
39. MN is the one who took the minors to the hospital and she should have shed some light on how she found out that the children had been defiled and under what circumstances did she take them to the hospital.
40. E was the person who stayed with the children and more importantly the minors seemed to have told her what had transpired between them and the appellant. She was left by pw4 to take care of them as she travelled to Nairobi. Clearly she had the trust of the minors and was their first point of contact but the respondent for unexplained reasons decided not to involve her in the case.
41. Their grandmother was as well informed of the incident but she did not record her statement despite going to the police station according to the appellant.
42. David is the neighbour who informed pw4 that she had “left the chicks with the cock “and indeed if he was truthful he ought to have told the court what he meant or knew.
43. The reason why I find their evidence so critical is because the evidence tendered against the appellant was by her step children and his wife who already their relationship was strained and as per her evidence the appellant had even threatened to kill her.
44. The court is aware of the provisions of Section 143 of the *Evidence Act* where it states that no particular number of witnesses was needed to prove an offence. In this case however, where the evidence by the minors was contradictory, I find it necessary that the other independent witnesses who were present and available ought to have been invited. There was nothing to suggest that they refused to be involved in the matter.



45. Again, this was critical noting that the charges facing the appellant were grave. I do not find the evidence by the investigating officer serious enough. She seemed to have simply taken the minors evidence as well as that of their mother casually without inviting other independent evidence.
46. It is true that the appellants defence was not strong enough to thwart that of the respondent. But that is it. He need not in any case prove anything. However, it was the prosecution duty to establish the serious offences which the appellant had been charged with.
47. In the premises and for the reasons adduced above, i find that there was doubt whether the appellant had defiled the minors as claimed. Their evidence was contradicting that given to the clinical officer. The times of the incident was not clear and more importantly key witnesses were not called to testify. As indicated above they will have given independent evidence which in this case would have tied or disapprove what the minors had stated.
48. The benefit of doubt ought to have gone in favour of the appellant.
49. The appeal is allowed, the appellant set free unless lawfully held.
50. Orders accordingly.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 21ST DAY OF JUNE 2023.**

**H. K. CHEMITEI**

**JUDGE**

