



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 52 OF 2019**

**ELIJAH SEREM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. In this Appeal, Elijah Serem (Serem or the Appellant) raises five grounds. These are in an Amended Petition. Collapsed, the Appeal challenges the sufficiency of the evidence at the lower Court.

2. In his Defence the accused chose to remain silent. This of course is inconsequential if the prosecution case was weak. But this is the story.

3. EC (EC or PW 4) is the sister of MJ (M J or PW1). PW1 was at the time she testified on 7<sup>th</sup> March 2018 aged 12 (See Immunization Card). That date may be important as the trial Court, correctly, conducted a voir dire before receiving her evidence. What is more critical is that it is alleged that she was defiled on the first day of the year in 2018. That would make her between 11 and 12 years at the time of the incident.

4. Emily says that on New Year's Day 2018, at around 4.00pm, she found Elijah Serem (E J or the Appellant) on top of M J, she "screamed" at him.

5. M J recalls the day. She says the accused came into her home and asked for water and as she fetched it he followed her to the house. That he removed his pants and as well hers. He then defiled her. In her words:-

"He injured me with the thing he uses to urinate."

6. Dr. Eunice Temet (PW 3) was on that day a doctor at Moi Teaching and Referral Hospital. He did a clinical examination on the Complainant and recorded the findings on a Police Form 3 (P3 Form). In it she records:-

"Erythematous posterior fourcheffe, fresh hymenal tear at position 2 o'clock."

7. Against this backdrop I must consider this appeal on the principles of **Okeno -vs- Republic**[1972]EA 32;

"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (**Pandya v R** [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (**Shantilal M Ruwala v R** [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see **Peters v Sunday Post** [1958] EA 424."

8. The Appellant makes heavy weather of the P3 Form. He says that in it, the Complainant is said to have reported a defilement by Benjamin Serem yet he is Elijah Serem. That is so in the P3 Form. Under the position "General medical history", the Doctor writes:-

"She was defiled by Benjamin Serem on 01/01/2010, at around 4pm."

Is this material?

9. In Court, the Complainant was able to identify the accused. Yet, dock identification may sometimes be tenuous because there would always be a temptation for witnesses to say that the person charged is the offender. But on this occasion, after pointing out the accused, the Complainant says:-

“I knew him as Benjamin.”

Then hear what PW4 says of the person she caught in the act:-

“We used to know the accused as Ben but I learnt that his official name is Elijah.”

10. I think the differences in name is well explained. It may not always be possible to know the accurate names of someone who assaults you.

11. The Appellant then argues that on the P3 Form the O.B Number is 9 yet on the charge sheet it is No. 41/2/1/18. In his evidence in chief, the investigating officer explains:-

“I reported on duty as usual. I perused the O.B and found this case having been minuted to me by the O.C.S.”

The Appellant did not press the issue of the O.B number in examination. The Court is therefore unable to know how much weight to place on this supposed discrepancy.

12. It is said that important witnesses like the village Elder and Assistant Chief who arrested the accused did not testify. I think for the completeness of the prosecution case, they should have all been called. Yet for both the trial Court and this Court it would have been troubling if the only eye witness did not testify. In my view the absence of these two does not downgrade the corroborative account of the eye witness (PW 4).

13. The Appellant also submits that there were inconsistencies in the testimony of the witnesses. It is argued that while the Complainant said that she was a resident of Maili Tisa Uasin Gishu, the mother (PW 2) said:-

“I stay at Luseiro area Uasin Gishu County.”

Is there an inconsistency? If so, is that inconsistency material? I am not sure that this should count for much because it cannot be ruled out that Maili Tisa is within Luseiro area.

14. Then the Appellant argues that the Doctor says she examined the Complainant on 1/1/2018 when the P3 Form was signed on 3/1/2018. That for sure is problematic because even PW2 was firm in her evidence that she was examined on 3/1/2018. In my view, as the P3 Form is corroborative of the account of PW2, the inconsistency in the oral evidence of the Doctor need not be heightened.

15. The age of the Complainant was provided by the Immunization Card. In Kenyan criminal law that has been agreed to be sufficient proof of age. There was clinical evidence of penetration, there was evidence of the Complainant and that of an eye witness. Their evidence was not shaken. The accused chose not to give evidence. He never gave an account of his whereabouts on that day. The conviction was, in my view, founded on watertight evidence and this Court has no reason to upset it.

16. On the sentence, the Trial Magistrate imposed the maximum sentence. This Court will relook at that sentence and reduce it to 7 years from the date of sentence being (21/9/2018). Only to that extent does the appeal succeed.

**Dated, Signed and Delivered in Court at Nairobi this 1<sup>st</sup> Day of February 2021**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Elijah Serem (the Appellant) in person.

Miss Muhonja (D.P.P) for the State