



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO 20 OF 2019

ALFRED KIBIWOTT CHEPSERGON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence of Hon. N.M Idagwa, SRM, delivered on 21/2//2019 in the SPM's Court at Kabarnet, in Criminal Case (Sexual offence) No. 19 of 2018, Alfred Kibiwott Chepsergon)

JUDGMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. In this court the appellant has raised five grounds of appeal in his amended petition of appeal.
3. I will consider grounds 2 and 3 first, in which the appellant has faulted the trial court in convicting and sentencing him on a defective charge. In this regard, the appellant in his written submission has submitted that the evidence produced is at variance with the particulars of the charge as framed in respect of the ages of the complainants namely Pw1, Pw 2 and Pw 3.
4. In count 1 the complainant is VJC (Pw 1), who testified on oath. Her age according to the charge sheet is 7 years. She did not testify as to her age, except that she told the court that she did not know her age when she was subjected to a *voire dire* examination.
5. In count 2 the complainant is JJS (Pw 3), who made an unsworn statement following her being subjected to a *voire dire* examination. Her age according to the charge sheet is 6 years.
6. In count 3 the complainant is LCC (Pw 2), who made an unsworn statement following her being subjected to a *voire dire* examination.
7. Her age according to the charge sheet is 4 years.
8. I will consider grounds 2 and 3 together for convenience as follows.
9. As regards the ages of the victims, the prosecution called AK (Pw 6), who is the father of LCC (Pw 2) and VJC (Pw 1). His evidence was as follows. Pw 6 testified that he was informed that his daughters and that of his neighbour (JCS, Pw 3) had been defiled. He then took them to Salawa health centre from where they were referred to Kabarnet referral hospital. The victims told him that the appellant had taken them to the shamba to give them oranges. It is in that shamba that he undressed them and forcefully had sexual intercourse with them.
10. The prosecution also called Monicah Kibet (Pw 7), who testified that she was called by Noel, the mother of Pw 3. She passed where these victims were and they told her that the appellant whom they called Kinorio had told them to follow him to his shamba, where he forcefully had sexual intercourse with them. The appellant then gave them fruits and allowed them to go their way.
11. Furthermore, Pw 7 testified that she went to where the victims said they were defiled and saw the scene. The scene looked disturbed. She then checked the victims. She saw the private parts of the three victims which were swollen.
12. Pw 7 further testified that there was no grudge between her family and that of the appellant.
13. The prosecution also called Benjamin Kendagor (Pw 8), who is the clinical officer. He examined the three victims. He examined VJC (Pw 1). Pw 8 found the following after examining Pw 1. She had tenderness in her lower abdomen. She was 7 years old and her hymen was missing. There were lacerations on her labia majora. She also had a whitish discharge from her vagina. Pw 8 testified that VJC told him that she was 7 years old. Her immunization card showed she was born on 3/8/2011. The said card was produced as prosecution exhibit Pex. 8.

The P3 form was produced as exhibit Pex 5. The lab test treatment sheet was produced exhibit Pex. a and b.

14. Pw 8 also examined JJS (Pw 3). His findings were as follows. She was aged 6 years. She was defiled by a person known to her on 13/5/2018. Her lower abdomen was tender on touch. Her hymen was missing. Her labia majora was hyperemic meaning it was excessively reddish. HIV and syphilis tests were negative. Urine tests revealed purple cells. He concluded that there was penetration. Pw 8 then produced the child's book as Pex. 1, the P3 form as Pex. 4 and the lab test as Pex 2a and b.

15. Pw 8 further examined LCC (Pw 2). His findings were as follows. Her lower abdomen was tender on touch. Her hymen was missing. Her labia majora had lacerations. She had a discharge from her vagina. HIV and syphilis tests were negative. Pw 8 concluded that there was penetration.

16. Pw 8 produced the treatment notes and lab results of LCC as Pex 6a and b. The P3 form as Pex 7. Her mother and child booklet as Pex.9.

17. It is clear from the medical evidence of Pw 8 and the evidence of the victims that there was penetration of their private parts.

18. In the premises I find that the ages of the victims were proved as per the charge sheet. I also find that penetration was also proved. I therefore reject grounds 2 and 3 for lacking in merit.

19. I have also considered ground 4 in which the appellant has faulted the trial court in failing to find that there unexplained material contradictions in the prosecution evidence. I find that the contradictions were minor and do not go to the root of the evidence. I therefore reject the submission of the appellant in that regard.

20. In ground 5 the appellant has faulted the trial court for failing to consider the appellant's defence. The sworn defence of the appellant was that he arrived at his shamba and saw fruit trees shaking. He thought that there were monkeys on those trees. When he went close he saw thieves on those trees. Upon seeing the appellant the thieves climbed down and some ran away. He beat those he caught. He then collected the oranges and mangoes the thieves had plucked.

21. The next day in the morning the appellant went to Kipsoit centre to watch news. While there a boy who works there called him out of the hotel. He went out. Out there he met the chief for Kipyemit.

22. The appellant then accompanied the chief to his office. There he met the chief of Lemmon location who handcuffed him. He asked why he was handcuffing him the chief told him he was to know later. They called police who took him to the station and charged him with these offences to which he pleaded not guilty.

23. It was also his evidence that the families of the victims fabricated a charge of defilement against his elder brother, who was released on appeal. The appellant continued to testify that: *"Its now me and they have threatened to go after my small brother next when my father died they started interfering with us due to land boundary. They lied to court. They lied to court. That all (sic)"*

24. I have re-evaluated the entire prosecution and defence evidence as a first appeal court. I find the prosecution evidence to be credible.

25. I find that the defence evidence is not credible in view of the ample credible evidence of the prosecution witnesses. Furthermore, I find that the defence of the appellant was rightly rejected for being incredible. I therefore reject the defence evidence for being incredible.

26. In the premises, I confirm the convictions recorded against the appellant. I therefore dismiss his appeal in that regard.

27. On sentence the appellant has faulted the trial court for imposing the mandatory life sentence upon him in; without taking into account the decision of the Supreme Court in *Francis Muruatetu v Republic (2017) e-KLR*.

28. I find that in sentencing the appellant the trial court failed to find that it was not bound to impose the minimum prescribed sentence. In doing so it failed to take cognizance of the decision in *Francis Muruatetu v Republic, supra*. I therefore agree with the appellant in that regard.

29. It therefore follows that I am entitled to interfere with the sentencing discretion of the trial court.

30. I find that the appellant was a first offender. He was an orphan. He also was taking care of his younger brothers, who are now out of school for lack of school fees following his arrest for these offences.

31. On the other hand, I find that the appellant inflicted pain and emotional stress upon his victims who were aged below 7 years.

32. In the premises I find that the sentence of life imprisonment was manifestly excessive in the circumstances of the case, I therefore reduce it to one of imprisonment for 25 years to run from the date of this judgment.

JUDGMENT DATED, SIGNED AND DELIVERED VIDE VIDEO CONFERENCE IN OPEN COURT AT KABARNET THIS 1ST DAY OF JULY 2021

J. M. BWONWONG'A

JUDGE

In the presence of:

Messr Sitienei and Kemboi, Court Assistants.

The appellant present in person.

Mr. Mong'are for the respondent.