



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 170 OF 2015

JOSEPH ESAGON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in Eld. Chief Magistrate

Criminal Case No. 866 of 2014 Republic v Joseph Easagon by H. Barasa Resident Magistrate dated 3rd December 2015].

JUDGMENT

1. The appellant (**JOSEPH ESAGON**) was convicted on a charge of defilement Contrary to Section **8(1)** as read with Section **8 (3)** of the Sexual Offences Act and sentenced to life imprisonment.
2. The particulars being that on 15th February 2014 in **ELDORET EAST** within **UASIN GISHU** county, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **JN** a child aged 8 years. The appellant denied the charge.
3. **JN** (PW1) testified that in December 2013, she was coming from her school known as **[Particulars withheld] ACADEMY** going home at **MARULA** when the appellant met her walking on the road, held her hand and walked with her to **HAWAI**. He locked her up inside his house and later at night while she slept on his bed, he arrived, removed his clothes, removed her underwear and had sexual intercourse with her. She stated on cross examination:

“He raped me here (pointing at her private parts area) with his private part which is between his legs...”

PW2 (**LUCY CHELAGAT**) who sold fruits at **MARULA TRADING CENTRE** was at her home washing clothes when she saw one **MA1** beating **JN** with a whip. Upon asking why, she was informed that **JN** had been to the appellant’s house in **HAWAI** and returned without a panty.

PW1 took **JN** aside and interrogated her – she learnt that **JN** had been locked up in the appellant’s house for three days and had been defiled by the appellant.

She stated;

“I recall 15.2.2014 at about noon, I was at the plot. Accused’s house is direct opposite to my plot gate. On that day, I heard a child crying at compound where Mzee Moja lives. I got out of the plot. I went to Mzee Moja’s plot. I found JN. She was walking without pant on her private part. I asked why. She told me Jose had carnal knowledge with her.”

She took the minor to hospital.

It was her further evidence that **JN** told her

“When she slept with the accused on bed and that he regularly used to have carnal knowledge of her.”

Incidentally the appellant had regularly defiled her.

4. **MA2** (PW3) got to learnt from her sister **MA1** that **JN** was at **HAWAI** at the appellant’s residence. She accompanied the said **MA1** to go and pick the girl.

They got into the appellants house and found **JN** and the appellant seated on the appellant's bed. They lied to him that **JN's** mother wanted to see her. **MA1** went with the minor to her place. PW2 knew the appellant very well as she used to sell fruits and would even visit their residence. She observed that the minor did not have any panty on.

5. 14 year old **MA1** (PW4) told the trial court that one day in year 2013 she met PW1 walking along the road alone – she was crying, so she took her to live with her at her home.

6. Eventually **JN** was taken to school by another good samaritan and thereafter **JN** stopped going to her house. She learnt that **JN** was living with the appellant.

Eventually she went to collect the minor from the appellant's home, and when she got there she found the minor and the appellant sleeping. She began caning the minor asking why she had refused to go to school and instead had chosen to sleep with the appellant.

7. The minor was examined by **DR JANE YATICH** (PW5) who found that the hymen was broken although the injury was not fresh. She however had fresh bruises in the vagina and an age assessment showed that she was under 18 years.

PC SHADRACK NOAH (PW6) who investigated the matter told the trial court that the appellant pretended to be an acquaintance of the minor's mother and disguised himself as a good samaritan. He took her and began living with her but repeatedly sexually violated her.

8. In his unsworn defence, the appellant stated that on 14.02.2015 that one Mama Rembo approached him and required him to deliver to her some maize which he was selling. She was to pay Kshs.2000/- for it and he obliged. She told him to go for the money on 16.02.2015. However when he returned for the money, she refused to budge and dared him to do the worst. He reported the matter to Kapsoya Police only to find Mama Rembo already talking to police, and the moment she saw him she said he was the man she was talking about, whereupon he was beaten and locked up in cells.

9. The trial magistrate upon considering the evidence found that the prosecution led evidence confirming that an age assessment carried out showed the complainant was under 18 years. The court also had opportunity to see and observe and from the opinion that she was indeed a child of tender years.

10. The trial magistrate pointed out that the medical evidence embodied in the P3 form confirmed that minor had hymenal tears and fresh abrasions on her labia minora.

11. Further that the minor's evidence was duly tested on cross examination and that despite her tender age, she was not shaken in cross examination, and described in detail and consistently what the appellant did to her. The evidence was described as overwhelming and corroborated, and that there was nothing on record to even remotely suggest that the minor had been coached. The trial magistrate believed she was telling the truth. The trial magistrate pointed out that the evidence of the minor's cohabitation with the appellant was corroborated by the evidence of PW3 and PW4 who confirmed that they picked her from the appellant's house on 15.04.2014, and even then she had no panty. It was the trial magistrate's find that two key ingredients for the offence of defilement i.e penetration and age had been proved.

The appellant's defence that the case against him had been fabricated was rejected on grounds that the evidence on record overwhelmingly showed he committed the offence.

12. Being aggrieved by the findings the appellant appealed on grounds that;

(1) The trial magistrate erred in convicting him yet there existed a grudge between him and the complainant neighbour who testified.

(2) The prosecution evidence was contradicting

(3) No immunization card or birth certificate was presented to support the minor's age

(4) He proceeded with the matter without prosecution witnesses statement

13. He filed written submissions to canvass his appeal arguing that witnesses were not credible and that PW2 was filled with a spirit of lies claiming that she did not know the appellant yet in the cruise of her testimony it was obvious she knew him as a neighbour. He also insisted that the minor had been coached on what to tell the court, saying at one point she claimed she had told **MA1** that the appellant had chased her away yet in the next breath she claimed the appellant had locked her up inside his house.

Also that whereas PW3 initially claimed she had picked the minor from the appellant's house in the morning, PW2 had said she heard the minor crying at 1.00pm while being beaten by PW3 and that this contradiction in time ought to be found to be fatal to prosecution's case saying the case of **RICHARD ADELA v R** held that two contradicting statements cannot be admitted in court as evidence of truth.

14. As regards the minor's age, the appellant argued that no documents were presented such as immunization card or birth certificate to prove her age and the court only relied on an age assessment report which did not give a specific age of the minor, simply saying she was under 18 years. The appellant also poked holes on the medical evidence saying although the minor claimed to have "bled from thing she uses to urinate." Upon examination no evidence of bleeding was found nor were there any injuries – the only finding being that she had a broken hymen. He pointed out that if the defilement took place on 15.2.2014, and the minor was examined on 16.02.2014, then it beats logic that the Doctor did not detect any fresh injury or bleeding, arguing that a broken hymen of itself alone is not prima facie evidence of defilement. He submitted that a child's hymen can be broken due to different interventions such cycling, running, jumping, stinging and other physical

exercise.

15. In opposing the appeal, Miss Mumo on behalf of the State submitted that the minor's age was assessed and proved that she was 9 years. Actually the age assessment lacked specificity giving a wide range of possibility – under 18 years could be anything between 17-Zero. It was crucial that the age estimate be specific especially because under the Sexual Offences Act, the age category determines the nature of sentence when one is convicted.

16. Miss Mumo further submitted that the evidence on record showed that the minor used to live with the appellant and that this was confirmed by PW3 and PW4.

The evidence of PW1 was that she met the appellant who held her hand and pulled her to his house, closed the door and defiled her – she had remained with him for a number of days she stated;

“When we got to his house, he closed the door and removed my pant. He also removed the short. He then put the thing he uses to urinate into mine. I felt pain. I bled from the thing I use to urinate. This happened at night. In the morning, he chased me away before he went to work. I went to MA1’s house. I told MA1 what Jose had done. I told MA1 that Jose had chased me away.... When I got well, Jose again came and picked me... We stayed at Marula for some time. We later went back to his house where he did the same thing to me. I stayed with him in his house for a number of days. I was later picked from his house by MA1 and MA2... Jose slept with me on a number of days. He inserted his thing into mine.”

17. This evidence suggests that the defilement had been on-going for a period of time it begun in December 2013, with an interval, then resumed in 2014, culminating in the two witnesses going to pick the minor from the appellant's house in February 2014. Indeed the minor on cross examination stated.

“In February, you did the same thing to me, you inserted your thing into my thing.”

18. It would therefore be reasonable to conclude that the charge preferred relates to this 2nd incident – which would thus explain why the Doctor found that the injury was not fresh, and that there were no traces of blood. In this regard I do not fault the medical finding which indicated defilement had been on going for a long time, nor the trial magistrate's conclusion that there had been penetration, and there had also been opportunity for the appellant to commit the offence.

The contradictions referred to are minor and did not touch on the material particulars of the offence as regards (a) penetration (b) Opportunity (c) Identity of the person who penetrated her.

19. The only loophole relates to age – on what basis did the trial magistrate conclude that the minor was 9 years and not falling into any other minor age bracket.

This is crucial because

(1) When voire dire examination was conducted by the trial court the minor said she was 9 years old – she did not disclose the source of this information. It is also significant that voire dire examination she stated

“I will tell what Noah has told me to come and say. Noah is outside.”

20. It is significant to note that **NOAH** is the Investigating officer. Little wonder that the appellant is apprehensive that the minor had been coached. But even if that was to be excused on grounds that the police officer probably just reminded her to state in court exactly what she had told the police, the age aspect still lingers. To his credit the trial magistrate made an observation that the minor was a child, but unfortunately when the P3 form was presented in conclusive findings, he did not probe further to establish which age bracket the minor fitted into.

Indeed the prosecution did inform the trial court on 2.7.2015 that the minor had been taken for age assessment but the report did not state her specific age and requested she be taken back to hospital for re-assessment and the trial magistrate made such order – but when the matter proceeded, no clarification was made with regard to her age.

This in effect meant the minor could be in the age bracket of;

9 – 11 years which would attract a life sentence.

12-15 years – which would attract a minimum sentence of 20 year sentence

16-17 years 11 months which would attract a minimum sentence of 15 years.

So should this court play a game of chess and say the chips fall in the highest age bracket or the lowest age bracket? In my view given the seriousness of the charge and the severity of the punitive, such a gamble would offend moral sensibility and justice. Yet it would be pretentious of me, nay myopic to conclude that no offence took place because indeed the evidence does demonstrate that an offence was committed against the minor, and it was of a sexual nature as to amount to a sexual assault under Section 5(1) (b) as read with Section 5 (2) of the Sexual Offences Act. Consequently in compliance with Section 179(1) of the CPC I substitute the finding of an offence of defilement

with that of Sexual Assault and convict the appellant on this reduced substituted charge.

Likewise the sentence be and is hereby set aside and substituted with an imprisonment term of 10(ten) years which shall run from the date of conviction. It is only to that extent that the appeal succeeds.

DATED, SIGNED and DELIVERED at ELDORET this 2nd day of April 2019.

H. A. OMONDI

JUDGE