



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 02 OF 2018

BETWEEN

NAHASHON OKISIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence dated 31.01.18 imposed by Hon. B.K.Kiptoo (RM) in Maseno Criminal Case Number 469 OF 2015)

JUDGMENT

Background

1. The Appellant herein **NAHASHON OKISIA** has filed this appeal against conviction and sentence on two charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**) which was allegedly committed on diverse dates between 14th December, 2014 and 16th January, 2015 against two girls namely **JAI** aged 9 years and **MA** aged 11 years. The appellant was also charged with two alternative counts of indecent act with the same complainants contrary to section 11 (1) of **the Act**.

2. In a judgment dated 31.01.18, the Appellant was convicted in both counts and sentenced to life imprisonment with the sentence in the second count being held in abeyance.

3. Aggrieved by this decision, the appellant lodged the instant appeal on 08.02.18. On 07.03.18, the Appellate filed amended grounds of appeal and submissions. From the 4 grounds in the amended petition of appeal and written submissions, the appellant's raises the following issues for determination.

- 1) That he was not subjected to medical examination***
- 2) That the language of the court was not indicated***
- 3) That the prosecution case was full of contradictions***
- 4) That his defence was not given due consideration***

4. At the hearing, the Appellant indicated that he was wholly relying on the amended grounds of appeal and written submissions.

5. Ms. Gathu, Learned Counsel for the State opposed the appeal on the ground it was proved that the Appellant who was known to the complainant had defiled the two complainants who were minors in broad day light and that their evidence was corroborated by medical evidence and other prosecution witnesses who testified.

Analysis and Determination

6. In the case of ***Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR***, the Court of Appeal reiterated as follows on the duty of the first appellate court:

“It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision.”

Prosecution case

7. **PW1, JAI** the first complainant recalled that sometimes in December, 2014, the Appellant called her, **MA**, the second complainant and two other girls to his house, put them on his bed and defiled them in turns. It was her evidence that one of the girls reported the matter to her mother who in turn informed their teachers who informed the police.

8. **PW2 MAA**, a teacher at [particulars withheld] Primary School, one of her pupils, the second complainant herein informed her that one Nahashon Okwisia had been defiling her, the first complainant and another girl called JO and she reported matter to the head teacher **PW3 ESO**. PW3 stated that she reported the matter to the parents of the 2 complainant and two other girls that claimed to have been defiled and also to the police.

9. **PW4 JO** the second complainant recalled that on 14th December, 2014, the Appellant called her, **JAI** the first complainant and two other girls to his house, put them on his bed and defiled them in turns. It was her evidence that one of the girls reported the matter to her mother who in turn informed their teachers who informed the police.

10. **PW5 FI**, the father of **JL**, the first complainant and **PW7 WO** the father of **MA** the second complainant told court that their daughters told them that the Appellant who was their neighbor had defiled them and two other girls.

11. **PW6 JOHN SHIGALI**, a clinical officer examined both complainants and found no injuries on any of their genitalia. He found that the hymens were patent and that both girls had been infected with a sexually transmitted infection. He produced the first complainant’s treatment notes and P3 Form as **PEXH. 1** and **2** respectively and second complainant’s P3 form as **PEXH. 4**.

12. **PW8 PC DENNIS THURANIRA** produced first complainant’s Immunization Card as **PEXH. 5** and it shows that she was born on 23.04.06.

13. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The Appellant denied the offences and stated he was framed after he declined to lease his land to the complainants’ parents.

14. I have considered the appeal in the light of the evidence on record, the amended grounds of appeal and submissions by the appellant and for the State.

15. **Article 49 (1)** of the Constitution provides that an arrested person has the right;

(a) To be informed promptly, in a language that the person understands, of; the reason for the arrest, the right to remain silent and the consequences of not remaining silent.

16. Section 198 of the Criminal Procedure Code on the other hand provides that:

(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

17. I have perused the original court record and while the language used is not indicated on some dates when the proceedings were undertaken, there’s evidence that the Appellant cross-examined the prosecution witnesses during the trial and this leads to the conclusion that the trial was conducted in a language understood by him.

18. From the foregoing, I do not detect violation of the provision of **Article 49 (1)** of the Constitution and Section 198 (1) of the Criminal Procedure Code in any way.

19. Concerning prove of defilement, the clinical officer did not find any injuries on the complainants’ genitalia. The clinical officer found that the hymens were patent. My search in Google reveals that the central portion of the hymen is **ordinarily patent (perforate)** and a hymen that is patent does therefore not necessarily denote that there has been penetration. And while the complainants were found with a sexually transmitted infection, the Appellant was not subjected to medical examination to find the link between the alleged defilement by him and the infection.

20. Concerning the age of the complainants, there is evidence that the first complainant was born on 23.04.06 and was 9 years at the time of the alleged offence but no evidence was tendered in support of the second complainant’s age which is a main ingredient in a charge of defilement because it determines the sentence to be meted out if the charge is proved.

21. From what is stated hereinabove, I have come to the conclusion that the prosecution case was not proved beyond reasonable doubt. Accordingly, this appeal succeeds. The conviction on both counts is therefore quashed and the sentences set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty. It is so ordered.

DELIVERED AND SIGNED AT KISUMU THIS 9th DAY OF May 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Felix

Appellant - Present in person

For the State - Ms. Gathu