



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NUMBER 25 OF 2016

JAPHETH LUKOSI EGRON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal against conviction and sentence in Criminal Case Number SO 110 of 2014 in the Chief Magistrate's Court at Kakamega delivered by Hon. F. Makoyo (RM) on 4<sup>th</sup> March, 2016)*

JUDGMENT

Background

1. JAPHETH LUKOSI EGRON, the appellant herein has filed this appeal against conviction and life sentence on a charge of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

*On 25. 12.14 in Kakamega Central District within Kisumu County unlawfully and intentionally caused your genital organ namely penis to penetrate the anus of LB a child aged 8 years*

2. Appellant was also charged with committing an indecent act with the child.

The prosecution's case

3. The prosecution called 5 witnesses in support of the charges. **PW1, LB**, the complainant herein stated that he was born in 2006. He recalled that on the material date which was a Christmas day at about 9 pm, he was going to the Approved School when he met Josephat and another boy both of whom he did not know before. That Josephat took him to an unknown place and defiled him. He identified the appellant as Josephat and stated that the person that defiled him was tall and black. He stated that he had bit him on the hand during the incident. **PW2 Wycliffe Ochieng** stated that he met complainant on 26.12.14 and after he reported that he had been defiled by a tall thin boy, he escorted him home and handed him over to his father. **PW3 KT**, the complainant's father recalled that on 26.12.14, complainant went home and reported that he had been defiled. That complainant took him to the scene of crime where a lady said that she knew the suspect and she identified the appellant who was arrested upon which he was identified by the complainant. **PW4 CPL Phoebe Oluoch** recalled that on 26.12.14, complainant reported that he had been defiled the previous day by a man unknown to him but who was dark and thin. That she later traced the appellant, arrested and charged him. She produced the complainant's age assessment report (PEXH. 2) which shows that he was between 7 and 8 years. **PW5 Dr. Akonya James** examined complainant on 26.12.14 after he reported that he had been defiled by two men. He filled a P3 form (PEXH. 4) which shows that complainant had several cuts in the anus. He also examined the appellant and filled his P3 form (PEXH. 5) which shows that he had bite marks on the left hand, middle and small fingers.

4. When put on his defence, the appellant conceded that he was with two of his friends when they met complainant on 25.12.14 at about 9.00 pm but denied that he defiled him. He said that the injuries on his hand were caused by a fall in the river.

5. In a judgment dated 4.3.16, appellant was convicted and sentenced to life imprisonment.

The Appeal

6. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 16.3.16, appellant raised 9 grounds of appeal which I have summarized into 5 grounds as follows:-

1) That the medical report was inconclusive

2) Was the appellant positively identified

3) That complainant's age was not proved by way of a birth certificate

4) That his defence and mitigation were not considered

5) That the sentence was harsh

7. When the appeal came up for hearing on 5.9.18, appellant relied wholly on the grounds of appeal and submissions filed on 5.9.18.

8. Mr. Juma, learned State Counsel opposed the appeal and urged the court to fully refer to the evidence on record.

#### **Analysis and Determination**

9. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005** where the court stated as follows:-

*“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.*

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellant.

11. In dealing with this appeal, I will address the 5 grounds summarized above

#### **Was the medical report was inconclusive**

12. Complainant's evidence that he was defiled in the anus was corroborated by a P3 form (PEXH. 4) produced by PW5 which shows that complainant had several cuts in the anus.

#### **Was the appellant positively identified?**

13. The appellant conceded that he they met complainant on 25.12.14 at about 9.00 pm. According to the complainant, that was the day and time that he was defiled. Evidence that appellant was with the complainant on the material date and time is not controverted and the prosecution was therefore under no obligation to lead evidence regarding the appellant's identification. The fact that the complainant referred to the appellant as Josephat and not Japhet is not fatal to the prosecution case.

14. Further to the foregoing, the complainant told court that he had bitten the hand of his assailant during the incident. Upon examination by PW5, the appellant indeed had bite marks on one of his hands. The P3 form tendered as PEXH. 5 conclusively corroborated the complainant's evidence.

#### **Was complainant's age proved**

15. The Court of Appeal in **J.W.A. v. Republic (2014) eKLR** held that age of the victim is a matter of fact which could be proved by evidence other than birth certificate and age assessment report. The complainant's age assessment report (PEXH. 2) placed complainant's age between 7 and 8 years thereby corroborating the evidence by complainant's and his father that he was born in 2006.

16. On my part, I see no reason to disturb the finding of fact made by the trial court that the complainant was below the age of 11 years and I am satisfied that the evidence on record shows that the age of the complainant was proved to be between 7 and 8 years.

#### **Was appellant's defence and mitigation were not considered**

17. On the basis of the appellant's concession, the trial court found as a fact that the appellant was with complainant on the material date. In view of the complainant's evidence which was corroborated by the P3 form that complainant had bitten the hand of his assailant, the court rightfully rejected the appellant's defence that injuries on his hand were caused by a fall. Contrary to the appellant's submission, the court record shows that his mitigation was considered.

#### **Was the sentence was harsh**

18. The age of the complaint having been established, the trial court could not deviate from the applicable sentence imposed under the Sexual Offences Act. The sentence imposed on the appellant is lawful and there is no reasonable cause to interfere with it.

19. From the above analysis, I have come to the conclusion that the prosecution discharged its burden and proved the case against the appellant beyond any reasonable. Accordingly, I find that this appeal has no merit. It is dismissed. The conviction and the sentence are upheld.

It is so ordered.

**DATED AND SIGNED AT KAKAMEGA THIS 7<sup>th</sup> DAY OF *September* 2018**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

Court Assistants - George & Erick

Appellant - In person

For the State - Mr. Juma