



REPUBLIC OF KENYA



**Ngera v Republic (Criminal Appeal E191 of 2021)
[2022] KEHC 12016 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E191 OF 2021
TW CHERERE, J
JUNE 30, 2022**

BETWEEN

JOHN KIMATHI NGERA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against judgment, conviction and sentence in Meru Chief Magistrate's Court Criminal SO No. E015 of 2021 by Hon. E. Mbicha (PM) on 09th December, 2021)

JUDGMENT

Background

1. John Kimathi Ngera (appellant) was charged defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006 (the Act). The offence was allegedly committed on diverse dates between 17th May, 2021 and 25th May, 2021 against SMM a child aged 8 years.
2. The prosecution called six (6) witnesses in support of the charges. PW1 the complainant was born on October 31, 2012 as demonstrated by her certificate of birth PEXH 4. She stated that at the material time, she was in Grade 2 at [Particulars withheld] Primary School and appellant was her teacher. She recalled that on May 25, 2021, they were sitting their mid-term exams. That after they were through with writing the English exam, appellant told them that they would sit the reading exam starting with her. That appellant told the other pupils to go and wait outside and it was then that he removed her pants, lifted up her dress, put on a condom and defiled her. She stated that one V peeped on the window and witnessed the incident. complainant reported the incident to Teacher F and Head-Teacher NK who escorted her to hospital.
3. PW2 FNK who was a teacher in the same school as appellant stated that on the material date, a pupil VK called her to go and see what appellant was doing to complainant. That she went to complainant's class and found appellant holding complainant with one and touching her private parts (vagina) with



the other. That upon seeing her, appellant let complainant go and she reported the matter to teachers M and F.

4. PW4 VK aged 8 stated that she was in the same class with complainant and that appellant was their teacher. She recalled that they were doing exams when accused sent all other pupils out of class and remained with complainant. That when complainant took long with the appellant, she went to check and saw complainant whose dress was lifted up sitting on appellant's laps and she rushed and reported the matter to PW2.
5. PW5 NWK who was the head-teacher in the school that appellant taught and complainant was a pupil stated that on the material date, complainant reported that appellant had sent all other pupils out of class and remained with her and defiled her. That PW2 and PW4 informed her that she had witnessed the incident and she reported the matter to police. Appellant was subsequently arrested and handed over to PW6 PC Beatrice Idewa who caused him to be charged.
6. Complainant was examined on May 25, 2021 PW3 John Waithaka, a clinical officer who tendered a P3 form PEXH 2 which reveals that complainant had an old torn hymenal scarring and mild inflammation on the vaginal canal.

Defence Case

7. Appellant in his sworn defence denied the offence. He stated that he was framed by complainant's aunt teacher Karani and PW2 after he proposed that teachers contribute Kshs 200/- each instead of Kshs 500/- for PW2's husband who had been unwell. His wife AN did know why appellant was charged.
8. The trial court after hearing the witnesses for the prosecution and defence found appellant guilty and sentenced him to life imprisonment.

Appeal

9. Aggrieved by the conviction and sentence, appellant lodged the instant appeal and filed submissions mainly on the ground that the prosecution case was not proved beyond reasonable doubt. The state on the other hand submitted that all the ingredients of defilement had been proved and appellant positively identified as the perpetrator.

Analysis and Determination

10. The appeal proceeded by way of written submissions. This being a first appeal, this court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial court, and give due allowance for that (See *Okeno vs Republic* [1972] EA32). I have considered the appeal and I shall deal with it as set out herein below.

Age of Complainant

11. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. In *Kaingu Kasomo vs Republic* Criminal Appeal No 504 of 2010 the Court of Appeal stated as follows:

“ Age of the victim of sexual assault under the [Sexual Offences Act](#) is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of



rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.

12. That complainant was born on October 31, 2012 as demonstrated by her certificate of birth PEXH 4. I therefore find that complainant was a minor aged 8 years and that appellant was correctly charged under section 8(1) as read with section 8(2) of the *Act*.

Penetration

13. Section 2 of the *Act* defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

14. The P3 form PEXH 1 reveals that complainant had had an old torn hymenal scarring and mild inflammation on the vaginal canal. Whereas there may not be any link between appellant and the old hymenal scar, the inflammation in the complainant’s vaginal canal taken together with the evidence by the complainant, PW2 and PW4 leaves no doubt that an act of penetration had been proved.

Identity of The Assailant

15. Appellant was complainant’s and PW4’s teacher. The incident happened during the day and was witnessed by PW2 and PW4. The trial magistrate’s finding that complainant’s evidence was consistent and well founded as to the identity of appellant as the assailant was well founded.
16. Appellant’s defence that he was framed by PW2 was not considered by the trial magistrate but it appears to me to be an afterthought for the reason that the issue was not raised when PW2 testified to give her a chance to answer to the allegation that there she had framed the appellant.
17. From the analysis of the complainant’s evidence, I find that the appeal on conviction has no merit.
18. Concerning sentence, the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, falls foul of article 28 of the *Constitution* which provides that “Every person has inherent dignity and the right to have that dignity respected and protected”.
19. In the end, the conviction is upheld but the life sentence is substituted with a 15 years’ imprisonment term from the date of conviction on December 9, 2021.

DELIVERED AT MERU THIS 30th DAY OF June 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

appellant - Present

For appellant - Mr. Mutegi Advocate

For the State - Ms. Mwaniki (PPC)

