



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. E007 OF 2020**

**BETWEEN**

**GREGORY MAWIRA MBAE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against judgment, conviction and sentence in Nkubu Principal Magistrate's Court Criminal SO Number 07 of 2018 by Hon. E.M.Ayuka (SRM) on 27<sup>th</sup> July, 2018)*

**JUDGMENT**

**Background**

1) **GREGORY MAWIRA MBAE (Appellant)** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (**the Act**). The offence was allegedly committed on diverse dates between 12<sup>th</sup> February, 2018 to 20<sup>th</sup> February, 2018 against **NN** a girl child aged 14 years.

2) The prosecution called 5 witnesses in support of the charges. **PW1** the complainant stated that she 14 years and in class 8 when she testified on 14.05.2018. She recalled that on 12.02.18 suspecting that she was pregnant from a sexual encounter she had with the Appellant called him to take her to hospital but he instead took her to his rental house where they stayed for some time after which he returned her home when the pregnancy test turned negative.

3) **PW2 EK**, complainant's mother testified that she was born on 05.10.2003 as shown on her certificate of birth **PEXH. 2**. It was her evidence that complainant left home on 12.02.2018 and did not return until 20.02.2018 when she reported that she had been with the Gregory Mawira who had been calling the witness claiming that he was praying for complainant to return home. Appellant was arrested by **PW3 Erick Bundi Mwirigi** and handed over to the police. Complainant was examined on 26.02.2018 by **PW3 Seberina Kaimatheri**, a clinical officer who found that she had no lacerations but her hymen was broken and he formed an opinion that she had been defiled He tendered complainant's P3 form as **PEXH. 1**.

4) When Appellant was placed on his defence, he denied defiling complainant or having been with her at his house explaining that he was at his sister's home at the time he is alleged to have defiled complainant.

5) Appellant was convicted on 27<sup>th</sup> July, 2018 and sentenced to serve 20 years' imprisonment.

**Appeal**

6) *Dissatisfied with the sentence, the Appellant lodged the instant Appeal mainly on the ground that medical evidence did not support the charge.*

**Analysis and determination**

7) *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] E.A.32).

8) I have considered the evidence on record in the light of the grounds of appeal and the submissions on behalf of both parties.

9) In convicting the Appellant, the trial magistrate observed as follows:

***PW3 who examined the complainant and filled the P3 form was firm and emphatic that the complainant's hymen was missing and that she had a whitish discharge from her private parts which was attributed to penetrative sexual intercourse.....The complainant was also categorical that she had played sexual intercourse with the accused repeatedly on several occasions.***

10) The first issue for determination is whether a broken hymen is *prima facie* evidence of penetration. In PKW versus Republic [2012] eKLR, the Court of Appeal observed that:

**“Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen.”**

11) The P3 Form PEXH. 1 tendered as evidence demonstrates that complainant had no lacerations but her hymen was broken. Other than that, the clinical officer noted on the P3 form, and confirmed in her evidence that complainant had informed her she did not engage in sex with the Appellant for the time she stayed with him because she was on her menses.

12) From her own evidence, complainant confirmed that she did not engage in any sexual acts with the Appellant during the material period. It therefore follows that the trial magistrates finding that complainant's missing hymen was attributed to penetrative sexual intercourse was against the weight of evidence in which the complainant exonerated the Appellant of defiling her during the material period.

13) In the end; I hereby reach a conclusion that the case against the Appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. Accordingly, the conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held. It is hereby so ordered.

**DELIVERED AT MERU THIS 20<sup>th</sup> DAY OF May 2021**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

**Court Assistant - Kinoti**

**Appellant - Present in person**

**For the State - Ms. Mbithe**