



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 089 OF 2021

BETWEEN

JONATHAN MUNENE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Nkubu

Principal Magistrate's Court Criminal SO Number 27 of 2020

by Hon. E.Ayuka (SRM) on 04th May, 2021)

JUDGMENT

Background

1) **JONATHAN MUNENE (Appellant)** was charged with three counts and was convicted of the 1st and 3rd counts and has filed this appeal against conviction and sentence on the two counts. The first is 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 Act*). The offence was allegedly committed on diverse dates between 07.06.2020 and 02.07.20 against **PM** a child aged 10 years. The third count is of being in possession of cannabis sativa contrary to section 3(1)(b) of the Narcotic Drugs and Psychotropic Substance Control Act which was allegedly committed on 02.07.2020.

2) The prosecution called seven (7) witnesses in support of the charges. PW1 the complainant stated that she had been sent to the shops by her mother when she met her father (Appellant) who took her to his house in Mikambune where she stayed for a day and then he took her to the home of her aunt where she stayed for 3 weeks. She said Appellant then went and took her back to his house where he defiled her twice. She said she was rescued by the chief at Mikambune market after Appellant threatened to beat her for not delivering cannabis to one Mureti as sent by Appellant. PW4, chief Joel Muriungi Kirimi indeed stated he was at Mikambune Market on 02.07.2020 when complainant who was crying and looked distressed ran up to him and reported that her father had beaten her for not delivering cannabis to one Mureti. He arrested Appellant with the assistance of PW5 Japhita Gatobu John and from his jacket pocket was recovered 11 rolls of what was suspected to be cannabis sativa. Appellant was handed over to PW6 PC Joseph Kyalo who in turn handed him over to PW7 PC Naomi Njuguna who after investigations caused Appellant to be charged. PW2 JM, complainant's mother stated that Appellant was her husband and complainant their child born on 15.01.2010 as shown on her birth notification card as PEXH. 6. She stated that she had separated from Appellant in 2013 and had been living with the complainant until Appellant took her away without her knowledge. When the child was not found about a month later, she said that Appellant had severely defiled her. when she was found with h by her certificate of birth. Complainant was examined on 29.06.2019 by **PW4 Moses Baiyenia**, a clinical officer on 03.07.2020 who found that the hymen was broken and her vaginal wall was swollen and hyperemic from which he opined that there was evidence of recent vaginal penetration. He tendered complainant's P3 form as PEXH. 3. **PW3 PC Margaret Cherotich**, the investigating officer received complainant's report on 28.06.2019, received Appellant from members of public on 27.06.2019, recorded witness statements and later charged the Appellant. She tendered complainant's certificate of birth which shows she was born on 07.05.2008 as PEXH. 1.

3) Appellant offered to give no defence. *In a judgment dated 04.05.2020 the Appellant was convicted and sentenced to serve 35 years in the count of defilement ad two years in the count of possessing cannabis sativa.*

Appeal

4) Being dissatisfied with the sentence, the Appellant lodged the instant Appeal mainly on the ground that the prosecution case was not proved.

Analysis and determination

5) The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant.

Age of complainant

6) The appellant was found guilty of committing an offence contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act. The provisions stipulate:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

7) 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”.

8) Complainant their child born on 15.01.2010 as shown on her birth notification card as PEXH. 6. Complainant was 10 ½ years when she was defiled and although the trial court ruled she was 11 years old, no prejudice as occasioned since Appellant was charged under a section dealing with victims that are 11 years or less.

Penetration

9) 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.”

10) The P3 form **PEXH. 3.** reveals that complainant had a broken hymen and her vaginal wall was swollen and hyperemic from which he opined that there was evidence of recent vaginal penetration. I am persuaded that the trial magistrate correctly found that penetration was proved.

Identification of the assailant

11) Appellant is complainant’s father and her evidence that it was her father that defiled her was not controverted by Appellant and was therefore proved.

Sentence

12) Concerning the 1st count of defilement, complainant was determined to be 11 ½ years old and was liable to conviction to life imprisonment or less. The trial magistrate in his discretion sentenced the Appellant to 35 years’ imprisonment. The sentence is lawful and I see no reason to interfere with it.

13) Concerning the charge under the Narcotic Drugs and Psychotropic Substance Control Act, I find that Appellant was charged under a non-existent 3(1)(b). The charge was defective and the sentence unlawful.

14) By dint of the Court of Appeal decision in **Ahmad Abolfathi Mohammed & Another v Republic [2018] eKLR**, the court when sentencing ought to take into account the period spent in custody. I direct that the 35-year sentence in the first count shall commence from **02nd July, 2020** when Appellant was arrested.

15) The conviction on the 3rd count is quashed and the sentence set aside. It is so ordered.

DELIVERED AT MERU THIS 25TH DAY OF NOVEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - **Kinoti**

Appellant - **Present in person**

For the State - **Ms. Mwaniki**