



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 005 OF 2021

BETWEEN

JAMES MUTWIRI MWORIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Githongo Senior Principal Magistrate's Court Criminal SO Number 16 of 2019 by Hon. S.Ndegwa (SRM) on 30.12.2020)

JUDGMENT

Background

- 1) **JAMES MUTWIRI MWORIA (Appellant)** was charged with 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 21.04.2019 against **VN** a child aged 7 years.
- 2) The prosecution called five (5) witnesses in support of the charges. PW1 the complainant stated that she was 7 years and in Grade 2 at [Particulars Withheld] Academy. She recalled that during April school holidays, she was walking home from Sunday school when Appellant called her into his house where he defiled her and then gave her 10/- to buy "ngumu mandazi." She reported the matter to M, M, her mother and grandmother. In cross-examination, she stated that she did not know Appellant before the material date and that it was her mother who told her that his name was Mutwiri. DK, complainant's grandmother stated that one Mureithi informed her that complainant had informed him that someone from Mutwiri's house had defiled her one Sunday. That she questioned complainant who said she was defiled by Mutwiri and subsequently reported the matter to complainant's mother.
- 3) Complainant was examined on 06.05.2019 by Dr. Mutegi a who found that the hymen was broken and her labia majora was reddish with sore bruises from which he opined that there was penetration. He tendered complainant's P3 form as PEXH. 1. PC Abraham Bale, the investigating officer received complainant's report on 06.05.2019 and after investigations caused Appellant to be charged. He tendered complainant's certificate of birth which shows she was born on 18.04.2012 as PEXH. 3.
- 4) Appellant confirmed complainant was her neighbour but denied defiling her. *In a judgment dated 13.12.2020 the Appellant was convicted and sentenced to serve 30 years.*

Appeal

- 5) 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

- 6) 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

- 7) 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.

8) 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”.

9) Complainant was born on 18.04.2012 as shown on her birth notification card as PEXH. 3 and the trial court correctly found that complainant’s age had been proved to be 7 years.

Penetration

10) 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.”

11) The P3 form **PEXH. 1.** reveals that complainant had a broken hymen and her labia majora was reddish with sore bruises from which he opined that there was penetration. I am persuaded that the trial magistrate correctly found that penetration was proved.

Identification of the assailant

12) Complainant stated that she was defiled by a man she did not know before and that it was her grandmother DK who told her that the man’s name was Mutwiri. Complainant’s grandmother stated that one Mureithi informed her that complainant had informed him that someone from Mutwiri’s house had defiled her one Sunday.

13) With this kind of evidence, the prosecution ought to have investigated if Appellant was the only man that lived in the house where complainant was defiled or even conducted an identification parade since the person that defiled complainant was unknown to her before the material date. I note from the proceedings that the trial magistrate failed to address the issue of identification of the assailant. I find that if the prosecution case had been appropriately analyzed, the trial magistrate might have come to the conclusion that identification of Appellant as the assailant was not free from error.

14) From the foregoing, I find and hold that the prosecution failed to prove beyond any reasonable doubt that the offence was committed by none other than the Appellant. His conviction and sentence were unsafe.

15) Accordingly, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, it is hereby ordered that Appellant shall be set at liberty forthwith.

DELIVERED AT MERU THIS 25TH DAY OF NOVEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Appellant - Present in person

For Appellant - N/A

For the State - Ms. Mwaniki