



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. E011 OF 2021**

**BETWEEN**

**SAMWEL NGONJO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in criminal S. O No. 2 of 2020*

*in the Principal Magistrate's Court at Nkubu by Hon. J.Irura (PM)*

*on 12.10.2020)*

**JUDGMENT**

**The Trial**

1. **SAMWEL NGONJO (Appellant)** has filed this appeal against sentence and conviction 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 Act**). The offence was allegedly committed on 08<sup>th</sup> February, 2020 against **EN** a child aged 12 years.

**Prosecution case**

2. The prosecution called a total of five (5) witnesses in support of its case. **PW2**, the complainant stated she was born on 23.03.2007 and was in class 7. She recalled that on 08.02.2020, Appellant who is their neighbor and who she had known since 2018 called her to his house and she found him wearing only a shirt with no trouser and underwear. That Appellant grabbed and put her on his bed where he defiled her. On the way from Appellant's house, she met her mother and upon informing her that she had ben to Appellant's house escorted her back there from where both of them were arrested by police. **PW3 Ann Rita Gakii** stated that she found Appellant in the act of defiling the complainant in his house on 08.02.2020. She locked them in the house and reported the matter to the area chief who arrived at the scene with two police officers who arrested both the Appellant and the complainant. **PW4 Eva Nkatha**, Chief Igoji found Appellant and complainant locked in Appellant's house. Complainant was on 10.02.2020 examined by **Moses Baiyenye (PW1)** a clinical officer. He noted that complainant's hymen was broken with bruises and swelling of the vaginal canal which he opined were suggestive of recent vaginal penetration. He produced complainant's P3 form, PRC form and treatment notes as PEXH. 1, 2 and 3 respectively. (a) and (b) respectively. **PW5 PC Celina Zawadi** denied that she accompanied chief to arrest the Appellant and stated that she received Appellant and complainant from the chief after which she escorted them to hospital and later caused Appellant to be charged. She tendered complainant's certificate of birth **PEXH. 7** which shows she was born on 23.03.2007.

**Defence case**

3. In his sworn defence, Appellant denied the offence. While conceding that complainant was found in his house, he stated that she ran to hide in his house when her mother threatened her with a panga.

4. Appellant was convicted on 08.10.2020 and was subsequently sentenced to serve 15 years' imprisonment on 12.10.2020.

## The appeal

5. Aggrieved by this decision, Appellant lodged the instant appeal. He subsequently filed amended grounds of appeal and written submissions on 01.09.2021. The state did not file any submissions.

## Analysis and Determination

6. It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the Appellant.

7. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and on behalf of the state and I have deduced two main grounds for determination.

1) **The prosecution case was marred by contradictions and inconsistencies**

2) **The defence was not given due consideration.**

8. Before delving into the main grounds of appeal, I will first consider the following ingredients of defilement:

1. **Age of complainant**

2. **Penetration**

3. **Identification of the assailant**

## Age of complainant

9. In the case Alfayo Gombe Okello v Republic [2010] eKLR, the Court of Appeal stated that:

**“In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. ....”**

10. The birth certificate **PEXH. 7** reveals that complainant was born on 23.03.2007. the trial magistrate found as a fact that complainant was 13 years when the offence was committed. The trial court rightly found that the Appellant ought to have been charged under section 8(3) of the Act and applied the law accordingly.

## Penetration

11. 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.”**

12. Appellant conceded that indeed complainant went to his house on the material date and complainant said that it was there that she was defiled. A P3 form **PEXH. 1** filled after complainant was examined reveals that she had a broken hymen with bruises and swelling of the vaginal canal which the clinical officer opined were suggestive of recent vaginal penetration.

13. Whereas I agree with the holding by the Court of Appeal in PKW versus Republic [2012] eKLR, that a broken hymen is not proof of sexual assault, I am persuaded that the trial magistrate rightly found that the complainant’s evidence that she was defiled was corroborated by medical evidence and that bruises and swelling of the vaginal canal was proof of penetration as defined by Section 2 of **the Act**.

## Identification of the assailant

14. Complainant’s evidence that Appellant was their neighbor was corroborated by her mother. That Appellant and complainant were arrested from Appellant’s house has been conceded by the Appellant. I therefore find that Appellant was positively identified as the assailant.

## Whether the prosecution case was marred by contradictions and inconsistencies

15. *From the evidence on record, I have noted two contradictions. The first one is that whereas complainant stated she met her mother after she left Appellant’s house, her mother said she found complainant and Appellant in the act. Secondly, the chief said she was with the investigating officer when Appellant was arrested whereas the investigating said that Appellant was handed over to her by the chief. The contradictions in my considered view are not material for the reason that Appellant conceded he was found in his house with the complainant and was arrested by the chief.*

**Whether Appellant's defence considered**

16. The court record reveals that the defence was considered and weighed against the prosecution case which was proved beyond reasonable doubt and rightfully rejected.

**Sentence**

17. Section 8 (3) that is applicable to the offence that Appellant was charged provides that:

**A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**

18. The sentence under Section 8(3) of the Act is a mandatory minimum term of not less than twenty years but Appellant having not been warned that the sentence could be enhanced, I find that there would be no reasonable cause to interfere with the sentence imposed by the trial court.

15. From the foregoing, I find that this appeal has no merit and it is dismissed. By dint of the Court of Appeal decision in **Ahmad Abolfathi Mohammed & Another v Republic [2018] eKLR** that in sentencing the court ought to take into account the period spent in custody. I have also considered that Appellant is completely blind The 15-year sentence is substituted with a 5-year sentence that shall commence from **08<sup>th</sup> February, 2020** when Appellant was arrested. 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**