



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 109 OF 2019

BETWEEN

DENIS MUTWIRI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the conviction and sentence in criminal S.O No. 1368 of 2014 in the

Principal Magistrate's Court at Nkubu by Hon. D.A Ocharo (PM) on 25.08.2016)

JUDGMENT

The Trial

1. **DENIS MUTWIRI (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 18th September 2014 against **RK** a child aged 9 years.

Prosecution case

2. The prosecution called a total of six (6) witnesses in support of its case. **PW1, RK** the complainant stated that she was 9 years old, a class 2 pupil. She recalled that on the material date at about 06.00 pm, she was returning home after collecting firewood with her sister when Appellant forcefully dragged her to his house, locked her in and defiled her. She met her mother after leaving Appellant's house and after explaining to her what had happened went back to Appellant's house but found it locked. Complainant's sister FN aged 6 years who was in company of complainant stated when Appellant dragged her sister to his house, she rushed home and informed her mother. She followed her mother towards Appellant's house and they met complainant walking home. That they went to Appellant's house but did not find him. **PW3 CK**, the complainant's mother stated that complainant was born in 2002. It was her evidence that after receiving information from PW1 that Appellant who was her neighbour had taken complainant to his house rushed there but didn't find Appellant in his house. She escorted complainant to hospital the next day and reported the matter to Mitunguu police station.

3. Complainant was on 12.06.2020 examined by **Siberina Kaimatheri (PW5)** a clinical officer. She noted that complainant had swollen and tender vulva, hymen was absent, there was foul smell from her private parts and presence of pus cells and red blood cells which were suggestive of penetrative sexual activity. She produced complainant's P3 form as PEXH. 1. **PW3 CPL Constantine Cheptoo**, the investigating officer received complainant's report on 19.09.2014 together her blood stained petticoat and panty marked (PEXH.1 & 2) and after investigations caused Appellant to be charged.

Defence case

4. In his sworn defence, Appellant denied the offence and stated that he was framed by complainant's parents with whom he had fought previously.

5. *In a judgment* dated on 25.08.2016, Appellant was convicted and sentenced to serve life imprisonment.

The appeal

6. Aggrieved by this decision, Appellant lodged the instant appeal. From the grounds and written submissions filed on 28.09.2021, Appellant raises grounds that:

1. **The prosecution case was not proved**

2. **The sentence is harsh**

7. The state did not file any submissions.

Analysis and Determination

8. 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. (See **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**).

9. 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.

10. In dealing with this appeal, I will deal with these issues:

1. **Age of complainant**

2. **Penetration**

3. **Identification of the assailant**

4. **Sentence**

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. As to what amounts to credible evidence, **Rule 4** of the **Sexual Offences Rules of Court Rules** provides that:

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”

13. Additionally, the age of a minor for purposes of the **Sexual Offences Act** can also be proved by the oral evidence of the minor’s mother, by way of age assessment as well as by observation and common sense. In **P.M.M. vs. Republic [2018] eKLR**, the Court of Appeal held that:

“...whilst the best evidence of age is the birth certificate followed by age assessment, the mother’s evidence of the complainant’s age together with the combination of all other evidence available can be relied on to determine the age of the complainant...”

14. Whilst complainant testified she was 9 years old, her mother testified she was born in 2002 and was therefore 12 and not 9 years when the offence was committed in 2014.

15. On the evidence of complainant’s mother that complainant was born in 2002, the trial magistrate fell into error in disregarding the mother’s evidence and find that complainant was 9 years old and not 9 years old as stated by the complainant. Consequently, I find that the best evidence of age was the mother’s who said that complainant was 12 years old.

Penetration

16. 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.”

17. The P3 form **PEXH. 1.** reveals that complainant had swollen and tender vulva, hymen was absent, there was foul smell from her private parts and presence of pus cells and red blood cells which were suggestive of penetrative sexual activity.

18. 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 equally agree with the trial magistrate's finding that swollen and tender vulva was proof of penetration.

Identification of the assailant

19. Complainant's mother testified that Appellant was his neighbour. No doubt, Appellant was not a stranger to complainant and her family and was positively identified by complainant and her sister as the one that forcibly dragged complainant to his house on the material date.

Sentence

20. Having determined that complainant was 12 years, Appellant ought to have been convicted under Section 8 (3) of the Act which 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.

21. As much as life imprisonment is more than 20 years, the foregoing section contemplates a definite imprisonment term. From the foregoing, I am persuaded to interfere with the sentence imposed on the Appellant.

22. The sentence of life imprisonment imposed on the Appellant is set aside and substituted with a **20-year imprisonment.**

23. 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 direct that the 20-year sentence shall commence from **19th April, 2014** when Appellant was arrested. It is so ordered.

DELIVERED AT MERU THIS 18TH DAY OF NOVEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki