REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E053 OF 2020

BETWEEN

BONIFACE KINOTI NTONGONDU…..……..…….APPELLANT

AND

REPUBLIC…….....…….RESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O 38 of 2020 in the Senior Principal* Magistrate's Court at Maua *by Hon. M.Nyigei (SRM) on 22.10.2020)

JUDGMENT

The Trial

1. **BONIFACE KINOTI NTONGONDU** (***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 12.06.2020 against **EWN** a child aged 7 years.

Prosecution case

2. The prosecution called a total of six (6) witnesses in support of its case. **PW1, EWN**, the complainant recalled that on the material date at about 08.00 pm, his father JN took her to the room where she slept alone. That later, Appellant went to the house and opened the room where she slept through a hole next to the door and defiled her as he had usually done previously after warning her not to report the matter to anyone. It was her evidence that later in the night, her father found Appellant in the house where she slept and arrested him. **PW2 JN**, the complainant's father stated that he went to sleep after ensuring that complainant was safely in the room where she slept. That in the night at about 3.00 am, he went out and upon seeing the complainant's room wide open checked inside using a torch and found Appellant on complainant's bed. He managed to arrest him. Complainant's mother **MK (PW3)** found her husband and Appellant who had dinner with them the previous night struggling inside complainant's bedroom at about 03.00 am on the material night. **PW4 Peter Gituma** and **PW4 John Kitiri** found Appellant locked in a room which was said to be complainant's bedroom and together with PW1 escorted him to the police station. Complainant was on 12.06.2020 examined by **Agnes Kagwiria (PW5)** a clinical officer. She noted that complainant had swelling of tissue surrounding the vagina with redness and that hymen was not freshly broken. She opined that there was evidence of penetration and filled P3 form marked **PEXH. 4.** Upon arrest, Appellant was handed over to **SSGT Martin Imo** who upon completing investigations caused Appellant to be charged. He produced a birth notification form **PEXH. 2** which reveals that complainant was born on 01st April, 2013.

Defence case

3. Appellant denied the charge. It was his evidence that PW2 who invited him to stay with his family but later framed him with this case so that he could take away his late father's land from him.

4. *In a judgment* dated on *22.10.2020*, Appellant was convicted and sentenced to serve an imprisonment term of 30 years.

The appeal

5. Aggrieved by this decision, Appellant lodged the instant appeal. From the supplementary grounds and written submissions filed on

30.04.2021, Appellant raises grounds that:

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

2. **The sentence is harsh**

6. The state opposed the appeal and submitted that the prosecution case was proved and the sentence was lawful.

Analysis and Determination

7. 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**).

8. 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.

9. 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

10. 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. ……..."**

11. On the evidence of a birth notification form **PEXH. 2** which reveals that complainant was born on 01st April, 2013, the trial magistrate found as a fact that complainant was 7 years and 2 months when the offence was committed. The Appellant was therefore rightly charged under section 8(2) of the Act which applies to children of 11 years and below.

Penetration

12. 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."

13. The P3 form **PEXH. 4.** in respect of complainant reveals that she had swelling of tissue surrounding the vagina with redness and that hymen was not freshly broken.

14. 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 swelling of tissue surrounding the vagina with redness was proof of penetration.

Identification of the assailant

15. Complainant's mother testified that Appellant had supper with the family, including the complainant on the night the offence was committed. Appellant in his evidence stated that he had stayed with the complainant's family for 5 days before the material date. No doubt, Appellant was not a stranger to complainant and her family. Having stayed with the complainant's family, it is safe to conclude that Appellant was aware that complainant slept alone and that her room could be accessed by opening the door through a hole on the mud wall next to the door.

16. Evidence by **PW2 JN**, the complainant's father that he arrested Appellant inside complainant's room was corroborated by **MK (PW3)**, **PW4 Peter Gituma** and **PW4 John Kitiri** who stated that they found Appellant in a room where complainant slept and it was from there that he was taken to the police station. From the foregoing, I am persuaded that the trial magistrates finding that Appellant was positively identified as the perpetrator and was arrested at the scene of crime was well founded.

Sentence

17. Section 8 (2) that is applicable to the offence that Appellant was charged provides that:

> **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.**

18. The sentence under Section 8(2) of the Act is mandatory life imprisonment 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 on the Appellant.

19. From the foregoing, I find that this appeal has no merit and it is dismissed. The sentence shall commence from 12th June, 2020 when Appellant was arrested.

DELIVERED AT MERU THIS 06th DAY OF *October* 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki