



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E057 OF 2021

BETWEEN

AYUB MUTEMBEI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in criminal S.O No. 10 of 2020 in the

Principal Magistrate's Court at Tigania by Hon. G. SOGOMO (PM) on 26.01.2021)

JUDGMENT

The Trial

1. **AYUB MUTEMBEI (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 23rd February 2020 against **CK** a child aged 7 years.

Prosecution case

2. The prosecution called a total of four (4) witnesses in support of its case. **PW1, CK**, the complainant stated that she was 7 years old, a class 2 pupil. She recalled that on the material date, she was eating mangoes in her father's farm with G and M when Appellant who is a neighbour called them to his house allegedly to watch TV but he locked the door and defiled them in turns. It was her evidence that Appellant had defiled her on 6 different occasions in the presence of G and M. **PW4 MK**, the complainant's mother stated that complainant was 10 years old. She recalled that on 23.02.20, she received information that Appellant who is her neighbor had defiled complainant and she reported the matter to police and escorted complainant to hospital. Complainant was on 24.02.2020 examined by **James Mwirigi Mathenge (PW2)** a clinical officer. He noted that complainant had a broken hymen but no lacerations of the genital area. She produced complainant's P3 form as PEXH. 1. **PW3 PC Rachel Kache** investigated the complaint and caused Appellant to be charged.

Defence case

3. In his sworn defence, Appellant denied the offence and stated that he did not know the complainant.

4. *In a judgment* dated on 27.01.2021, Appellant was convicted and sentenced to serve 30 years' imprisonment.

The appeal

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

1. The prosecution case was not proved

2. The defence was not given due consideration

6. The state did not file any submissions.

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. 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 (See **Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010**).

11. 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."

12. 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..."

13. Whilst complainant testified she was 7 years old, her mother testified she was 10 years. Based on the evidence of complainant's mother that complainant 10 years old when the offence was committed, I find that Appellant was correctly charged under section 8(1) as read with section 8(2) of the Act.

Penetration

14. 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."

15. The P3 form **PEXH. 1.** reveals that complainant's hymen was absent which the trial court found was corroborative evidence of penetration. The Court of Appeal in **PKW versus Republic [2012] eKLR** observed that:

"Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."

16. From the foregoing, I find that the trial magistrate erred when he in the absence of that corroborative evidence accepted the clinical officer's evidence that the broken hymen was indicated that the complainant had been defiled.

17. In the end, I find that the prosecution case was not proved beyond any reasonable doubt and Appellant ought not to have been convicted.

18. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless

otherwise lawfully held, it is ordered that the Appellant shall be set at liberty. 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