



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E145 OF 2021

BETWEEN

ISAAC MUTUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O 40 of 2019 in the

Principal Magistrate's Court at Tigania by Hon. P.M. Wechuli (SRM) on 05.08.2021)

JUDGMENT

The charge

1) **ISAAC MUTUMA (Appellant)** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (**the Act**). The offence was allegedly committed on 06.09.2019 against **SK** a boy child aged 12 years.

Prosecution case

2) The prosecution called a total of six (6) witnesses in support of its case. The prosecution case as narrated by the complainant is that on 06.09.2019 at about 05.00 pm Appellant who was their school cook asked him to wash and mop the kitchen floor and as he was doing so, he called him into the cold room where he defiled him. He only disclosed what had happened to him after Appellant was found attempting to defile another school boy. MM stated he saw Appellant emerge from the cold room on 06.09.2019 but did not witness the act of defilement. The incident was reported to the school principal on 16.10.2019. Complainant was examined by Godfrey Muthomi a clinical officer on 23.10.2019 and by Dr. Hughie Atemi on 17.10.2019 and as shown on the P3 forms **PEXH. 1** and **2**, complainant had neither lacerations nor bruises on the anal area. This case was investigated by IP Mureithi who arrested Appellant and caused him to be charged. He tendered complainant's immunization card which shows she was born on 24.08.2006.

Defence case

3) In his sworn evidence, Appellant conceded that he worked at the school kitchen where complainant was a student but denied defiling complainant.

4) *On 05.08.2021*, Appellant was convicted and sentenced to serve an imprisonment term of 20 years.

The appeal

5) Aggrieved by this decision, the Appellant lodged the instant appeal. From the amended grounds and written submissions filed on 30.04.2021, Appellant raises grounds that:

1. Prosecution case was not proved

2. Time spent in custody was not considered

3. His alibi defence was not considered

Analysis and Determination

6) This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and I am expected to draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

7) Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

“1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

8) I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the Appellant the State having filed none

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. That must be so because dire consequences flow from proof of the offence under section 8 (1).

10) That Complainant was 12 years when the offence was allegedly committed was demonstrated by the age assessment report PEXH. 4.

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) Complainant was examined over a month after the offence was allegedly committed and as the P3 forms **PEXH. 1** and **2** reveal, complainant had neither lacerations nor bruises on the anal area.

13) The evidence in both P3 forms failed to confirm that complainant was defiled which both the clinical officer and the doctor saying that there was no evidence of penetration the examination having been affected by effluxion of time.

14) The medical evidence having failed to confirm that complainant was defiled, the only other evidence of defilement was that of complainant. It is trite that under the proviso to section 124 of the Evidence Act, a trial court can convict on the evidence of the victim of a sexual offence alone. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.

15) Much as the trial court believed the testimony of the complainant, it is quite clear that there was doubt as to whether the complainant was actually defiled by the Appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts ought to have been resolved in favour of the Appellant.

16) Consequently, it is my finding that penetration as an element for prove of defilement was not established beyond reasonable doubt and in the circumstances, it is my finding that the prosecution evidence in this regard is not watertight.

17) From the foregoing analysis, the appeal succeeds. The conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty forthwith.

DELIVERED AT MERU THIS 09th DAY OF DECEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Accused - Present

For the State - Ms. Mwaniki