



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. E103 OF 2021**

**BETWEEN**

**JOHN BOSCO KIRUJA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against judgment, conviction and sentence in Nkubu Principal Magistrate's Court Criminal SO Number 13 of 2020 by Hon. J.Irura (SRM) on 10.06.2021)*

**JUDGMENT**

**Background**

1) **JOHN BOSCO KIRUJA (Appellant)** was charged with 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 12.05.2020 against **GN** a child aged 7 years.

**Prosecution case**

2) The prosecution called seven (7) witnesses in support of the charges. PW1 the complainant stated that she was 7 years. She recalled that she was playing when M and J when Kiruja asked her to follow him so that he could give her macadamia but he instead took her to a banana plantation and defiled her. That she screamed and one K went to her rescue and arrested the Appellant. BG and MM minors aged 15 and 13 years respectively stated they followed Appellant as he led complainant into a banana plantation. That when they saw Appellant defiling complainant, they reported the matter to complainant's grandmother who arrested Appellant. CK after receiving MM's report proceeded to the scene and found Appellant who was identified as the one who had defiled complainant who was not at the scene at the time. JK complainant's mother stated that complainant was born on 02.03.2012 as shown on her certificate of birth PEXH. 3 upon being informed that complainant had been defiled by Kiruja reported the matter to police. Complainant was on 12.05.2020 examined by Moses Baiyeria a clinical officer who found that the hymen was broken and vaginal wall was swollen from which he opined that there was evidence of penetration. He tendered complainant's P3 form as PEXH. 1A. PC Njoki the investigating officer received complainant's report arrested Appellant and after investigations caused Appellant to be charged. She tendered complainant's certificate of birth which shows she was born on xxxx as PEXH. 3.

**Defence case**

3) Appellant in his unsworn defence denied the offence and stated that he was framed.

**Conviction and Sentence**

4) *In a judgment dated 10.06.2021*, Appellant was convicted and sentenced to serve 20 years.

**Appeal**

5) *Being dissatisfied*, the Appellant lodged the instant Appeal mainly on the ground that the prosecution case was not proved.

**Analysis and determination**

6) The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant.

#### **Age of complainant**

7) The appellant was found guilty of committing an offence contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act. The provisions stipulate:

**(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**(2) 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.**

8) 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”.**

9) Complainant was born on 02.03.2012 as shown on her certificate of birth as PEXH. 3 and the trial court correctly found that complainant’s age had been proved to be 8 years and 2 months when the offence was committed. I am therefore persuaded that Appellant was correctly charged under section 8(1) as read with section 8(2) of **the Act**.

#### **Penetration**

10) 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.”**

11) The P3 form **PEXH. 1A** reveals that complainant had a broken hymen and hymen was broken and vaginal wall was swollen from which the clinical officer opined that there was evidence of penetration. I am persuaded that the trial magistrate correctly found that penetration was proved.

#### **Identification of the assailant**

12) Complainant stated that she was defiled by Kiruja, Appellant herein. The incident was witness by two other minors BG and MM. And contrary to the Appellant’s contention that no **voire dire** examination of the complainant was conducted, I find that **voire dire examination** in compliance with **Section 125 (1)** of the **Evidence Act** was conducted not only of the complainant but also of the two minor witnesses. The incident happened in broad day light and Appellant who was well known to the complainant and the two minors could not have been confused for another person. I am therefore persuaded that Appellant was positively identified as the assailant.

13) Given a chance to defend himself, Appellant merely stated that he was framed. He did not explain who framed him and the probable reason. All the same I find that the prosecution case against the Appellant was well corroborated and the mere denial did not cast any doubt on the overwhelming prosecution case. From the foregoing, I find that the Prosecution discharged the legal burden to prove their case against an Appellant beyond any reasonable and that Appellant was lawfully convicted.

14) **Section 8**, under which Appellant was charged stated that:

**(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**(2) 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.**

15) From the foregoing, I find and hold the 20 years’ sentence imposed on the Appellant is lawful and there is no judicial cause to interfere with it. Accordingly, the conviction is upheld and sentence confirmed.

**DELIVERED AT MERU THIS 09TH DAY OF DECEMBER, 2021**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

**Court Assistant - Kinoti**

**Appellant** - Present in person

**For the State** - Ms. Mwaniki