



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. E086 OF 2021**

**BETWEEN**

**JOSEPH MUGAMBI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence in Criminal Case S.O 26 of 2018**

**in the Chief Magistrate's Court at Maua by Hon. J.W.WANGÁNGÁ (SRM)**

**on 22.01.2019)**

**JUDGMENT**

**The charge**

1) **JOSEPH MUGAMBI (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 25.04.2018 against **BK** a child aged 16 years.

**Prosecution case**

2) The prosecution called a total of four (4) witnesses in support of its case. The prosecution case as narrated by the complainant is that she was in class 7. She recalled that on 25.04.2018 at about 4.00 pm, she passed by Appellant's kiosk and went to his house where she stayed with him for one day within which time he defiled her. PW2 Complainant's mother said complainant ran away from home on 25.04.2018. That she went looking for her and her son brought her home and said he had found her at Appellant's place. That later, she noticed changes in complainant's body and took her to hospital where she was confirmed to be pregnant.

3) Complainant was examined by David Njenga a clinical officer on 29.05.2018. Her hymen was not freshly torn and she had no injuries. A vaginal swab reveals the presence of spermatozoa which he concluded was evidence of penetration as shown on the P3 form marked **PEXH. 3** and an age assessment which indicated complainant's probable age to be 16 years as shown on the report **PEXH. 4**. The same clinical officer examined Appellant on the same day and said that he did not find any evidence of ejaculation. He similarly could not tell how long spermatozoa had been in complainant's vagina. This case was investigated by CPL Sammy Kanali Opiyo who arrested Appellant and caused him to be charged.

**Defence case**

4) In his sworn evidence, Appellant said he that on 26.04.2018 was arrested from his kiosk and complainant from outside his kiosk and he was later charged with an offence he did not commit.

**Conviction and Sentence**

5) *On 22.01.2019*, Appellant was convicted and sentenced to serve an imprisonment term of 10 years.

## The appeal

6) 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**

## 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 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's age was assessed and found to be probably 16 years when the offence was allegedly committed in 2018 was demonstrated by her 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 4 days after the incident and the clinical officer found that the hymen was not freshly torn and she had no injuries. A vaginal swab reveals the presence of spermatozoa which he concluded was evidence of penetration. From the foregoing, the trial court rightly found that there is evidence that complainant was defiled.

## Identification of the assailant

13) Complainant testified that Appellant was well known to him and that he had a torch on the night he defiled her whose light enabled her to identify him. Her brother similarly said he Appellant with the light from Appellant's torch. Both said that Appellant use to work at a car wash near Laare Hospital. Their evidence as corroborated by the watchman who stated that he saw Appellant turned towards him as he was running from the scene and he identified him with the assistance of electric lighting as the person that used to work at a car wash near the hospital. Although the incident happened at night, Appellant was well known to the three witnesses and as they explained, the probability that the three could have mistaken Appellant with someone else is almost nil.

14) 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.

15) **Section 8. (1)** under which Appellant was charged stated that:

**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.**

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

**DELIVERED AT MERU THIS 02ND DAY OF DECEMBER 2021**

**WAMAE. T. W. CHERERE**

**JUDGE**

**COURT ASSISTANT - KINOTI**

**ACCUSED - PRESENT**

