



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E131 OF 2021

BETWEEN

MOSES NKUBUKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Tigania Principal Magistrate's Court Criminal SO Number 008 of 2021 by Hon. P.M.Wechuli (RM) on 03.06.2021)

JUDGMENT

Background

- 1) **MOSES NKUBUKU (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 17.02.2021 against **PK** a child aged 3 years.
- 2) The prosecution called four (4) witnesses in support of the charges. The mother of the child stated that on the 17.02.2021, she was bathing the complainant when she noted that her private parts were swollen and she informed her mother that Appellant who is her grandfather had defiled her. She informed her husband and together they reported the matter to police.
- 3) Complainant was examined on 18.02.2021 by Geoffrey Muthomi, a clinical officer who found that the hymen was broken and her labia minora and majora were bruised from which he opined that complainant had been defiled. He tendered complainant's P3 form as PEXH. 1. PC Langat, the investigating officer received complainant's report on 18.02.2021, arrested Appellant on the same date and after investigations caused him to be charged.
- 4) Appellant denied the offence and accused his son PW2 and his son's wife PW1 of framing him after he told his son not to marry PW1 but he went against his will. He accused them of wanting to take his land from him. His 2nd witness stated that he was left with the complainant the whole day on 17.03.2021 from 8.00 am to 06.00 pm which evidence was confirmed by another neighbor and Appellant's second witness who said she saw the child at the home of DW3 the whole day on 17.03.2021.
- 5) *In a judgment dated 03.06.2021 the Appellant was convicted and sentenced to serve life imprisonment.*

Appeal

6) *Being dissatisfied with the sentence, the Appellant lodged the instant Appeal mainly on the grounds that:*

- 1) *The prosecution case was not proved*
- 2) *His defence was not given due consideration*

Analysis and determination

7) 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

8) 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.

9) 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”.

10) Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. Dire consequences flow from proof of the offence of defilement. (See **Hadson Ali Mwachongo vs Republic Criminal Appeal No. 65 of 2015 [2016] eKLR & Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009[2010] eKLR**).

11) The complainant’s parents did not tell court how old complainant but the evidence contained in the P3 form assessed her age to be 3 years when she was examined. The Court of Appeal in **Evans Wamalwa Simiyu vs R Criminal Appeal No. 118 of 2013 [2016] eKLR** held as follows in a similar case:

“As to whether the appellant’s age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant’s mother did not offer any useful evidence in this regard as she did not say anything about the complainant’s age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children’s Act “age” where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”

12) From the foregoing, I find that the trial court correctly analysed the evidence and came to the conclusion that the complainant was below the age of 11 years.

Penetration

13) 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.”

14) The P3 form **PEXH. 1.** reveals that complainant had a broken hymen and her labia minora and majora were bruised from which it was opined that there was penetration. I am persuaded that the trial magistrate correctly found that penetration was proved.

Identification of the assailant

15) Complainant’s parents claimed that complainant informed them that Appellant who is her grandfather had defiled her. Appellant denied the offence and called two witnesses who stated that the complainant was at the home of one of them, the whole day on the date that she was allegedly defiled.

16) Appellant conceded that the complainant was known to him and even used to sleep in his house and on that ground the trial court concluded that the Appellant had the chance and the opportunity to commit the offence. Whilst that may be true, the charge against the Appellant relates to a specific date which is 17.02.2021 and not any other date.

17) Evidence by two defence witnesses that the child had spent the whole day at the home of one of them on the date that she was allegedly defiled was not controverted. And whereas evidence was only raised at the defence hearing, the Prosecution had a right to call or recall witnesses under Section 150 of the Criminal Code to rebut the evidence by Appellant’s two witnesses on the ground that it could not have been anticipated, or foreseen the possibility of such evidence being adduced by the defence.

18) The prosecution having failed to rebut the defence case, it was with respect not open to the trial court to dismiss the defence exonerating the Appellant only for the reason that it was adduced at the tail end of the trial.

19) The well corroborated prosecution case exonerating the Appellant by removing him from scene of crime should have raised judicial antenna in the mind of the trial magistrate that complainant and her parents were either being economical with the truth or untruthful and the evidence ought to have been treated with a lot of caution bearing in mind that Appellant was charged with an offence that attracts life imprisonment.

20) 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 02ND DAY OF DECEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

In the presence of-

COURT ASSISTANT - KINOTI

ACCUSED - PRESENT

FOR THE STATE - MS. MWANIKI