



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
(CORAM: CHERERE-J)
CRIMINAL APPEAL NO. E153 OF 2021
BETWEEN
PETER MWENDA..APPELLANT
AND
REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O 20 of 2019 in the Chief Magistrate's Court at Maua by Hon. A.G. Munene (SRM) on 06.09.2021)

JUDGMENT

The charge

1. **PETER MWENDA (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 diverse dates between 20.01.2014 and 04.02.2014 against **AK** a child aged 13 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 she was born on 14.07.2000 as shown on her immunization card PEXH. 3. She recalled that on 21.01.2014, she went to Appellant's home with her friends DM, G and AM. That he sent her into the house and he followed her and defiled her as the others peeped through the openings on the wooden wall. DM said she accompanied complainant to the house of Appellant several times and AM said she accompanied complainant and DM to Appellant's house once. Both did not witness Appellant defile complainant nor did complainant inform them that Appellant had defiled her.

3. Complainant was on 07.02.2018 examined by Romano Mwenda, a clinical officer who found that her hymen was missing as shown on the P3 form marked **PEXH. 1.** It was his evidence that he could not tell when the hymen was torn. A complaint was made to police that Appellant had defiled complainant and he was arrested and charged.

Defence case

4. In his unsworn evidence, Appellant conceded that complainant and other girls went to have him repair their shoes and also bought cakes from his shop. He denied defiling the complainant or giving her any phone and said he was framed by complainant's father over a land dispute.

5. On 06th September, 2021, Appellant was convicted and sentenced to serve an imprisonment term of 20 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. Key witnesses were not called
3. Defence was not given due consideration
4. 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.

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 born on 14.07.2000 and was therefore 13 years when the offence was allegedly committed in 2014 was demonstrated by her immunization card PEXH. 3.

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 testified that Appellant defiled her once on a date she could not recall but that her friends DM, G and AM witnessed the incident peeping through the openings on the wooden wall of Appellant’s house. However, DM and AM only conformed going to Appellant’s home with complainant but not witnessing the incident.

13. From the foregoing therefore, the only witness to the incident is the complainant. As a general rule of evidence embodied in Section 124 of the Evidence Act, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

14. The evidence on record reveals that the trial magistrate relied on the evidence that complainant had been to Appellant’s house to conclude that he had defiled her. He also relied on the clinical officer’s evidence that it is impossible for girls to be born without a hymen to conclude that it had been torn in a sexual encounter.

15. The issue for determination is whether a broken hymen is *prima facie* evidence of penetration. In **PKW versus Republic [2012] eKLR**, the Court of Appeal 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, it is apparent that the evidence of missing hymen is not automatic proof of penetration through a sexual act. In this case, it was upon the prosecution to establish, beyond reasonable doubt, that complainant’s hymen was torn by an act of defilement by the Appellant.

17. Complainant did not know when the alleged defilement took place nor did she inform anyone. In fact, the evidence from complainant’s mother reveals that the complainant did not inform her that she had been defiled and Appellant was arrested only because he had allegedly given a phone to the complainant.

18. The totality of the complainant’s evidence which is not supported by medial evidence raises a reasonable doubt whose benefit ought to have been given to Appellant.

