



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E123 OF 2021

BETWEEN

TITUS KARANI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O No.19 of 2019

in the Principal Magistrate's Court at Tigania by Hon. R.ONGIRA (RM)

on 29.05.2021)

JUDGMENT

The charge

1) **TITUS KARANI (Appellant)** has filed this appeal against sentence and conviction on a charge of 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 20.04.2020 against **WW** a child aged 11 years.

Prosecution case

2) The prosecution called a total of four (4) witnesses in support of its case. **PW1 WW** the complainant stated that she was 12 years. She recalled that on 20.04.2020, she was working on Kirito's farm and when it started raining she sought shelter outside Kirito's house where Appellant who used to make samosas outside [Particulars Withheld] shop found her and dragged her to his house and defiled her. Complainant did not inform anyone what Appellant had done until 21.04.2020. Complainant's uncle PN reported the matter to police on 22.04.2020. Complainant was on 22.04.2020 examined by Geoffrey Mureithi a clinical officer who found that complainant had no injuries on the labia majora and minora and that the hymen thought broken was not freshly broken. He tendered complainant's P3 form and age assessment report which assessed her age at 12 years as PEXH.1 and 3 respectively. IP Wanyama upon receiving complainant's report on 22.04.2020 commenced investigations and subsequently caused Appellant to be arrested and charged.

Defence case

3) In his sworn evidence, Appellant conceded that on the material day, complainant went to his house and he gave her a panga to till [Particulars Withheld] farm but denied defiling her.

4) *In a judgment* dated on 29.05.2021, Appellant was convicted and sentenced to 10 years.

The appeal

5) Aggrieved by this decision, the Appellant lodged the instant appeal. From the amended grounds of appeal and written submissions Appellant raises various grounds but mainly that the prosecution case was not proved.

Analysis and Determination

6) I have carefully considered the appeal in the light of the evidence on record and submissions filed on behalf of the Appellant the State having filed none.

7) This being a case for defilement what was to be proved are the ingredients of the offence of defilement and in the case of **George Opondo Olunga v Republic [2016] eKLR**, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

Age of complainant

8) 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.”

9) The age assessment report **PEXH. 3** reveals that complainant’s age was estimated to be 12 years.

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 evidence on record reveals that the trial magistrate relied medical evidence that the hymen was broken to conclude that it had been torn in a sexual encounter.

12) 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.”

13) 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.

14) The clinical officer’s evidence was that the hymen was not freshly torn and did not give the age of the tear. His evidence during cross-examination that the tear was two days old was not supported by his own report.

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

Appellant - Present in person

