



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E112 OF 2021

BETWEEN

TIMOTHY MUREITHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O 28 of 2020 in the

Chief Magistrate's Court at Maua by *Hon. M.Nyigei (SRM)* on 18.03.2021)

JUDGMENT

The charge

1. **TIMOTHY MUREITHI (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 18. 03.2020 against **SK** a child aged 13 years.

Prosecution case

2. The prosecution called a total of five (5) witnesses in support of its case. The prosecution case as narrated by the complainant is that she was born on 24.08.2006 and was in class 5. She recalled that on 01.03.2020, she was sleeping in an abandoned bathroom with Moses and Jesse when Appellant who had a torch found them there at about 10.00 pm chased away the others and defiled her. That Appellant heard footsteps approaching and he ran away leaving behind his trousers behind. It was her evidence that she knew Appellant physically before the material date and saw his face before he switched off the torch. Her brother JM Mrefu chased them out of the bathroom where they were sleeping and he defiled complainant. He said that Appellant had a torch whose light assisted him to identify him from where he reported the matter to the watchman. Boniface Muthee a watchman at Laare dispensary heard screams at about 2.00 am and a boy reported that her sister who was in the bathroom had been attacked and undressed. That he ran towards the bathroom and saw a man who was running turned to face him and with the help of electric lighting identified him as Appellant who used to work near the hospital car wash. Complainant was examined by a clinical officer on 02.03.2020 which was a day after the incident and was found with a freshly torn hymen, swollen vulva and bruises on labia majora and minora as shown on the P3 form marked **PEXH. 6**. This case was investigated by IP Wambua who arrested Appellant and caused him to be charged. He tendered complainant's immunization card which shows she was born on 24.08.2006.

Defence case

3. In his sworn evidence, Appellant conceded that he works at a car wash near Laare hospital but denied defiling complainant and that he knew complainant who used to frequent the car wash.

4. On 18th March, 2021, Appellant was convicted and sentenced to serve an imprisonment term of 17 years.

The appeal

5. 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

6. 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**).

7. 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

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. That must be so because dire consequences flow from proof of the offence under section 8 (1).

9. That Complainant was born on 24.08.2006 and was therefore 14 years when the offence was allegedly committed in 2000 was demonstrated by her immunization card PEXH. 1.

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. Complainant was examined a day after the incident and was found with a freshly torn hymen, swollen vulva and bruises on labia majora and minora as shown on the P3 form marked **PEXH. 6**. I find that the trial court rightly found that penetration was proved.

Identification of the assailant

12. 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.

13. From the foregoing, I find that the Prosecution discharged the legal burden to prove their case against 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 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

For the State - Ms. Mwaniki