



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 99 OF 2018

BETWEEN

WILLIAM AMUKA AWITA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence dated in Tamu SO NO. 11 of 2016 by Hon. P.K.Rugut (SRM) on 06th October, 2017)

JUDGMENT

Background

1. **WILLIAM AMUKA AWITA (Appellant)** has filed this appeal against conviction and sentence 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 (hereinafter referred to as *the Act*) which was allegedly committed on 07.10.16 against **AA** a girl aged 14 (fourteen) years.
2. The prosecution called 4 witnesses in support of the charges. **PW1**, the complainant stated that in 2016, she was in class 6 at [Particulars Withheld] Primary School. She recalled that on 07.10.16 at about 05.00 pm, she met the Appellant who threatened her with a panga, took her into a sugar plantation and defiled her. A day later she informed her sister in law **DA** who escorted her to the police station where she made a complaint and later to hospital where she was treated on 10.10.16. It was her evidence that the Appellant was from her village and she had known him for over 3 years.
3. **PW2 DA**, the complainant's sister in law stated that complainant was born in 2001. She stated that she used to stay with the complainant and that on 10.10.16, complainant told her that the Appellant had defiled her on her way from school and had threatened her not to report.
4. **W3 PC Agnes Wanjiku**, the investigating officer received complainant's report on 10.10.16, sent her to hospital where she was treated and thereafter Appellant was arrested and charged.
5. **PW4 VICTOR OMONDI AJUMBO**, a clinical officer produced a P3 form as **PEXH. 1** he filled after examining complainant on 10.10.16 and it showed that she did not have any injuries in her genitalia but lab tests revealed that she as HIV +. He also produced complainant's treatment notes as **PEXH. 2**.
6. In his sworn defence, the Appellant conceded that complainant was his relative but denied defiling her.
7. In a judgment dated 06th October, 2017, the Appellant was convicted and sentenced to 20 years' imprisonment.
8. Aggrieved by this decision, the appellant lodged the instant appeal on 02.11.18. From the grounds of appeal and written submissions filed 23.10.19, I have deduced the following issues for determination.

1) Complainant's age was not proved

2) The sentence was unlawful

3) Defence case was not considered

9. At the hearing, the counsel for the Appellant and for the state agreed to dispose off the appeal by way of written submission which were dutifully filed.

Analysis and Determination

10. In the case of **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**, the Court of Appeal stated as follows:

“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.”

11. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under ***the Act***. These are the age of the victim, penetration and identity of the offender.

12. In the case of **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).

13. It is therefore important for the prosecution to prove the age of a victim since age determines the sentence to be meted out on the offender. **PW2 DA**, the complainant’s sister in law stated that complainant was born in 2001 but there was no evidence in support thereof. The court record demonstrates that the age assessment ordered by court was not conducted since the complainant was not availed for assessment.

14. There being no evidence in support of complainant’s age, the trial placed reliance on the P3 form and the treatment notes marked as **PEXH. 1** and **PEXH. 2** respectively and came to a conclusion that the age of the complainant had been proved to be 14 years.

15. Part I of the P3 form marked as **PEXH. 1** is normally filled at the police station. The police officer that filled that part was not called to explain the source of information that complainant was 14 years old. Similarly, **PW4 VICTOR OMONDI AJUMBO** that prepared the treatment and **PEXH. 2** did not in his testimony state explain the source of information that complainant was 14 years old.

16. I have considered the case of **Dominic Kibet Mwareng v Republic [2013] eKLR** which cited with approval the case of **Hilary Nyongesa Vs Republic (Eldoret Criminal Appeal No 123 of 2009)** where Mwilu J (as she then was) stated that:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”

17. I agree with the trial court and add that while the Court may in certain circumstances rely on evidence other than a birth certificate and an age assessment report, the onus of proving the age of the victim resides with the Prosecution and a simple statement by the Complainant or an entry in treatment notes and P3 form as to complainant’s age without prove thereof does not in my view, constitute such proof.

18. 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.”

19. The P3 form **PEXH. 1** produced by **PW4**, shows that complainant was examined on 10.10.16 which was 3 days after the alleged incident and it shows that she did not have any injuries in her genitalia but lab tests revealed that she as HIV +.

20. Whereas there was evidence that the complainant was HIV+ which can be transmitted by other means other than sexually, there was no evidence of either partial or complete penetration. With respect, there was no evidence that complainant had been defiled and the trial court’s finding that penetration had been proved was against the weight of evidence.

21. In the absence of evidence of complainant’s age and penetration, I need not belabor on the issue of the identity of the offender.

22. From the foregoing, I have come to the conclusion that the prosecution case was not proved beyond any reasonable doubt or at all. The conviction and sentence were unsafe and cannot be sustained. The conviction is quashed, the sentence set aside and unless otherwise lawfully held, I direct that the Appellant be set at liberty forthwith.

DELIVERED AND SIGNED AT KISUMU THIS 5TH DAY OF DECEMBER 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - **Amondi**

Appellant - **Present**

For the State - **Ms. Gathu**