REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 25 OF 2018

DICKSON ODHIAMBO OUDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment, conviction and sentence delivered by Hon. J.N.Thuku, Senior Resident Magistrate in

Nakuru Adult Criminal Case Number 66 of 2012 on 11th July 2013)

JUDGMENT

1. The Appellant was charged in Nakuru Children's Court ***Adult Criminal Case No. 66 of 2012*** with the offence of **Defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.**

2. The particulars of the offence were that on 13th March 2012 at [Particulars Withheld] in Nakuru District of the Rift Valley province he unlawfully and intentionally committed an act which caused penetration by inserting his male genital organ (penis) into the female genital organ (vagina) of MW a child aged 15years.

3. In the alternative, the Appellant was charged with **Committing an Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.**

4. The particulars were that on the 13th March 2012 at [Particulars Withheld] in Nakuru District of the Rift Valley Province unlawfully and intentionally committed an indecent act by touching female genital organs namely Vagina of MW a girl aged 15 years with his genital organ namely Penis.

5. On 16th March 2021 the appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.

6. The hearing of the case ensued on 21st March 2012 with prosecution summoning evidence of five (5) witnesses in support of their case.

7. **PW1 the complainant**, victim herein MW testified that she was fifteen (15) years old as she was born on 28th June 1996. At the time she was a class eight (8) pupil and was living with her grandmother. On 13th March 2012 at around 6:50 pm she had gone to visit her friend called Q who is around thirty two (32) years at her home Q served her food which she ate. As she was about to leave the appellant, who was Q's boyfriend came in.

8. The appellant shut the door and told her that people were saying out there that she was having an affair with him. She told him that that was a lie. He beat them up.

9. The Appellant then picked the metal appliance used for holding sufurias while cooking and threatened to kill both she and Q if either of them raised alarm. He forced her to lie on a mattress that was behind the curtain and demanded to touch her private parts while asking questions; whether she had a boyfriend, whether the boyfriend had a big or small genital organ. He told her he wanted to check whether she had sex before.

10. She tried to fight him off and even hit him on the head drawing blood. However he forced her to remove her pants and defiled her for about an hour. He ordered her to sleep and any attempt to escape was futile until about 5:00 a.m. when she got away and reported to her grandmother. She left her panty at the house but her T shirt was blood stained.

11. She reported at Menengai Police Station where she and Q both recorded their statements and the appellant was arrested.

12. On cross examination she confirmed that the appellant had previously found her at Q's house while Q had gone to fetch water. She told the court that she was not aware any other rape case committed by the Appellant.

13. **PW2, CK** also known as Q testified that she had dated the appellant for about two months before this incident. She had known the complainant for about 6 months. Her testimony was that when the appellant came into the house he found the complainant leaving. He was drunk. He locked the door and took the metal tool for holding sufurias and threatened them both telling them that nobody was to leave the house or make any sound. She begged the appellant to let the complainant to leave but he refused. He ordered both to get onto the bed and to sleep. They did so. It was about 8pm.

14. About 2.00a.m. he ordered the complainant to undress as he beat her. He then had sex with her as she cried. He went on to about 5.00a.m. which is when she left for her grandmother's house. The appellant left the house about 6.00a.m.

15. The complainant later reported to the police and the appellant was arrested. She confirmed that she too recorded a statement with the police. She testified that the accused had told her he could marry her, that he used to visit her severally but that he and the complainant had never met in her house. That the complainant's grand mother lived nearby. That she could not scream because of the beating and the threats issued by the appellant. That there were blood stains from the complainant and other stains from the appellant.

16. On cross examination, she confirmed that the Appellant defiled PW1 in her house and that she saw him do it. They could not scream because the appellant had threated to kill them. She denied that that this case was frame up against the Appellant herein.

17. **PW3, DR. Justus Nondi** from Provincial General Hospital Nakuru testified on behalf of Dr. Karanja who had filled the P3 with respect to the complainant but was unavailable to produce it. He confirmed that he had worked with him for two (2) years and was familiar with his hand writing and signature.

18. He testified that PW1 went to the hospital on 15th March, 2012 with history of having been defiled by a person known to her. He said that PW1 had a white T-shirt with blood stains and dirty underpants. He confirmed PW1's hymen was broken and that the conclusion was that there was evidence of defilement.

19. He produced P3 Forms, Post Rape Care Forms and Lab receipt forms as **Exhibit 1 - 3** respectively.

20. **PW4, Corporal Paul Mwaura**, from Lomolo Police Post testified that on 14th March 2012 he received a report from the Chief Omondi at 6.30 p.m. that there was a girl who had been defiled by a person known to her. That he went to his office in company of PC Wanjeri and he led them to the Appellant's house where they arrested him.

21. He said a search was conducted at the scene and clothes i.e. white T-shirt, blue jacket and white pants which belonged to PW1 was recovered. He said PW1 told them that it was the Appellant who defiled her.

22. On cross examination he confirmed that it was the chief who took him to the Appellant's house. That no search was conducted in the appellant's house as they had gone there only to arrest him. He confirmed that the chief was not a witness in this case.

23. **PW5, No. xxxx PC Jane Kirui**, attached at Menengai Police Station was the Investigating officer. She testified that on 14th March 2012 while at the office PW1 came and reported that the Appellant had defiled her. That she was fifteen (15) years old and a student in class eight (8). She said PW1 informed her that the Appellant had defiled her in PW2's bed and the clothes i.e. jacket, T-shirt and a panty recovered from the scene was positively identified by PW1 as hers.

24. She issued her with a P3 form and took her to the hospital where she was treated and her P3 forms filed.

25. She produced the complainant's Birth Certificate which showed she was born on 25th June 1996 as an exhibit together with the clothes recovered at the PW2's house. On cross-examination she confirmed she took PW1 to the hospital where p3 forms were filled. She stated that PW1 came to their office with clothes on and told them that she had left some clothes at her friend's place due to fear.

26. She said she did not take the appellant to the hospital as it was too late and that p3 forms and PW1's evidence prove the charges.

27. After PW5's testimony the prosecution closed its case and on 11th February, 2013 the appellant was found to have a case to answer. In his defence he opted to give unsworn evidence and not to call any witnesses.

28. He testified that he was a mason and had gone to work on 2nd March 2012 until the 14th of March 2012 when his boss released him to go home after having done a good work. He said he told his boss that he needed money to send home to his family and to pay rent. That he was paid Kshs. 5,000/=, sent Kshs. 3,000/= to his family then went to pay rent.

29. He went to his house around 5p.m. on that 14th March 2012. He fetched water, went back to the house, made and ate supper went to bed and turned on his radio. It was then he heard a knock at the door and when he opened he found police officers who arrested him then taken to house he did not know where PW2 gave out some clothes and a metal bar. The following day he was presented to court not knowing why he had been arrested.

30. After the evidence of the appellant his case was closed and parties took a date for submissions.

31. The appellant made oral submissions that the evidence of investigating officer was untrue. That he was not taken to the hospital together with the complainant. He was arrested while sleeping and taken to a house of another. That this witness was riled with him because she had wanted him to marry her but he told her he had a wife.

32. He contended that the metal bar allegedly used to hit PW1 was not produced as an exhibit before the court.

33. He submitted that based on evidence of the doctor its clear PW1 sustained no injuries and blood that was in her clothes could mean she was on her monthly periods.

34. He argued that no exhibit was found in his house by the investigating Officer

35. The learned trial magistrate delivered her Judgment on 11th July 2013 having determined the following issues:

a. Has the age of the complainant been proved?

b. Has penetration been proved? if yes

c. Has it been proved that the said penetration was occasioned by the accused person's genital organ (penis)?

36. The court confirmed that the complainant was born on 28th June 1996 and that means by March 2012 she was 15 years old.

37. On the second issue, the court found that penetration was proved.

38. On the last issue, the court found that it was the appellant who had committed the penetration hence rejecting his defence.

39. The court in its sentence stated that;

> *"The accused has been convicted of an offence whose minimum sentence is prescribed by the law. Having listened to his mitigation I find impunity with which he committed this beastly offence quite blood cuddling. He is a person who clearly has no respect for women as sympathy for children for that matter. I therefore sentence him to serve thirty (30) years imprisonment"*

40. Dissatisfied by the said judgment, conviction and sentence, the appellant filed his Petition of Appeal dated 4th February 2021 premised on the following grounds:

> *(i) THAT the trial court erred in law and in fact by concluding that there was sufficient evidence to sustain a conviction and sentence.*
>
> *(ii) That the trial court erred in law and in fact by admitting evidence of a witness with mental retardation without proof from an expert of the witness mental capability.*
>
> *(iii) That the trial court erred in law and in fact by concluding that penetration was proved by solely relying on broken hymen.*
>
> *(iv) That the trial court erred in law and in fact by pronouncing on excessive sentence far from the weight of the evidence adduced.*

41. The Appellant thus prayed that his appeal be allowed, conviction be quashed and sentence be set aside and that he be set at liberty and this Honourable Court be pleased to make any other orders it may deem correct in the interest of justice.

42. In support of the Grounds of Appeal, the appellant filed Written Submissions dated 4th February 2021.

43. Having considered the evidence, the submissions and the authorities cited the issue is whether the appeal has merit. The appellant attacked the evidence produced by the prosecution, the credibility and reliability of that evidence.

44. The role of the first appellate Court is well settled in the case of ***Okeno vs Republic*** ***(1977) EALR 32*** and further buttressed in the Court of Appeal decisions: to revisit the evidence tendered before the trial Court afresh, evaluate it, analyze it and draw its own independent conclusions. This task must have regard to the fact that this court never saw or heard the witnesses testify thus the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence.

45. In ***Victor Owich Mbogo vs Republic,*** **Criminal Appeal No. 152 of 2015 [2020] eKLR,** the Court of Appeal stated that:

> ***"It is the duty of the first appellate court to re-evaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify***."

46. In line with the foregoing, this Court is duty bound to satisfy itself that the ingredients of the offence of defilement age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence beyond any reasonable doubt.

47. The first issue was about the complainant's clothes. It was his position that there was contradictory evidence as to whether the T-shirt was recovered from the alleged scene or whether the complainant was wearing it. In that PW1 testified that she had a T-shirt on during examination, while the arresting officer stated that white T-shirt was recovered from PW2's house, that the doctor testified that PW1 had her clothes on and the Investigation Officer testified that white T-shirt was among the exhibits recovered from the house. He argued that there were two t- shirts.

48. The prosecution did not specifically address this issue of the T- shirt in response.

49. The evidence however shows that what was recovered in the house of PW2 as per her evidence was the panty and jacket. The girl left PW2's house in the blood stained T- shirt which attended hospital in and which the police took from her. It is the police officer (who it appears was a reluctant witness) who brought in the confusion of the recovery of the T-shirt from the scene. It is therefore clear that there was only one T-shirt and not two as submitted by the appellant.

50. The appellant also wondered where the blood could have come from yet the complainant had no injuries. However there was evidence that the complainant's hymen was broken leading to the bleeding.

51. The appellant also raised the issue of the metal bar having not been produced. The record is correct that this metal rod was not produced. He submitted that there was no proof of harm or injury to make it clear to court that PW1 and PW2 were in actual danger. He wondered why other people living at the same plot never heard the commotion, how a drunk person subdued a mature woman and a girl of that age the whole night and why his alleged lover PW2 never raised an alarm when he defiled a girl in her bed and he urged this court to find this evidence unbelievable and dismiss it in his favour.

52. The appellant also submitted that the prosecution failed to call PW1's grandmother who was a crucial witness since she could have told the court whether PW1 was missing on alleged date, what PW1 told her after the incident, that she would have disclosed where PW1 alleged to have gone since she admitted to having a boyfriend.

53. The appellant faulted the trial court for admitting the evidence of a mentally retarded person (sic). He stated that the trial court after noticing that PW2 was mentally retarded ought to have acted in compliance with the provisions of **Section 31 and 32 of the Sexual Offences Act.**

54. He thus submitted that the lower court convicted him based on the evidence adduced by a mentally handicapped witness without any legal measures put into account concerning the evidence of such witness.

55. He argued that mental ability is crucial and admitting of the evidence of PW2 without appropriate measures in place and without proof from an expert of her fitness to testify infringed his right to fair trial and was against the law.

56. On this issue the prosecution submitted that the court noted the issue of the mental retardation of PW2 and drew its own conclusions which included believing the witness.

57. The record shows that the learned trial magistrate did not record anything about the mental capacities of PW2 when she took down her evidence. That would have been helpful. The issue about her mental retardation only comes up in the judgment where the magistrate stated

> "*I observed PW2 who PW1 described as a woman in her forties and noted that though she is a bit retarded mentally she is a person who is able to communicate clearly and I found her version of the story quite convincing …her body size is like that of a twelve year old or so and when she says she got scared when the accused became violent and beat her and told both women to be quiet I find that very convincing since both women could not be a match for the accused person''*

58. What is evident from the foregoing is that the court observed some kind of retardation on the part of PW2. The court formed the opinion that the witness understood the nature of the evidence and found her credible. The court saw and heard the witness. This court must of necessity be alive to the fact that as an appellate court I did not have the same opportunity and there lies the difference. The record bears a consistent credible record of what PW2 told the court. I have no reason to doubt her testimony.

59. The body size of the PW2 and her disability explains the reason why the appellant could ride rough shod over the minor and the adult woman in the room.

60. On penetration, the appellant submitted that laceration and bruises are common observation among young defiled girls. He referred this court to the case of **David Mwingiria Nyeri Criminal Case Number 23 Of 2015** where the court interrogated lengthily the factors that can rapture hymen and he submitted that the court erred by fully relying on the doctor's testimony on broken hymen alone as a conclusive proof of defilement.

61. He stated that there are other factors that can lead to hymen breakage.

62. He contended that absence of injury or semen discharge in the genitalia of PW1 raised doubts as to who defiled her.

63. He stated that broken hymen could have been occasioned by PW1's boyfriend.

64. He urged this court to find that broken hymen alone cannot stand defilement and failure to observe other injuries consistent with penis penetration is a clear indication that PW1 was not defiled on the alleged material date.

65. **Section 2** of the **Sexual Offences Act** defines penetration as:

> ***"the partial or complete insertion of the genital organs of a person into the genital organ of another person."***

66. In the case of **Mark Oiruri Mose vs Republic (2013) eKLR** when the Court of Appeal stated thus:

> ***'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….'***

67. The Court of Appeal in the case of **Erick Onyango Ondeng vs Republic (2014) eKLR** held as such on the aspect of penetration:

> ***"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."***

68. The law does not envisage absolute penetration into the genital nor the release of spermatozoa or semen of the male organ for the act of penetration to be said to be complete.

69. In the instant case PW1 testified that the appellant forced her to remove her clothes and he had sex with her. This position was corroborated by PW2. The evidence of PW3 also proved that PW1 was defiled.

70. The evidence of PW1, PW2 and the doctor was cogent noting there is no mandatory requirement that the victim should bleed and have body injuries for penetration to be probable. Therefore there was proof beyond reasonable doubt that PW1 was defiled.

71. While it is true that the broken hymen *per se* may not be proof of defilement, in this case there is more than just the broken hymen. There is the eye witness evidence of the PW2 and that of the complainant herself both of whom the trial court heard, saw, observed their demeanor and believed their evidence. Hence it is not correct for the appellant to argue that the learned trial magistrate took into consideration only the broken hymen in determining whether there was penetration.

72. He also argued that the prosecution failed to call the complainant's grandmother as she was the one who saw the complainant so soon after the alleged defilement. That that failure was a minus on the part of the case for the prosecution. From the record the complainant simply reported the ordeal to the grand mother who sent her to the chief from where she went to the police. The same story she told the grandmother is the same she told the police. True, the grandmother could have testified as to the complainant having spent the night away from home. However, **Section 143 of Evidence Act (Cap 80) Laws of Kenya** provides:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

73. In **Donald Majiwa Achilwa and 2 other vs Republic (2009) eKLR** the Court stated:

> ***"The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case.***
>
> ***However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549).***
>
> ***That is, however, not the position here. We find no basis for raising such an adverse inference."***

74. In **Keter v Republic [2007] 1 EA 135** the court held *inter alia:*

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.***

75. Once again the prosecution had the evidence of a credible eye witness.

76. The appellant denied the offence and put forward a kind of alibi saying that he was away on the alleged dates and only came home on the 14th March 2012 when he was arrested for unknown reasons. He urged the court to find that these charges were made up against him by the PW2 and PW1 was assisting her.

77. It is not in doubt that he was known to both PW1 and PW2.

78. In his submissions before the lower court he stated that PW2 framed him because he declined to marry her.

79. The appellant submitted that the PW2 was his friend but not a sexual friend, that he was just assisting her. At the same time he told the court that she was following him to marry her yet he had a wife. There is no evidence that there was a quarrel about this alleged friendship that could have led to a grudge between the appellant and the PW2 to warrant her to lie against him. The lower court found the version of both PW1 and PW2 convincing, direct and cogent.

80. The appellant questioned the fact that he was alleged to have beaten the two with an iron bar but the two did not exhibit any injuries and neither was the weapon produced. The record shows that the metal tool he picked he used to threaten them. It is not in the evidence that he hit them with the tool. He threatened them with the tool. They said he beat them but they did not say he used the metal tool.

81. On the issue of sentence, the appellant submitted that thirty (30) years imprisonment was excessive, harsh, unfair and not commensurate with the offence and that it will not serve a purpose of sentencing being rehabilitation amongst others.

82. He prayed for a lesser sentence in line with what he called the "weightless evidence of the prosecution."

83. The prosecution submitted further that the minimum sentence for defilement is fifteen (15) years and thirty (30) years imprisonment was within legal limits and urged this court to dismiss the Appeal.

84. He prayed that court takes cognizance of the fact that he has been behind bars since the year 2012 and allow his appeal, quash the conviction and set aside the sentence.

85. The **Sexual Offences Act** provides at Section 8(3) that a person who commits an offence of defilement with a child between the age of twelve (12) and fifteen (15) years is liable upon conviction to imprisonment for a term of not less than twenty (20) years.

86. The learned trial magistrate court in the exercise of her discretion sentenced the appellant to thirty (30) years imprisonment. The prosecution submitted that he was a first offender. The court was of the view that the appellant was not remorseful. The manner in which he committed the offence was reprehensible as it demonstrated a complete disrespect for vulnerable women. *The question then is whether that sentence was harsh and excessive.*

87. The sentence must be commensurate with the offence, facts of the case, circumstances of the commission of the offence and the moral blameworthiness of the offence.

88. In the case **of Omuse vs Republic 2009 KLR 2014** *where the Court of Appeal in referring to* **Ambani vs Republic [1990] KLR, 161** *noted as follows:*

> **"Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence."**

89. The Sentencing Policy Guidelines provide a process for the determination of imprisonment sentences. In the case of sexual offences there are minimum sentences hence the trial court may not have much choice with that. However in increasing the sentence the court needed to set down the reasons so as to meet the justice of the case. The fact that the appellant was a first offender ought to have counted for something.

90. ***Section 354(3) (b) of the Criminal Procedure Code*** *gives the High Court power, on appeal against sentence to, increase or reduce the sentence or alter the nature of the sentence;* ***Section 8(3) of the Sexual Offences Act*** *provides* that;

> **"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

91. The age of the complainant was not disputed. It was proved to be fifteen (15) years hence the appellant was liable to imprisonment for twenty (20) years.

92. The Court of Appeal in ***Dismas Wafula Kilwake vs Republic*** *analysed the minimum sentences under* ***Section 8 of the Sexual Offences Act*** *and stated:*

> **"On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."**

93. On the application of the Sentencing Policy Guidelines the Court stated:

> **"The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage**

inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

94. *In view of the foregoing and in the circumstances of this case the appeal succeeds on sentence only. The sentence of thirty (30) years imprisonment is substituted with a sentence of twenty (20) years imprisonment to commence from the date the appellant was held in custody.*

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER, 2021.

MUMBUA T MATHEKA

JUDGE

Edna Court Assistant

Appellant present virtually

Ms Murunga for state