



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO E011 OF 2020**

**COLLINS OUMA OMBIJO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the Judgment of Hon J. Mitei (SRM) delivered**

**at Winam in the Senior Principal Magistrate's Court in**

**Criminal Case No 10 of 2018 on 16<sup>th</sup> October 2020)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) and (3) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 5<sup>th</sup> day of March 2018 at [Particulars withheld] Village Nyalunya Sub location Kolwa Central Location in Kisumu East District within Kisumu County, he intentionally caused his penis to penetrate the vagina of VRA, the Complainant herein (hereinafter referred to as "PW 2"), a child aged fifteen (15) years.

2. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 5<sup>th</sup> day of March, 2018 at [Particulars withheld] village, Nyalunya Sub location Kolwa Central Location in Kisumu East District within Kisumu County, he intentionally touched PW 2's breasts, a child aged fifteen (15) years.

3. He was tried and convicted by Hon J. Mitei, Senior Resident Magistrate for the offence of defilement and sentenced to serve twenty (20) years imprisonment.

4. Being dissatisfied with the said Judgement, on 11<sup>th</sup> November 2020, he lodged this appeal. In his Petition of Appeal dated 9<sup>th</sup> November 2020, he set out five (5) grounds of appeal challenging both conviction and sentence. His undated Written Submissions were filed on 28<sup>th</sup> July 2021. Notably, the State's Written Submissions were dated 19<sup>th</sup> July 2021 and filed on 22<sup>nd</sup> July 2021.

5. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

6. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution:**

**it is not enough that the appellate court might have come to a different conclusion...”**

8. Having looked at the Appellant’s and State’s Submissions, it was this court’s considered view that the issues that have been placed before it for determination are:-

**a. Whether or not the Prosecution had proved its case beyond reasonable doubt.**

**b. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Trial Court was lawful and or warranted.**

9. The court dealt with the two (2) issues under the following distinct and separate heads.

#### **I. PROOF OF PROSECUTION’S CASE**

10. Grounds of Appeal Nos (1), (2), (3) and (4) were dealt with together under this head as they were all related.

11. The Appellant challenged his identification by PW 2. It was his contention that there was no corroboration of evidence on identification. He also stated that the evidence of PW 2’s mother JAO (hereinafter referred to as “PW1”) and PW2 was contradictory. He argued that PW 2’s asserted that it was PW 2 who pointed him to her while on the other hand, PW 2 testified that upon shouting “Ondicho” she was shown the man by workers at the petrol station. He added that on cross-examination, PW 2 indicated that she did not depend on the name to identify him.

12. He submitted that no worker from Gulf Petrol Station was summoned to corroborate PW2’s evidence on identification as they are the ones who recognised him as he was their colleague. He contended that the names used to identify him were confusing as he could not differentiate between “Ondijo” “Ondicho” and “Ombijo”. He further asserted that there was also no document before the court to ascertain if this (**sic**) was Ombijo, Ondicho or Ondijo and the Investigating Officer never visited the scene to also ascertain the veracity of the allegations.

13. He pleaded with the court to consider that this was a case of identification in the night and of a stranger and that it was therefore prudent for him to have been subjected to an identification parade as PW 2 did not know him previously and never gave his description. In this regard, he relied on the case of **James Chege Wanja vs Republic [2014] eKLR holding** where the issue of identification at night and difficult circumstances was considered.

14. He was also categorical that the P3 form and the PRC were contradictory. He asserted that the P3 form indicated that at the time of treatment, PW 2 had already changed clothes while the Post Rape Care (PRC) form indicated that she had not changed clothes and had a cream pink, stained, non-torn pant.

15. He also pointed out that the Trial Court did not comply with the provisions of Article 50(3) of the Constitution of Kenya 2010. He argued that the language used in plea taking was never specified on record. He stated that dholuo, Kiswahili and English language were used interchangeably and therefore it was difficult to ascertain if he pleaded to a charge that he understood.

16. The State was categorical that the ingredients necessary to prove the offence of defilement were proved beyond reasonable doubt by the prosecution as was laid out in the case of **George Opondo Olunga vs Republic [2016] eKLR**.

17. It submitted that penetration was proven as PW 2 testified that the Appellant defiled her by penetrating her using his penis. It argued that Collins Omondi Odongo (hereinafter referred to as “PW 3”) a Clinical Officer working at JOOTR-Hospital presented a PRC form as an exhibit which confirmed that she was defiled.

18. It argued that PW 2 was able to identify him as there was lighting from the room where the offence occurred. It argued that she had served him food and had gone to collect money from him. It added that she also heard his name being called out by his co-workers. It was its contention that given the duration she interacted with him, she could positively identify him. It added that her evidence remained consistent through trial.

19. It was categorical that her age was proven beyond reasonable doubt as her mother testified that she was born on 15<sup>th</sup> December 2003 and the birth certificate produced on trial confirmed the same. It pointed out that PW 2 was therefore fifteen (15) years at the material time. It urged the court to uphold both conviction and sentence.

20. A perusal of the proceedings showed that PW 1 testified that on the material date, she was at home. She stated that she was not feeling well. She explained that normally, she would prepare and supply food both lunch and supper to Petrol Stations. She told the court that on that particular day at around 7.30 pm, she sent PW 2 to deliver food at Gulf Petrol Station but she took too long to return. She stated that when she went to check on her, she met her crying.

21. She asserted that the Appellant had sent PW 2 to buy him a soda and after doing so, he called her to go and collect the money of the food he had eaten. She testified that PW 2 told her that when she went to collect money from him, he removed her panty and had sex with her. She said that she was shocked as she had perceived him to have been of good reputation.

22. She further testified that they went home and they met PW 2’s aunt who accompanied them to Gulf Petrol Station where PW 2 pointed at the Appellant. In her testimony, she referred the Appellant as ‘Ondicho’. She stated that she approached him and asked him why he had defiled her daughter and that he told him that he did not know what had happened.

23. She averred that she first reported the matter to the police who were on patrol who said that they had seen PW 2 delivering food but did not see her leaving. She testified that the matter was reported at Nyamasaria Police Station and that both PW 2 and the Appellant were taken to Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) for examination the following day.

24. PW 2 testified that she was born on 15<sup>th</sup> December 2003. She told the court that on 5<sup>th</sup> March 2018 at 8.00pm, PW 1 sent her to deliver food to the workers at Gulf Petrol Station and that when she went to collect money for the food from the Appellant's office, he grabbed her and laid her on the ground. She further testified that the Appellant pulled up her skirt, removed her pant and defiled her. She explained that in the process, she managed to get hold of his penis and withdrew it from her vagina, she then stood up and rushed out while crying.

25. PW 3 testified that he examined PW 2 on 6<sup>th</sup> March 2018 at 1210hrs. He produced a PRC form and noted that no physical injuries were present on the outer genitalia but there was presence of whitish discharge and the hymen was absent. He told the court the anus was intact and pregnancy and HIV test were negative. He added that the epithelial and pus cells were seen.

26. No 78992 Corporal Charles Tanui (hereinafter referred to as "PW 4") who took over from Corporal Ndombi, produced a birth certificate which showed that PW 2 was born on 15<sup>th</sup> December 2003.

27. Lucy Omboko, a Doctor from JOOTR-Hospital (hereinafter referred to as "PW 5") tendered in evidence a P3 form on behalf of Dr. Ngolona who was away on her studies. She told the court that on examination PW 2, she observed that there was normal external genitalia, creamy vaginal discharge, absent hymen, high vaginal swab taken found pus cell and epithelial cells. She added that pregnancy, HIV, Hepatitis B and VDRL tested negative. The document was signed on 8<sup>th</sup> March 2018 and it had indicated patient had changed her clothes.

28. In his sworn evidence, the Appellant denied having committed the offence as PW 2 had contended and was categorical that the evidence tendered by the Prosecution was not true. He denied that his name was Ombijo.

29. Section 8(1) of the Sexual Offences Act provides that:

**"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

30. To prove an offence of defilement, the Prosecution must prove that there was an indecent act or an act which caused penetration, the victim must be a minor and that the offender must have been identified and/or recognised by the victim.

31. Notably, Rule 4 of the Sexual Offences Rules, 2014 provides that:-

**"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."**

32. This court thus associated itself with the holding in the case of Musyoki Mwakavi vs Republic [2014] eKLR where the court held that apart from medical evidence, the age of the victim could also be proved by birth certificate, the victim's parents or guardian and by observation and common sense (emphasis court).

33. Having carefully scrutinised the evidence adduced on trial, the birth certificate which was adduced in evidence by PW 4 showed that she was fifteen (15) years of age at the material time. This was confirmed by PW 1 who testified that PW 2 was born on 15<sup>th</sup> December 2003. This was the same date that was indicated in the P3 Form and PRC Form.

34. This court was therefore satisfied that PW 2's age was proven beyond reasonable doubt and that she was a minor.

35. Going further, the PRC Form and the P3 form were not contradictory as the Appellant had argued. The results of PW 2's genitalia examination were consistent. There was a whitish creamy discharge and a missing hymen. It was immaterial that the P3 form indicated that she had changed clothes since the said document was dated 6<sup>th</sup> March 2018 and signed on the 8<sup>th</sup> March 2018. It was unreasonable to have expected her to have had the clothes that she had on the material day when she was examined.

36. This court had due regard to the case of Andrew Mulika Kithusi vs Republic [2014]eKLR where the court stated that:-

**"Generally, corroboration is not a requirement in Sexual offences. A sexual offence can be proved by evidence of a victim per se as long as the trial court is satisfied that the witness is truthful."**

37. While Section 124 of the Evidence Act Cap 80 (Laws of Kenya) provides that a court can believe a single witness in sexual offences, in this case there was more than PW 2's evidence to rely on. Her evidence was corroborated by the medical examination which was documented in the P3 Form and PRC Form. She had whitish vaginal discharge and the hymen was missing. The P3 form had also indicated that the approximate age of the injuries was forty eight (48) and seventy two (72) hours. The degree of the injuries was indicated as "harm".

38. Turning to the issue of identification, this court found the Appellant's argument that PW 1 and PW 2 used the name, "Ondicho" to identify him and his denial that his name was not "Ombijo" was immaterial. In his defence, he did not even allude to his arrest at the Gulf Petrol Station or if he even worked there. He skirted around the issue. He had the opportunity to call his colleagues as witnesses to testify what happened on that material night but he did not. An alibi could have perhaps assisted his case if the same was tight and cogent.

39. The fact that PW 1 and PW 2 used different names to refer to him in their testimony was immaterial. PW 1 knew him physically as she used to supply the workers at Gulf Petrol Station where the Appellant worked, food. PW 2 only heard him being called by his colleagues telling him, "Ondijo, fanya haraka." She served him food and went to collect money from him. Evidently, the time the Appellant and PW 2 interacted was sufficient time for her to have identified him by way of recognition. She pointed at him as the perpetrator at the police station. He did not deny that he worked at Gulf Petrol Station. In the circumstances, it was therefore not necessary to have held an identification parade.

40. This court found and held that the evidence that was adduced by the Prosecution witnesses was cogent, consistent, trustworthy and clear. There were no contradictions which if resolved in the Appellant's favour would create a doubt in the Prosecution case. On the contrary, the Appellant's defence was a mere denial and could not displace the Prosecution's case.

41. This court was therefore satisfied that the Prosecution proved that the Appellant was guilty of the offence of defilement beyond reasonable doubt.

42. The language that was used for purposes of taking plea was not indicated. Neither was it indicated in the entire proceedings. He was represented by counsel who would not have proceeded if he did not understand the language in which the charge was read out to him. It did appear to this court that this argument was an afterthought.

43. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (4) were not merited and the same be and are hereby dismissed.

## **II. SENTENCE**

44. The Appellant's Ground of Appeal No (5) was dealt with under this head.

45. On sentencing, the Appellant submitted that the sentence imposed on him was a minimum mandatory sentence that did not give the court the chance to exercise its judicial discretion based on the circumstance of his individual case. In this regard, he relied on the case of **Christopher Ochieng vs Republic [2018] eKLR** and **Jared Koita Injiri vs Republic Kisumu CA No 93 of 2014.**

46. On the other hand, the State did not submit on the Appellant's sentence but urged the court to uphold the trial's court decision.

47. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. This was reinforced by the Court of Appeal in **Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010** as was cited in **NNC vs Republic [2018] eKLR** when it had this to say:-

**"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."**

48. Notably, Section 8(3) of the said 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."**

49. A reading of the Trial Court's Judgment shows that the Learned Trial Magistrate considered the Appellant's mitigation and the fact that he was a first offender and noted the Probation Officer's report and the nature of the offence before imposing the impugned sentence.

50. It was therefore the finding of this court that the sentence imposed on the Appellant by the Learned Trial Magistrate was not harsh and/or excessive warranting any interference and/or disturbance by this court.

51. In the premises foregoing, this court found that the Appellant's Ground of Appeal No (5) was not merited.

## **DISPOSITION**

52. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 11<sup>th</sup> November 2020 was not merited. The conviction and sentence be and are hereby affirmed as it is safe to do so.

53. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF OCTOBER 2021.**

**J. KAMAU**

**JUDGE**