REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. E040 OF 2020

DENNIS OKOTH ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the original sentence in Criminal Case No. 5106 of 2013 at the

Chief Magistrates Court Makadara by Hon. H. M. NYAGAH – CM on 18/11/2020)

JUDGMENT

1.**Dennis Okoth Onyango,** the appellant, was arraigned in court following allegations of having intentionally and unlawfully caused his penis to penetrate the anus of **ROM,** a child aged 16 years, on 20th day of October 2013.

2.In the alternative, it was alleged that he committed an indecent act with the stated child by rubbing his penis against his buttocks.

3.Having been taken through full trial he was found guilty of defilement under section 8(1) as read with section 8(4) of the Sexual Offences Act and sentenced to serve ten (10) years imprisonment.

4.Aggrieved he appeals against the conviction and sentence on grounds that:

> *1.That the learned magistrate erred in law for convicting the appellant for the offence of defilement of a child contrary to Section 8 (1) (4) of Sexual Offences Act No. 3 of 2007*
>
> *2.That the learned magistrate erred in law and facts by sentencing the appellant for 15 years without the option of a fine.*
>
> *3.That the learned trial magistrate erred in law and facts for convicting the appellant where the essential ingredients of the offence had not been proved beyond reasonable doubt by the prosecution since all witnesses never testified, contrary to article 50(b) of the Constitution of Kenya.*
>
> *4.The trial magistrate erred in law and facts by convicting the appellant where the prosecution had not proved beyond reasonable doubt, since no **D.N.A** test was conducted.*

5.Evidence adduced by the prosecution was that the Complainant visited his friend A, who lived with the appellant herein, their scout trainer. He had disagreed with his parent therefore sought a place to stay for the night. He found A with D and requested to be accommodated for the night. The appellant arrived at 9.00 pm and asked him what he was doing at night. He explained to him that he intended to stay with D and the appellant instructed him to go and ask A for left over chapatis. He went and found A with another young boy at the appellant's house. Upon arrival the appellant instructed A and the boy to spread a bed on the floor where they slept while he slept with the complainant on the bed. In the course of the night ROM the

complainant felt someone touching his penis. His pair of trousers and shorts were pulled down and when he told the person to stop, the appellant responded by telling him to be quiet. He did not act further, then the complainant fell asleep. Thereafter he woke up to find the appellant having pulled down his pants and was on top of him. He penetrated his anus. He felt pain and told him to stop, but he could not let him go. However, he managed to push him away.

6.In the morning he sneaked out of the house and went to school. While at school he met A his classmate and asked him whether the appellant had done anything to him but he did not answer. Therefore, he opted to confide in the school Headteacher who instructed **PW2, SKN** his class teacher to take him to hospital and also inform his mother, **PW3 MO**. He was subjected to medical examination by **PW4 Doctor Kizzie Shako** who found tenderness on his anal opening.

7.Upon being put on his defence the appellant denied the charge. He testified that he found the complainant, a person that he knew at the kiosk and he told him to go to his house and stay as he was already staying with Arnold Otieno, a boy he was taking care of and a friend to the complainant. That on the material night, the complainant slept with A while he slept with his nephew JO. In the morning the complainant left. Later, he was arrested following allegations of sodomy. That the police searched his phone for pornographic videos but none was found. He urged that he helped the complainant being a Community Health worker.

8.The appeal was disposed through written submissions. It was urged by Mr. Mitullah, learned Counsel for the appellant that to affirm the complainant's testimony of having been sodomized, a medical report was vital. That PW4 testified that on examination of the minor, there was tenderness on the anal opening but she did not observe any lacerations, tears or bruises, whether fresh or otherwise. That tenderness being a pain sensation, PW4 did not explain the degree of tenderness, although the examination was done four (4) days after the offence was allegedly committed. That PW4 having implored the complainant to be taken for further tests at the government chemist laboratory, her examination was inconclusive. On the question of tenderness as proof of penetration various authorities were cited.

a.The case of ***JKH -vs- Republic (2016) eKLR*** where Ngaah J held that:

> ***"Penetration" as a technical term is defined under Section 2 of the Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".***
>
> ***The medical evidence Mr. David Kabuga (PW4), the clinical officer who examined the complainant, was to the effect that the complainant suffered tenderness on the anal region and the probable type of weapon causing the injury was 'blunt'. He admitted, however, that "the tenderness could be caused by anything else", thereby implying that it was not necessarily caused by the appellant's genital organ as suggested by the charges against him.***
>
> ***In view of the inconclusiveness of the medical evidence as to what could probably have injured the complainant, the natural evidence to fall back to remove the apparent doubt would have been the evidence of the complainant himself; however, looked at in its entirety, that evidence is not helpful either."***

b.***Wycliff Lumala -vs- Republic (2020) eKLR*** where J Matheka stated that:

> ***"…Did the prosecution prove its case to the required standard against the appellant? The age of the complainant was not disputed. The appellant was not a stranger to complainant. The appellant is said to have been found with bruises and tenderness, and discharge in the anal area. However, the totality of the evidence is that the prosecution did not establish that it was the appellant who had committed the said offences. "***

c.***Mohamud Omar Mohamed -vs- Republic (2020) eKL*****R criminal appeal No. 2 of 2020** when **Kariuki J** stated that:

> **"25.** ***Key evidence relied by the courts in rape cases and defilement in order to prove penetration is the complainants own testimony which is usually corroborate by the medical report presented by the medical officer. In this case since the complainant was a minor, the evidence of Clincal Office is key so as to corroborate with testimonies. I have critically analysed the evidence of PW4 the clinical office who testified herein.***
>
> **29 –** ***It is also noteworthy that there were no traces of spermatozoa, yet form the P3 form the same indicates that the complainant was examined after 12 hours, and that at no point did she shower. Although absence of spermatozoa cannot discount rape, it adds to speculations in this case. Even though the Investigating Officer in his testimony told the court that on vising the scene he saw some whitish spots on the beddings, that t in my view cannot be sufficient to prove penetration***
>
> ***30 – It is trite that the benefit of doubt should always go to the accused person. Therefore, in the circumstances it is my find that the second element of the offence which is penetration was not proved beyond reasonable doubt."***

9.That other people who were in the house did not testify and the Investigating Officer having not testified did not point an opportunity of

being cross examined on their whereabouts.

10.That the age of the complainant was not ascertained. In this regard the appellant relied on the case ***of Hadson Ali Mwachongo -vs- Republic (2016) eKLR Criminal Appeal No.65 of 2015*** where the Court of Appeal emphasized the importance of ascertaining the age of the complainant in sexual offences as the prescribed sentence depends on the same.

11.That no documents were adduced to confirm the age of the complainant. As stated in the case of ***Francis Omuroni -vs- Uganda Cr. Appeal No.2 of 2000*** where the Court stated that:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

12v.Further, it was argued that evidence adduced by PW1 PW2 and PW3 was at variance, contradictions that were fatal to the prosecution's case.

13.That the complainant was sodomized at night and the person did not talk therefore circumstances of identification were challenging. That whereas the complainant claimed that he slept on the same bed with the appellant, the appellant testified that he slept on the same bed with his nephew and not the complainant. That the nephew was the appellant's alibi in the case, a defence that the prosecution failed to disapprove and also failed to call the two boys who were in the house to testify. In this regard he cited the case of ***Charles Anjere Mwamusi -vs- Republic CRA No,226 of 2002*** where the court of appeal stated that:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."***

14The prosecution was faulted for not calling key witnesses.

That failure to call the two (2) boys and the Investigation Officer denied the appellant the right to establish full facts of what transpired that evening.

15. That the court erred by relying on Section 124 of the Evidence Act and It did not give reasons to satisfy itself that evidence of the complainant was sufficient

16. The State/Respondent through Mr. Mutuma learned State Counsel urged that upon medical examination it was confirmed that there was tenderness in the complainant's anal opening which was evidence of penetration of the minor. He relied on the case of ***John Onzere Kambi -vs- Republic (2013) eKLR*** *w*here the court held that:

> ***"I find that there was at least partial penetration of the complainant's anal orifice. The said penetration was by way of appellant's penis. Therefore, I find that the ingredients of the offence of defilement were proved beyond reasonable doubt"***

17. That the age of the complainant , who had finished standard 8 the previous year at U Primary School was not in dispute. He cited the case of **Richard Wahome Chege -vs- Republic Cr. App. No. 61 of 2014** where the court stated that:

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate.PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."***

18. On the question of identification of the assailant, it was submitted that the accused was well known to the complainant being their scout trainer. That the appellant spoke to the complainant telling him not to shout as there were other people in the room. And having been in the same bed clearly identified him. He relied on the case of **Karani -vs- Republic (1985) eKLR 290.** Where it was stated that:

> ***"There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances, carry as much weight as visual identification since it would be identification by recognition rather than at first sight. In Rosemary Njeri v Republic (1977) CR.A.27 a Victim of the offence of grievous harm testified that she heard the appellant say 'break her legs'. The reception of this evidence was upheld in the High Court on the first appeal and also in the second appeal"***

19.v He called upon the court to reject the denial put up in the appellant's defence.

20. On the question of sentence, basing the argument on the decision of the Court of Appeal in the case of ***Ogolla s/o Owuor -vs- Reginum (1954) EACA 270,*** he submitted that the trial court relied upon proper law to mete out a sentence that should not be interfered with.

21. This being a first appellate court, I am duty bound to analyse and evaluate afresh all the evidence adduced before the trial court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. In the case of ***Okeno vs. Republic [1972] EA 32*** the Court of Appeal set out the duties of a first appellate court as follows:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***

22. The case of defilement is created by Section 8(1) of the Sexual Offences Act that provides thus:

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

23. From the definition of the offence, the prosecution was duty bound to prove defilement. In the case of ***Charles Wamukoya Karani -vs- Republic, criminal Appeal No.72 of 2013*** it was stated that:

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

24. The argument of the appellant is that the prosecution failed to adduce documentary evidence to prove the age of the complainant. In the **Omuroni** case (supra) the Court of Appeal stated that:

> ***"Age may be proved by … the victim's parent or guardian and by observation and common sense."***

25. PW3 the mother of the complainant told the court that he was sixteen (16) years old. The testimony in respect to the age of the complainant was not in dispute.

26. In the case of **Mwalengo Chichoro Mwajembe -vs-** ***Republic (2016) eKLR*** the Court of Appeal stated that:

> ***"The question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."***

The complainant was a pupil in class 7 at U Primary School according to his testimony and that of his teacher PW2. He told the court that he was born in 1997. Having been born in that year, at the time of the incident he was sixteen(16) years old.

27. **Section 2** of the Children Act defines a child as: **…..any human being under the age of eighteen years.**

28. The appellant was known to the complainant and he did not dispute the apparent age of the complainant. Therefore, the trial court did not fall into error in reaching a finding that the complainant was a minor aged 16 years old, because he was of an apparent age of sixteen (16) years

29. On the question of penetration, it is defined by **Section 2** of the Sexual Offences Act as:

> ***…Partial or complete insertion of the genital organs of a person into the genital organs of another person***.

30. Evidence of the appellant that he offered to accommodate the complainant at his house on the fateful night is not in dispute. It was the complainant's testimony that he slept on the bed with the appellant while the other boys, A and another stated to be the appellant's nephew slept on the bed that was spread on the floor.

31. The incident happened at night. The individual caressed the complainant and inserted his penis into his anus and he felt pain. The appellant contented that there was no evidence to corroborate that of the complainant that he was indeed molested. The complainant was examined by PW4 who found tenderness on the anal hole, and recommended further examination at a government chemist. What remained unexplained is why she made such a recommendation?

32. The complainant identified the appellant as the assailant. It was his testimony that he slept on the same bed with the appellant and when his trouser was pulled down he told the person to stop and the appellant told him to keep quiet as there were other people. He fell asleep and when he woke up, the person was on top of him thrusting his penis into his anus, but he (complainant) managed to push him away.

33. It is argued by the appellant that his alibi defence was disregarded. According to him, his alibi was his nephew a person he claimed to have slept with. In his defence the appellant made an excuse of having not had the opportunity of committing the offence for allegedly having slept with his nephew, a defence that he alleged, was not disproved by the prosecution. An alibi defence would ordinarily mean that the offender was elsewhere when the offence was committed. The appellant was inside hishouse, sleeping on one of the beds. The complainant identified him by his voice intonation. In the case of **Karani -vs- Republic (1985) eKLR 290** the court stated that:

> ***"There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances, carry as much weight as visual identification since it would be identification by recognition rather than at first sight. In Rosemary Njeri v Republic (1977) CR.A.27 a Victim of the offence of grievous harm testified that she heard the appellant say 'break her legs'. The reception of this evidence was upheld in the High Court on the first appeal and also in the second appeal"***

34. The complainant could not have been mistaken about his voice since he was familiar with the voice being his scout leader and a person well known to his family.

35. The appellant faults the prosecution for failing to call crucial witnesses in the matter. **Section 143** of the Evidence Act provides thus:

> ***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.***

36. In the case of **Keter -vs- Republic (2007) IEA 135** the court held that:

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

37. In the case of ***Donald Majiwa Achilwa and 2 others -vs-Republic (2009) eKLR*** the court stated that:

> ***"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)."***

38. The appellant was a guardian of the children who lived with him. One of them was stated to be in class 3. **Section 125(1)** of the evidence Act provides thus:

> ***(1)v All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.***

39. It is argued that evidence adduced was full of contradictions that would have been resolved by evidence of the two (2) children who were in the house and the Investigating Officer who did not testify. In case of **Philip Nzaka Watu -vs- Republic (2016) eKLR.**

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses."***

40. In the case of **Twehangane v Uganda (2003) UGCA 6** It was stated that:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

41. The argument raised by the appellant was that evidence adduced by PW3 was at variance with that of PW1 and PW2. Since PW2 alleged that he was informed of the defilement on 2nd October, 2013 which was two (2) days after the occurrence while PW3 alleged that the complainant returned home on 21st October,2013 to take school uniform. It was however, appreciated by the appellant that the charge reads that the incident occurred on 20th October, 2013. As stated in the case of **Nzaka** (Supra) No two witnesses can recall exactly the same thing. In any case PW2 and PW3 were not witnesses to the act.

42. Could the two boys and the Investigating Officer have clarified what happened? The two (2) boys depending on the age may have been competent witnesses but it was not ascertained whether they were legally competent to testify.

In any case it is not stated that they saw or heard what transpired on the fateful night.

43. On the question of the Investigating Officer having not

testified, in the case of **Jeremiah Gathuku -vs- Republic Criminal Appeal No. 73 of 2008** the court held:

> ***"… The effect of failure to call police officers in criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate."***

44. In the instant case the prosecution was granted a last adjournment by the court, and it closed the case without calling the Investigating Officer. However, evidence adduced by the complainant proved that he recognized the voice of his assailant.

45. Evidence of the Doctor who examined the complainant left a doubt as to whether there was penetration or partial penetration.

46. In the alternative the appellant faced a charge of committing an incident act with a child.

47. **Section 2** of the Sexual Offence Act defines an indecent act as:

> ***"…An unlawful intentional act which (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration..."***

48. The complainant explained how the assailant lay on him and thrust his penis onto his anal area and he managed to push him off. In the premises the penis, part of the appellant's body touched his buttocks. The act in question was done deliberately. This was an indecent act.

49. The proviso to **section 124** of the evidence Act provides thus:

> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

50. The trial Magistrate upon hearing and seeing the complainant formed an opinion that the narration was not a mere fabrication or lies. He believed him. The prosecution is not obligated to adduce forensic evidence such as DNA profiling to prove a case against an accused person in Sexual Offences.

51. From the foregoing, I find that the prosecution did not prove the charge of defilement beyond reasonable but it did prove the alternative charge. Consequently, the appeal succeeds to the extent that the conviction for the charge of defilement is quashed and the sentence meted out is set aside and substituted with a conviction on the alternative charge of committing an indecent act with a child. **Section 11(1)** of the Sexual Offences Act provides thus:

> ***Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is***

liable upon conviction to imprisonment for a term of not less than ten years.

52. The appellant is therefore sentenced to serve ten (10) years imprisonment, to be effective from the date of his arrest, the 29th October 2013.

53. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 23RD DAY OF NOVEMBER 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Mr. Mitullah for Appellant

Mr. Kiragu for ODPP