



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 38 OF 2019

JOO.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. M. Obiero Principal Magistrate in Migori Magistrate's Court Criminal Case No. 44 of 2018 delivered on 6/05/2019)

JUDGMENT

1. The appellant herein, JOO, was charged with the offence of *Defilement* contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006 and with an alternative offence of *committing an indecent act with a child*. The Appellant denied both counts.
2. The particulars of the offence of defilement were that '*on diverse dates between 23rd November 2018 and 24th November 2018 at [particulars withheld] intentionally caused his penis to penetrate the vagina of AAO a child aged 15 years*'.
3. The appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.
4. Six witnesses testified in support of the prosecution's case. **PW1** was the victim one AAO. **PW2** was a Clinical Officer attached to Macalder Sub-County Hospital. **PW3** was the Director of Blue Cross Nyatike, an NGO. **PW4** was a brother to the complainant. **PW5** was the Chairman of Matende Village in Nyatike. **PW6** was the investigating officer one **No. 112921 PC Stanley Solgori** attached to Macalder Police Station.
5. At the close of the prosecution's case the trial court placed the appellant on his defence. The appellant opted to and gave a sworn defence and a witness who testified as **DW2**.
6. Thereafter the court rendered its judgment on 15/05/2019 where the appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 15 years' imprisonment.
7. The appellant was represented by Counsel during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the victim (PW1) whom I will refer to as '**the complainant**'.
8. Being dissatisfied with the conviction and sentence, the appellant preferred an appeal in person. He filed a Petition of Appeal on 29/05/2019 where he contended that the offence was not proved and that the defence and mitigations were not considered.
9. Directions were taken and the appeal was disposed of by way of written submissions. The appellant expounded on the grounds of appeal and in particular contended that the court failed to take into account that he was a minor at the time the offence was committed. He prayed that the appeal be allowed, conviction quashed and sentence set-aside.
10. **Mr. Kimanthi** Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any peradventure and that the sentence was indeed lawful. Counsel prayed that the appeal be dismissed.
11. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

12. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt.

13. I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions. As the trial court captured the evidence quite well in its judgment I will adopt that part of judgment herein by reference.

14. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. I will consider each of them separately

(a) On the age of the complainant:

15. The age of the complainant was not contested in this appeal. The court rightly so relied on *inter alia* the Certificate of Birth No. [...] and settled the age of the complainant at 15 years.

16. The complainant was therefore a child within the meaning of the law.

(b) On the issue of penetration:

17. 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.

18. This position was fortified in the case of Mark Oiruri Mose vs R (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....

(emphasis added).

19. Later the Court of Appeal, then differently constituted, in the case of Erick Onyango Ondeng v. 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.

20. The trial court dealt with the issue of penetration at length. The evidence of penetration was adduced by the complainant and PW2. The complainant narrated how she was drugged and found herself lying in bed next to the assailant. She felt pain in her private parts and realized that her inner wear had been removed and that she had engaged in sex. The complainant testified that before that day she did not have any boyfriend and had not engaged in sex at all.

21. When the complainant was taken to hospital she was examined and treated by PW2. It was observed that her hymen had been freshly broken. There were bruises on the *labia minora*. PW2 filled and produced the P3 Form, treatment notes and a Post Rape Care Form for the complainant as exhibits.

22. Going by the narration by the complainant coupled with the evidence of PW2 and the contents of the Post Rape Care Form, the treatment notes and the P3 Form, I find no difficulty in holding, which I hereby do, that penetration into the complainant’s vagina by a penis was proved.

c) On whether the Appellant was the perpetrator:

23. The appellant denied being the assailant. The trial court rightly pointed out that the evidence on identification rested with the complainant, PW3, PW4 and PW5. I am impressed in the manner in which the court analyzed the evidence of the said four witnesses. It was precise and logical.

24. The court dealt with the contradiction between the evidence of PW4 and the other witnesses. It was on where the accused person was arrested. At the end the court held as follows: -

From the evidence of the complainant, it is clear that she was able to identify the person who was sleeping next to her on the bed when she became conscious on the morning of the 24th day of November, 2018. She was firm that the person is the accused person herein. That being the position, I am of the finding that the contradiction does not go to the core of this case. I am of the finding that the complainant positively identified the accused as the person who caused the penetration.

25. I must add that not every contradiction affects a conviction unless it causes miscarriage of justice. However, a Court must always endeavour to reconcile any contradiction whenever it arises. That is what the trial court did.

26. The witnesses testified before the trial court which observed their demeanors. The court considered the totality of the evidence alongside the defence and was satisfied that the appellant had been placed as the assailant. I have as well reviewed the evidence on record. There is nothing meaningful on record challenging the demeanor of the witnesses and that is why the trial court believed the witnesses. As an appellate Court I am called upon to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to my own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and I must give allowance for that.

27. The complainant stayed with the assailant from 23/11/2018 to the following day. Although it was the first time the complainant met the assailant there was ample opportunity to see and recognize the assailant. The complainant talked to the assailant. They so closely dealt as the assailant was determined that the complainant should not escape.

28. By subjecting the prosecution evidence and the defence to the principles laid down in **Wamunga vs Republic (1989) KLR 426** and **R – vs- Turnbull & Others (1973) 3 ALL ER 549** I am satisfied that the appellant was rightfully placed at the scene and as the assailant. The defence holds no water in the presence of the prosecution evidence. The trial court rightly rejected it. Having reconsidered the evidence, I am satisfied beyond any doubt that it is the appellant who beastly and sexually assaulted the complainant.

29. The appeal on the conviction is hereby dismissed.

30. On **sentence**, the Appellant was to be sentenced to 15 years' imprisonment. He contended that he was a minor and ought to benefit from a non-custodial sentence.

31. I have seen the manner in which the trial court handled the issue of the age of the appellant. He subjected him to an age assessment. The report which was produced as an exhibit assessed the age of the appellant as above 18 years. That was on 14/05/2019. Although there may be no clarity on the age of the appellant at the time he committed the offence in November 2018, there is ample evidence that the appellant was above 18 years old at the time he was sentenced.

32. The manner in which Courts may deal with minors who are guilty of commission of serious crimes was recently re-discussed by the Court of Appeal in **Kisumu Criminal Appeal No. 52 of 2015 Duncan Okello Ojwang vs. Republic (2019) eKLR**. My Lordships had the following to say: -

Section 191(1) of the Children Act sets out different ways in which the Court can deal with a child offender. The trial Court is required to exercise judicial discretion in determining the manner in which to deal with a child offender. Section 191(1)(f) of the same Act empowers the Court to deal with an offender in any other lawful manner and therefore does not in any way conflict or oust the penalty prescribed under Section 25(2) of the Penal Code. However, the Court gives effect to the best interests of the child as required under Section 4(2) of the Children Act. The Court should also bear in mind the principles of proportionality, deterrence and rehabilitation; and as part of the proportionality analysis, mitigation and aggravating factors should also be considered. This Court while faced with a similar case in Richard Mwaura Njuguna & another v Republic [2019]eKLR observed thus:

“It is worth mentioning that this Court as well as the High Court have come across similar situations as the case before us, where the offender in question was a minor during the commission of the offence in issue is the High Court case of Daniel Langat Kiprotich vs State [2018]eKLR wherein the petitioner therein had challenged the death penalty meted out to him on account of the offence of robbery with violence on the ground that during the commission of the offence he was a minor. Ngugi, J. expressed the dilemma faced by courts in such situations. He expressed:

This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to a borstal institution for no more than three years, the options are limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost - adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.

A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn”.

Earlier on this Court in the case of J M K v Republic [2015]eKLR had observed

....A critical issue in this appeal relates to the appropriate sentence for a minor who has been convicted of murder. At the time of the offence, the appellant was a minor 16 years of age. The offence of murder attracts a mandatory death sentence. In Nyeri Criminal Appeal No. 118 2011 (JKK -v- R, (2013)eKLR, this Court had an opportunity to consider the appropriate punishment for a minor offender. The Court stated that the offence of murder committed by the minor appellant was serious and an innocent life was lost. The appellant though a minor at the time of the offence was to serve a custodial sentence so that he could be brought to bear the weight and responsibility of his omission or lack of judgment. The Court expressed that the appellant who was now of age of majority could not be released to society before being helped to understand the consequences of his mistakes. (See also Republic -v- S. A. O., (A MINOR) [2004]eKLR and Nyeri Criminal Appeal No. 184 of 2009, Dennis Kirui Cheruiyot -v- R).

The Court went further and held that:

The appellant in this case was not found to be of unsound mind to be detained at the pleasure of the President. No legal provision was cited to us to support the order that if a minor offender is found guilty of murder he should be detained at the pleasure of the President. Due to the gravity of the offence and the current age of the appellant, he cannot be released to society. The Children Act prohibits a death sentence to a child offender, life sentence is also not provided for; we, therefore, allow the appeal to the extent that we substitute the order directing the appellant to be detained at the pleasure of the President with a custodial term of imprisonment for 10 years from the date of conviction by the trial court on 5th May, 2011. We have considered this custodial sentence as appropriate to give time to the prison authorities and perhaps the probation department to take the appellant through the rigours of coming into terms with his mistake and poor judgment which have consequences such as a loss of liberty.

We are in total agreement with the above sentiments and observations. Accordingly we find that committing the appellant to a borstal institution as prescribed under Section 6(1) of the Borstal Institutions Act is not foreseeable in view of the appellant's current age. The appellant is no longer a minor. Instead, we are inclined to impose a sentence of 10 years imprisonment which we think is commensurate with the appellant's culpability.

33. The offence the appellant faced was a serious one. This is a case where the appellant drugged the complainant. He then carried her to his house and had sex with her while she was unconscious. That is a very dangerous way of executing a criminal intent. It is an aggravating factor as the appellant is a serious danger to mankind. He can as well do so to anyone.

34. I would have readily enhanced the sentence had the State appropriately applied. The sentence of 15 years' imprisonment cannot be said to be excessive in the circumstances of this case. The appeal on sentence is also rejected.

35. From the foregoing analysis, the entire appeal is unsuccessful and is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

JOO the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant