



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**(Coram: A. C. Mrima, J.)**

**CRIMINAL APPEAL NO. 54 OF 2019**

**FRANCIS OTIENO OLAJO.....APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

**(Being an appeal arising from the conviction and sentence by Hon. M. M. Wachira Senior Resident Magistrate in Migori Magistrate's Court Criminal Case No. 42 of 2018 delivered on 10/7/2019)**

**JUDGMENT**

1. *Francis Otieno Olajo*, the Appellant herein, was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** 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 1<sup>st</sup> day of November 2018 at [particulars withheld], intentionally caused his penis to penetrate the vagina of DA a girl aged 6 years old*.'
3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.
4. Ten witnesses testified in support of the prosecution's case. **PW1** was the victim one **DA**. The victim's friend and also a minor one **SV** testified as **PW3**. **PW2** was the victim's mother. The victim's grandmother and who lived with the victim as a guardian testified as **PW4**. The father to the victim testified as **PW5**. The arresting officer one **No. 3360 APC Stephen Chacha Gwenchuo** attached at Sori AP Camp testified as **PW6**. A Senior Clinical Officer attached to Karungu Sub-District Hospital testified as **PW7**. The Elder of Okiro village in Nyatike testified as **PW8**. The Area Chief of Karungu West in Nyatike testified as **PW9** and the investigating officer one **No. 70501 PC Everlyne Borage** attached to Karungu AP Post under Macalder Police Station testified as **PW10**. The Appellant appeared in person 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**'.
5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave an unsworn defence without calling any witness. Thereafter the court rendered its judgment on 10/07/2019 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to life imprisonment.
6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal on 22/07/2019 where the Appellant challenged the judgment on grounds that his right under **Article 50(1)(b)** and **(h)** of the **Constitution** were violated and that the offence was not proved as required in law.
7. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant expounded on the grounds of appeal and prayed that the appeal be allowed, conviction quashed and sentence set-aside.
8. **Mr. Kimanthi** Senior Principal Prosecution Counsel supported the appeal and submitted that the offence was proved as the complainant did not testify but only the mother, PW2. He also contended that given that the complainant was 6 years old had the appellant really defiled her there would have been serious injuries which was not the case.
9. This being the Appellant's first appeal, the role of this Court was stated in **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.

10. 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. Needless to say, 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.

11. 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:**

12. The age of the complainant was contested in this appeal. The prosecution relied on the Complainant's *Child Health and Nutrition Card* in proof of the age of the complainant. The Card indicated the date of birth as 22/01/2012.

13. Under **Rule 4 of the Sexual Offences Act, (Rules of Court) 2014 which came into force on 11/07/2014 under Legal Notice No. 101**, a victim's age can be determined by way of a Birth Certificate, any School documents, a Baptismal Card or any other similar document. Of much importance is the fact that apart from proving the age by a Birth Certificate, any School documents or a Baptismal Card the **Rules** further gives allowance to other ways of such proof under the category of '**any other similar documents**'.

14. In this case the complainant's *Child Health and Nutrition Card* was produced as an exhibit. To me, the *Child Health and Nutrition Card* is one of the documents contemplated under the category of '**any other similar documents**'. The Card was rightly used to prove the age of the complainant. 14.

15. The complainant was therefore born on 22/01/2012. She was almost 7 years old at the time the alleged offence was committed. The complainant was hence a minor of tender age within the meaning of the law.

**(b) On the issue of penetration:**

16. 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.**

17. 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).

10. 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.**

19. Penetration was hotly contested. Five witnesses testified on the aspect of penetration. They were the complainant, PW3, PW4, PW5 and PW7.

20. The complainant narrated what happened to her on the material day. She stated that she was with PW3 near the Church gate when she met the assailant. PW3 had however left her briefly. The assailant took her to the house of one *Baba Lado* where he removed her pants and also removed his clothes. The assailant then laid on her top and did bad manners. She further explained that the assailant put his manhood into her private parts as he held her mouth and neck. She felt a lot of pain and thereafter she was released. She walked away while crying.

21. PW3 stated that she saw the assailant coming out of the house of *Baba Lado* with the complainant. She asked the complainant what she was doing with the assailant and the complainant told her that PW7 had beaten her for doing bad manners with the assailant.

22. PW4 was the guardian of the complainant. On the material day PW4 recalled that the complainant and PW3 were together near the church. PW3 then left the complainant behind. PW4 later asked PW3 to go and call the complainant. That was the time PW3 saw the assailant and the complainant coming out of the house of *Baba Lado*. PW4 learnt of the ordeal the following day when the complainant told her uncle (not a witness) what the assailant had done to her. PW4 immediately reported the matter to PW8. It was PW8 who informed PW9. PW9 told PW8 to arrest the assailant and await further instructions. PW8 complied. PW9 went to his office and found PW8 and the assailant. PW9 escorted the assailant to the Sori AP Camp and handed over the assailant to PW6. The complainant and the assailant were later escorted to hospital.

23. PW4 also informed the father of the complainant (PW5) of the ordeal. PW5 rushed and picked his wife (PW2) and went to the hospital. PW5 found the complainant having already been attended to. They were however referred to the Children Officer. PW5 observed the complainant and noted that she walked with a lot of difficulties and cried. He believed that something wrong must have happened to her.

24. PW7 examined and treated the complainant on 02/11/2018. He observed bruises on both *labia majora* and *labia minora* of the vagina. The vagina was also swollen and reddish in colour. PW7 conducted a laboratory urinalysis and vaginal swap tests and confirmed the presence of epithelial cells and spermatozoa. He filled the P3 and produced it as an exhibit together with the treatment notes. PW7 concluded that the complainant's vagina had been penetrated by a male organ. The suspected assailant was also examined and a P3 Form filled and produced in court as an exhibit.

25. I have carefully reviewed the foregone evidence and the contents of the treatment notes and the P3 Forms. I find no difficulty in holding, which I hereby do, that penetration into the complainant's vagina by a penis was proved.

26. The second ingredient was sufficiently proved.

**c) On whether the Appellant was the perpetrator:**

27. Having believed the evidence of the complainant, suffice to say that the said evidence also touched on the identity of the assailant. The complainant spent time with the Appellant whom she knew well before that day. He referred to him as Baba Effy, a fact which was not disputed. Further, the ordeal happened during day time.

28. PW3 also confirmed seeing the assailant with the complainant coming out of the house of Baba Lado wherein the complainant contended the act took place. PW3 also referred to the assailant as Baba Effy. Both the complainant and PW3 referred to the Appellant as Baba Effy, the assailant.

29. The defence tendered by the Appellant did not puncture the prosecution's evidence. The Appellant's evidence on how he was arrested in fact corroborated the prosecution's evidence.

30. 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.

31. I have noted that the complainant and PW3 readily gave the name of the Appellant as the assailant when the matter was disclosed. (See the Court of Appeal in **Simiyu & Another vs. R. (2005) 1 KLR 192, R. vs. Alexander Mutuiri Rutere alias Sanda & Others (2006) eKLR, Lesarau vs. R. (1988) KLR 783, Morris Gikundi Kamunde vs. Republic (2015) eKLR** among others).

32. Having carefully weighed the evidence, the law and the defence, I have no doubt in my mind that there were no circumstances that may have led to any doubtful identification of the Appellant by the complainant and PW3. Therefore, the identification of the Appellant as the aggressor was not in error. I now find and hold that the prosecution proved that it was the Appellant who sexually assaulted the complainant. The third ingredient of the offence of defilement is also answered in the affirmative.

**Other issues raised by the Appellant: -**

33. The Appellant contended that his rights under **Article 50(1)(b)** and **(h)** of the **Constitution** were violated. The **Constitution of Kenya** does not have **Article 50(1)(b)** and **(h)**. However, I will instead consider **Article 50(2)(b)** and **(h)** of the **Constitution**. Sub-Article 2(b) deals with the right of an accused person to be informed of the charge with such details to answer it. **Article 50(2)(h)** deals with the right to be assigned an Advocate at State's expense.

34. The record indicates that the trial was conducted in English/Kiswahili and Dholuo languages. The record further indicated that the Appellant was given all witness statements at the plea stage. The Appellant never raised the issue of the statements again. The Appellant requested for a copy of the charge sheet and P3 Form and was granted. I do not find the contention that his right under **Article 50(2)(b)** of the **Constitution** was infringed as holding. It is hereby dismissed.

35. On **Article 50(2)(h)**, the Appellant was charged on 05/11/2018. By then the **Legal Aid Act** No. 6 of 2016 which came into operation on 11/05/2016 was in place. The Appellant ought to have applied for legal representation under the said **Act** instead of contending a constitutional infringement. The issue fails.

36. I therefore find that the prosecution availed sufficient evidence to find the Appellant guilty. I do not agree with the prosecution that the complainant did not testify. The position is that the complainant testified on 10/12/2018. The complainant however began her testimony and was stepped down as she broke down. She was however recomposed and tendered her evidence after the testimony of PW2. The Appellant was rightly found guilty and convicted. The appeal on conviction fails.

37. On **sentence**, the complainant was 6 years old at the time the alleged offence was committed. The Appellant was sentenced under **Section 8(2)** of the **Sexual Offences Act** to life imprisonment. I have perused the sentencing notes. The court stated that it was bound by the minimum sentence provided by the law.

38. The Supreme Court in **Francis Muruatetu & Another -vs- Republic (2017) eKLR** as well as the Court of Appeal in **Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR** rightly restated the law on the mandatory nature of minimum sentences. Such sentences were rendered unconstitutional for they interfered with the discretion of the sentencing officer. To that end the appeal on sentence is hereby allowed. The life sentence is set-aside.

39. The Appellant shall be re-sentenced. A Pre-Sentence Report shall be availed for consideration and re-sentencing on **08/06 /2020**.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 22<sup>nd</sup> day of May, 2020.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Francis Otieno Olajo**, 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