



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CRIMINAL APPEAL NO. 39 OF 2019

JOSHUA OTIENO NGOWE.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. S. Ouko Resident Magistrate in Migori Chief Magistrate's Court Criminal Case No. 12 of 2018 delivered on 23/05/2019)

JUDGMENT

1. The Appellant herein, *Joshua Otiemo Ngowe*, 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 the 1st day of February 2018 and the 2nd day of April 2018 at [particulars withheld], intentionally caused his penis to penetrate the vagina of LE a girl aged 14 years old.*'
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 **LE**. An aunt to the victim and who was also the guardian one **MA** testified as **PW2**. A neighbour to accused one **RLK** testified as **PW3**. A Clinical Officer attached to Migori County Referral Hospital testified as **PW4**. **HO** testified as **PW5**. She was within the precincts where the alleged offence was committed. The investigating officer was one **No. 91830 PC Nahashon Akumu** attached to Migori Police Station who testified as **PW6**. The Appellant appeared in person during the trial and was a neighbour to the victim and PW2. 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 a sworn defence without calling any witness. Thereafter the court rendered its judgment on 23/05/2019 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 20 years' imprisonment.
6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal on 29/05/2019 in challenging the judgment on mainly two grounds to wit that the offence was not proved and that the defence was not considered.
7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant mainly expounded on the grounds. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.
8. **Mr. Kimanthi** Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any peradventure and that none of the grounds tendered are holding. Counsel prayed that the appeal be dismissed.
9. 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.
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.

11. 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. I must say that the prosecution's evidence as well as the defence were well captured in the judgment under appeal which evidence I herein incorporate by way of reference.

12. 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:

13. The age of the complainant was properly settled. The prosecution produced a Certificate of Birth No. [...] which gave the date of birth as 03/11/2004. Since the complainant was between 13 years and 14 years old the court rightly settled the age at 13 years old on the basis of the Court of Appeal decision in **Hadson Ali Mwachongo vs. Republic Criminal Appeal No. 65 of 2015.**

14. I therefore find that the complainant was a minor within the meaning of the law.

(b) On the issue of penetration:

15. 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.***

16. 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).

17. 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.

18. The prosecution availed the complainant and PW4 in demonstrating penetration. The complainant stated as follows: -

.....he pulled me towards his house, it was around 4:00pm.....

..... He told me to lie on the seat in his sitting room. He then closed the door. I asked him why he was closing the door. He told me to keep quiet.

He took off my shorts and panty. He took a piece of cloth and put it in my mouth. He took off his trousers and lay on me. He took his thing and put it in me. The thing he uses to urinate. He put it where I urinate, my dudu. He told me not to tell anyone or he would kill me.

My aunt called me from outside.....

19. PW4 examined and treated the complainant on 02/04/2018 at Migori County Referral Hospital. She also filled the P3 Form for the complainant. PW4 observed that the complainant's vagina walls were freshly-bruised, the hymen was missing and the presence of a white discharge and epithelial cells. On the basis of the examination PW4 concluded that the complainant had engaged in a sexual activity.

20. The witnesses testified before the trial court and the court had an opportunity of observing their demeanour. Whereas an appellate Court is to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter, it must always bear in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and it should give allowance for that. The trial court evaluated the evidence and found the witnesses truthful and reliable.

21. I have equally re-evaluated the evidence and have no difficulty arriving at a similar finding as the trial court as there is nothing on record to impeach the credibility of the prosecution witnesses. The evidence of the complainant and PW4 taken cumulatively therefore prove penetration in this case.

c) On whether the Appellant was the perpetrator:

22. The Appellant denied committing the offence. The complainant, PW2, PW3 and PW6 testified on the identification of the assailant.
23. The complainant testified that the assailant was a neighbour and that he used to send her to the shops on a number of occasions. She knew him well. On the material day the complainant stated that the assailant sent her to buy a soap from the nearby shop. She obliged and on availing the soap the assailant held her hand and pulled her into the house which was securely surrounded by a fence and had a gate.
24. The complainant then narrated how the ordeal took place inside the house. She then heard PW2 calling her from outside the house and the assailant went out to find out who she was. She heard PW2 ask the assailant twice whether the complainant was inside the house, but the assailant denied. The assailant then walked back into the house and removed the piece of cloth he had put into the mouth of the complainant. The complainant dressed up and left.
25. The complainant further testified that when PW2 saw her walking out from the assailant's house PW2 raised alarm and people immediately gathered. The assailant was arrested as he was about to escape. The complainant identified the appellant as the assailant both at the scene and in court.
26. PW2 was informed by a woman who did not testify that the assailant was spoiling the complainant and was led to the house where the complainant and the assailant were in. PW2 confronted the assailant. The assailant then went inside his house and produced the complainant. PW2 accompanied the complainant and the assailant to the police station. PW2 identified the assailant as the appellant.
27. PW3 confirmed the arrest of the assailant. She was at her kiosk which was next to the house in which the appellant used to work as a watchman. Suddenly, she heard a woman screaming and rushed to the watchman's house. She saw and asked the complainant why there was a commotion and the complainant told her that the assailant had sex with her. PW3 slapped the complainant and ordered her to sit next to the assailant who was already arrested and sat on the ground. PW3 identified the assailant as the appellant. She witnessed the appellant escorted to the police station.
28. PW6 confirmed *inter alia* that he interrogated the complainant who gave the name of the appellant as the assailant.
29. The appellant offered a sworn defence. He contended that he was being framed by one *Odhiambo* (not a witness) whom he had a grudge with. The trial court found that the defence was an afterthought since the Appellant did not raise the issue during the prosecution's case.
30. As stated, the trial court believed the witnesses. I have reviewed the evidence. I find the witnesses forthright in their evidence. The evidence of the complainant was aptly corroborated by that of PW2 and PW3. PW6 also testified that the complainant gave the name of the appellant as the assailant. (See the Court of Appeal in *Simiyu & Another vs. R. (2005) 1 KLR 192*, *R. vs. Alexander Muturi Rutere alias Sanda & Others (2006) eKLR*, *Lesarau vs. R. (1988) KLR 783*, *Morris Gikundi Kamunde vs. Republic (2015) eKLR* among others).
31. I find as a fact that the complainant knew the appellant well before the incident. Likewise, PW2 and PW3 knew the appellant as their neighbour. I am also satisfied that the appellant was rightly placed at the scene as the perpetrator more so that he was arrested with the complainant during day time. From the foregone analysis I have no doubt in my mind that there were no circumstances that may have led to any doubtful recognition of the Appellant by the complainant and the other witnesses and as such the identification of the Appellant by way of recognition as the aggressor was not in error.
32. 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.
33. In sum I find and hold that the Appellant was properly found guilty and convicted of the offence of defilement. The appeal on conviction hereby fails.
34. On **sentence**, the Appellant was sentenced to the mandatory 20 years' imprisonment term under **Section 8(3) of the Sexual Offences Act**. The record is clear on that. I have previously dealt with the mandatory nature of sentences in *Migori High Court Criminal Appeal No. 58 of 2018 Morris Odero Nyangoko versus Republic* (unreported) and relied on the Supreme Court in *Francis Muruatetu & Another -vs- Republic 2017 eKLR* and the Court of Appeal in *Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR*. Such sentences were rendered unconstitutional for not allowing a court exercise its discretion in sentencing.
35. In this case, I have carefully considered the circumstances in which the offence was committed and the mitigations. In as much as the sentence of 20 years' imprisonment was the minimum prescribed by law I find that if I have to exercise my discretion in re-sentencing the appellant herein, I would readily settle for a similar sentence. The offence was so serious and was beastly carried out. The offence has life-long adverse effects on the complainant.
36. Having said so, I find no need of setting aside the sentence on record. The upshot is that the appeal on sentence is likewise disallowed.
37. The entire appeal is dismissed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of May, 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Joshua Otieno Ngowe, 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