



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CRIMINAL APPEAL NO. 50 OF 2019

JUSTUS ONYANGO SIGIRIA.....APPELLANT

-versus-

REPUBLIC..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. S. Ouko Resident Magistrate in Migori Magistrate's Court Criminal Case No. 29 of 2019 delivered on 27/06/2019.)

JUDGMENT

1. The Appellant herein, *Justus Onyango Sigiria*, was charged with the offence of *Defilement* contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006. He also faced an alternative count of *committing an indecent act with a child*. The Appellant denied both counts.
2. The particulars of the offence of defilement were that '*on 25th day of July 2018 at [particulars withheld], intentionally and unlawfully caused your male genital organ namely penis to penetrate into a female genital organ namely vagina of MMO a girl aged 14 years*'.
3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.
4. Seven witnesses testified in support of the prosecution's case. **PW1** was the complainant one **MMO PW2** was the complainant's mother. The chairman of the *boda boda* at [particulars withheld] Centre testified as **PW3**. He was an uncle to the Appellant. The Assistant Chief of Nyamaraga Sub-Location testified as **PW4**. **PW5** was at the *boda boda* stage at [particulars withheld] Centre on the material day and time. A Clinical Officer attached to Migori County Referral and Teaching Hospital testified as **PW6**. **PW7** was the investigating officer one **No. 84137 PC Athman Said** attached to Migori Police Station. 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 **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 gave an unsworn defence without any witness. Thereafter the court rendered its judgment on 27/06/2019 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 timeously preferred an appeal by filing a Petition of Appeal on 08/07/2019. The Appellant raised the following 4 grounds of appeal: -
 - a) **THAT I pleaded NOT guilty to the charge herein.**
 - b) **THAT the trial court erred in both law and facts by not considering that the ingredient of penetration was not confirmed medically.**
 - c) **THAT the trial court erred in both law and facts by not putting into consideration that the prosecution witnesses **PW3** and **PW4** had grudges with me.**
 - d) **THAT the trial court erred in both law and facts by not observing that the evidences of **PW4** was misleading and contradicting.**
7. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant complied. He expounded on the grounds of appeal. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

8. **Mr. Kimanathi** Learned Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any peradventure. He prayed that the appeal on conviction 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. 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. The trial court properly captured both the prosecution and the defence evidence which evidence I incorporate as part of this judgement by reference.

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 produced a Certificate of Birth No. [...] in settling the age of the complainant. The said Certificate was not contested in its production and contents. The certificate indicated the date of birth as 04/07/2004. The complainant was around 14 years old. I hence find and hold that the age of the complainant was rightly proved and the complainant was a minor within the meaning of the law.

(b) On the issue of penetration:

13. 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.

14. 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).

15. 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.

16. Penetration was hotly contested. The Appellant contended the complainant used the word 'kitu yake' and 'tabia mbaya' instead of a penis and sex respectively.

17. It is true the complainant used the words 'kitu yake' and 'tabia mbaya' in her testimony. She tendered her evidence in Kiswahili language. She stated as follows: -

... He put on a C.D. on his 'thing' (kitu yake) He put his penis in my vagina, he started doing his work, he did 'tabia mbaya'....

18. In the case of **Muganga Chilejo Salha v Republic [2017] eKLR** the Court of Appeal while acknowledging the use of euphemisms by children when describing acts of sexual intercourse stated: -

Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generated/accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE v Republic, Kapenguria High Court Criminal Case No. 11 of 2016) "he pricked me with a thorn from the front part of this (sic) body." (Samuel Mwangi Kinyati v Republic, Nanyuki HC Criminal Appeal No. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v Republic, Homa Bay HC Criminal Appeal No. 44 of 2015), "he inserted his "dudu" into my "mapaja" (Jones Kaburu v Republic, Meru HC Criminal Case No. 196 of 2016), "he used his munyunyu" (Thomas Alugha Ndegwa, Nairobi HC Criminal Appeal No. 116 of 2011) as apt description of acts defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me" which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See AM v Republic Voi HC Criminal Appeal No. 35 of 2014, EMM v Republic Mombasa HC Criminal Case No. 110 of 2015, among others. Trial courts should record as

nearly as possible what the child says happened to him or her.

19. In this case the complainant was clear in what she meant by the use of the words '*kitu yake*' and '*tabia mbaya*'. The said words meant a 'penis' and 'sexual act' respectively. The complainant vividly explained what happened to her. She further certainly stated that the assailant undressed her and put his penis into her vagina.

20. PW5 rushed to the scene when the complainant screamed. The scene was at the house of the assailant. PW5 and his companions knocked the door, but there was no response. The radio was playing in a very high volume. They pushed the door open and found the assailant naked and on top of the complainant on the bed.

21. PW6 was a Clinician. He examined and treated the complainant. The vaginal examination revealed that there were no bruises on the labias, but the hymen was missing. A high vaginal swab and urine tests were conducted and the presence of epithelial cells was noted.

22. PW5 caught the assailant and the complainant in the sexual act. The assailant was naked and laid on top of the complainant. When the assailant was confronted he left the complainant and put on his clothes. He eventually managed to escape.

23. Going by the narration by the complainant which was corroborated by the evidence of PW5 and PW6 and to the contents of 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:

24. The Appellant vehemently denied being the assailant and attacked the evidence of the prosecution mainly on the issue of identification. He also contended that the prosecution evidence was contradictory and not believable.

25. 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. The trial court gave its reasons for such belief. I have as well reviewed the evidence on record. I did not come across any meaningful contradictions as alleged. 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.

26. The complainant knew the appellant well. She used to see the appellant at the centre. She gave the name of the appellant to her mother (PW2) and the police 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).

27. PW5 caught the appellant in the act with the complainant. PW5 knew the appellant so well. He immediately called and informed PW4 that he had found the appellant having sex with the complainant. The report led to the arrest of the appellant. PW5 further confirmed that he was a *boda boda* rider and operated from the centre. He was aware that the appellant lived just next to the *boda boda* stage and knew him quite well.

28. As to whether the Appellant was framed by PW4, the Appellant cross-examined PW4 on the issue. PW4 denied and stated that he had never had any issues with the appellant. He also stated that he was not at the scene, but was only called after the appellant had been arrested by members of public.

29. The appellant had no issue at all with PW5 who testified to have caught him in the act with the complainant.

30. The trial court considered the defence. It rejected the Appellant's position that the case against him was a fabrication. Without attempting to shift the burden of proof to the Appellant, I note that the Appellant gave an unsworn defence. He was indeed well within his right. The prosecution was however denied the opportunity to interrogate, by way of cross-examination, the defence which the Appellant gave.

31. Having re-evaluated the defence against the prosecution's case I find that no doubt was raised by the defence. The defence was rightly rejected. I am satisfied beyond any peradventure that it is the Appellant who beastly and sexually assaulted the complainant.

32. The trial court therefore rightly found the Appellant guilty as charged. He was lawfully convicted. The appeal on conviction is hereby dismissed.

33. On **sentence**, the Appellant was sentenced under **Section 8(3)** of the **Sexual Offences Act** to 20 years' imprisonment. Although the court did not take into account the legal principle laid in Francis Muruatetu & Another -vs- Republic 2017 eKLR by the Supreme Court and in Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR by the Court of Appeal on minimum sentences, I have reconsidered the evidence and the manner in which the incident occurred. I am satisfied that the sentence of 20 years' imprisonment was indeed reasonable. I do not think there is any reason to disturb that sentence. The appeal on sentence is likewise disallowed.

34. The upshot is that the entire appeal is unsuccessful and is hereby 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:

Justus Onyango Sigiria, 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