



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

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

CRIMINAL APPEAL NO. 30 OF 2019

GE KONORI.....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. 8B of 2018 delivered on 13/12/2018.)

JUDGMENT

1. The Appellant herein, *George Konori*, was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006. He faced an alternative count of **committing an indecent act with a child**. The Appellant denied all counts.
2. The particulars of the offence of defilement were that '*on the 7th day of March 2018 at [particulars withheld], intentionally caused his penis to penetrate the anus of JDA a child aged 7 years.*'
3. The Appellant was subsequently tried, found guilty and convicted on the main charge of defilement. He was accordingly sentenced.
4. Four witnesses testified in support of the prosecution's case. **PW1** was the complainant. He was **JDA**. The mother of the complainant testified as **PW2**. A Clinical Officer attached to Migori County Referral Hospital testified as **PW3**. The investigating officer one **No. 91830 PC Nahashon Akumu** attached to Migori Police Station testified as **PW4**. The Appellant appeared in person during the trial.
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. He did not call any witness.
6. The trial court thereafter rendered its judgment on 13/12/2018 where the Appellant was found guilty of defilement. He was convicted and sentenced to life imprisonment.
7. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal. He contended *inter alia* that the offence was not proved.
8. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant filed the submissions and expounded on the grounds of appeal. The Appellant contended that the evidence was riddled with unreconciled testimonies of the witnesses, that the offence was not proved and that his defence was not considered. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.
9. **Mr. Kimanthi** Learned Senior Principal Prosecution Counsel relied on the record in opposing the appeal. He submitted that the offence was properly proved and that the defence was duly considered in the impugned judgment. Counsel prayed that the appeal be dismissed.
10. 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 **Okemo 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.

11. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offences 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.

12. 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 whom I will refer to as '**the complainant**'.

13. I will begin with ascertaining whether the offence of defilement was proved.

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 properly settled by an age assessment report. The report was produced and it was not contested. Based on the evidence on record the trial court rightly settled the age of the complainant at 7 years old. The complainant was hence a minor of tender age in 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).

18. 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 contested. I have carefully and repeatedly gone through the record. The complainant narrated the ordeal. The narration was so clear and the events freely fell from his lips. The complainant was consistent. He knew what he engaged in with the assailant were sexual activities. He described the activity as '*... He did bad things to me here at the back*'. The complainant was candid in his testimony.

20. The aspect of penetration was corroborated by PW2 and PW3. PW2 who was the mother noted that the complainant had pain on his buttocks as she was washing him. Upon probing, the complainant disclosed the ordeal he underwent in the hands of the assailant. PW2 then '*parted his buttocks and noted his anus was swollen and was emitting a bad smell...*'

21. When the complainant was taken to hospital he was examined and treated. According to PW3, on examination of the complainant's anus she noted that the anal muscles were loose. There was as well stool impaction in that faeces were stuck in the loose muscles. A surgery was carried out to repair the anus. Relying on the treatment notes, the Post Rape Care Form and the P3 Form PW3 affirmed that there was a penile penetration into the anus of the complainant.

22. Based on the evidence on record, the trial court analysed the aspect of penetration. The analysis was perfect. I therefore find no difficulty in holding, which I hereby do, that penetration into the complainant's anus by a penis was proved.

c) On whether the Appellant was the perpetrator:

23. The issue of identification was also contested in this appeal. The Appellant denied committing the offence. He narrated how he was not in good terms with PW2. He alleged that he was framed.

24. The Appellant and the complainant knew one another well. They were neighbours. The Appellant was a herdsman in the neighbourhood. According to PW2 at times the complainant used to accompany the Appellant to graze the cows. The incident occurred during the day. The complainant saw the assailant well. He described how the assailant lured him into an abandoned house and sexually assaulted him. There was no doubt that the complainant's visibility was not in any way hindered.

25. The complainant also readily gave the name of the Appellant when he was confronted by PW2. He also consistently revealed the Appellant's name to the police thereby sealing any doubt as to whom the complainant referred to. The assailant was also identified before the trial court by the complainant. (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).

26. I am alive to the fact that the sexual assault happened when the complainant was alone with the assailant. That being so, the trial court was enjoined to strictly comply with **Section 124** of the **Evidence Act**. The trial court did so by stating the reasons why it believed that the complainant was truthful. In Kisumu Criminal Appeal No. 32 of 2015 Vincent Mukombwa Makotsi vs. Republic (2019) eKLR the Court of Appeal stated that: -

22. Furthermore, Section 124 of the Evidence Act is clear that the trial court can convict on the basis of the complainant's evidence, if satisfied that the complainant is a truthful witness. Hence the appellant's argument that there was no clan elder, Assistant chief, or even a neighbour who was called to testify simply does not hold.

27. There was however the defence tendered by the Appellant. The Appellant raised the issue of a grudge with PW2. That was in his defence. It was at the tail end of the proceedings. That in itself denied the prosecution the opportunity to appropriately challenge it and remains in contravention of **Article 50** of the **Constitution**. Without shifting the legal burden of proof, suffice to say that the Appellant did not raise the issue with PW2 or any of the prosecution witnesses or at all and that is why the trial court rightly so described the alleged grudge as a mere denial.

28. 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 as such 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.

29. There was also the issue of inconsistencies and contradictions in the evidence. The Court of Appeal in Nyeri Criminal Appeal No. 74 of 2016 Richard Munene vs. Republic (2018) eKLR had the following to say on the issue: -

It is a settled principle in law however, that it is not every trifling contradiction or inconsistency in the evidence of prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

In this appeal the inconsistencies identified are in relation to the dates on P3 Form and treatment notes, the names of the complainant on the charge sheet and in the birth certificate, the date of the offence on the charge sheet and the treatment card; that the complainant+

told different people different version of what had happened to her; that she had been injured by a stick; that she had a headache; and that she had been defiled.

To our mind these are matters of fact which both courts below satisfactorily reconciled by finding that they were insufficient to set aside the prosecution case against the appellant. There is no merit on this ground.

30. In this case the alleged inconsistencies were that PW2 talked of sweets bought by the Appellant whereas the complainant did not state that he was given any sweets; that it was not clear when the incident was reported to PW2; that PW2 alleged that the Appellant met the complainant at the bridge whereas the complainant stated that he met the assailant on the way and whereas PW2 talked of infection found on the complainant, PW3 did not so medically confirm.

31. I have weighed and reviewed the nature of the inconsistencies in issue. They are peripheral in nature and do not rapture into the heart of the prosecution's case. The alleged inconsistencies cannot be a basis of inferring that the Appellant was not connected with the offence when cumulatively taken with the rest of the evidence. They are easily resolved in favour of the prosecution.

32. The foregone analysis yields this Court to find and hold, which I hereby do, that the Appellant was properly found guilty and convicted of the offence of defilement. The appeal on conviction hereby fails.

33. I will now deal with the **sentence** rendered on the conviction of defilement. The Appellant was sentenced to life imprisonment sentence under **Section 8(2)** of the **Sexual Offences Act**. In rendering the sentence, the court stated that '...I therefore sentence him to life imprisonment as by law required....'

34. The court was therefore guided by the mandatory nature of the sentence under **Section 8(2)** of the **Sexual Offences Act**. The Court of Appeal has considered the issue in several matters. That was so in Christopher Ochieng vs. Republic (2018) eKLR, Jared Koita Injiri vs. Republic Kisumu Criminal Appeal No. 93 of 2014 and in Vincent Mukombwa Makotsi case (supra) among others.

35. In Jared Koita Injiri case (supra) the Court stated as follows: -

In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. Needless to say, pursuant to the Supreme Court's decision in Francis

Karioko Muruatetu & Another (supra), we would set aside the sentence of life imprisonment imposed and substitute it therefor with a sentence of 30 years' imprisonment from the date of sentence by the trial court.

36. The foregone applies to this case. The appeal on sentence is hereby allowed. The life sentence is forthwith set-aside. Having considered the mitigations on record and in view of the manner in which the offence was committed coupled with the injuries sustained by the complainant I hereby sentence the Appellant to 30 years' imprisonment. For clarity, the sentence shall run from the date of sentence by the trial court; that is 13/12/2018.

37. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

George Konori, 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