



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 4 OF 2018

JOSEPH MOGESA NYAMBEGA.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. P. N. Maina

Magistrate in Kehancha Senior Principal Magistrate's Court Criminal Case No. 826 of 2016 delivered on 31/01/2018)

JUDGMENT

Introduction and Background:

1. **Joseph Mogesa Nyambega** the Appellant herein, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(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 the 1st and 2nd October 2016 in Kuria East Sub-County within Migori County, intentionally caused his penis to penetrate the vagina of CS, a girl aged 9 years old'*.
3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.
4. Five witnesses testified in support of the prosecution's case. **PW1** was **ANM**, the mother of the victim. The victim, **CS**, testified as **PW2** whereas the father to the victim one **SMG** testified as **PW3**. A Clinical Officer attached to Migori Komasiimo Health Centre one **EO** testified as **PW4** and the investigating officer one **No. 70036 PC Paul Mursoi** attached to Ntimaru Police Station testified as **PW5**. 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 **PW2** 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 31/01/2018 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 14/02/2018 where he challenged the judgment on grounds that the trial court erred in not finding that he was framed and that the trial court refused to acquit him even after **PW1** had wished to withdraw the case.
7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant argued that the evidence was riddled with contradictions and that crucial witness did not testify. The Appellant prayed for the appeal to be allowed, conviction quashed and sentence be set-aside.
8. The appeal was opposed by the State which submitted that the offence was proved beyond any peradventure and prayed that the appeal be dismissed.

Analysis and Determinations:

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 **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.

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. I must however confirm that the prosecution's evidence and the defence evidence were well captured in the judgment under appeal and I hereby adopt the same as part of this decision by reference.

(a) On the age of the complainant:

12. The age of the complainant was not contested in this appeal. The prosecution relied on the Child Health Card to settle the age of the complainant. I find that the finding was in line with the **Sexual Offences Act** which promulgated some rules towards the achievement of its objectives which rules came to be known as "**The Sexual Offences Act (Rules of Court) 2014**". The Rules came into force on 11/07/2014 under **Legal Notice No. 101**. Under **Rule 4** thereof, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or **any other similar document**.

13. In this case a Child Health Card was produced. The Card is a medical record of the complainant from birth. It contains the date of birth, the immunization programme undertaken and generally shows the development of the complainant. The Card was produced as an exhibit without any objection. I have carefully perused the Card and I am satisfied that the same falls under the category of the documents described as '**any other similar document**' under **Rule 4** of the **Sexual Offences Act (Rules of Court) 2014**. I say so because if a school document or a baptismal card is a way of proving age then a medical document like the Card herein is a better way of such proof.

14. The Card gave the date of birth as 12/04/2007 and as such the complainant was around nine and a half 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:

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. Again the Appellant did not contend the aspect of penetration. PW4 examined the complainant and found that her hymen was missing and had bruises and lacerations on her vaginal walls. There was blood on the vulva and thighs. A laboratory high vaginal swab revealed the presence of pus cells, motile spermatozoa and white blood cells. PW4 filled in the P3 Form and the Post Rape Care Form and produced them as exhibits.

19. The complainant testified and narrated what had happened to her in the course of the day. She stated how the assailant carried her to the bush and had sex with her during the day and again how she was carried as she slept through a connecting door and was again sexually assaulted by the same assailant at night. The evidence of the complainant was properly corroborated by PW1 and PW3.

20. The complainant was very categorical and forthright that she twice engaged in sexual acts with the assailant. She certainly described the sexual encounter. Going by the narration by the complainant coupled with the evidence of PW1, PW3 and PW4 and the contents of the P3 Form and the Post Rape Care 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:

21. Having believed the evidence of the complainant, suffice to say that the said evidence also touched on the identity of the assailant. The complainant stated that he knew the Appellant who was their neighbour and stayed in the same house as a tenant. She also described how the Appellant used to access her room using a connecting door and how he carried her during the sexual acts.

22. The Appellant was arrested with the complainant in his house having undressed her and hidden her under a seat. The incidents occurred during day time and at night and the complainant had ample time to recognize the Appellant as the assailant. The complainant as well identified the Appellant in court.

23. The Appellant in his defence raised the issue of being framed up by PW1 so that he is not paid his dues having dug a pit latrine for her. The trial court considered the defence in its judgment and found the Appellant as being dishonest. I entirely agree with the consideration of the defence by the trial court and its finding. I find the submission that the defence was not considered as not supported by the record and it is for rejection.

24. I have carefully weighed the evidence and the law and 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.

Other issues raised by the Appellant: -

25. The Appellant raised the issue of contradictions in the prosecution's evidence and that crucial witnesses were not called to testify and their absence not explained. There was indeed some variance on the date of the alleged offence between PW1 and the complainant. PW2 talked of 02/10/2016 whereas the complainant talked of 01/10/2016. Whereas the dates are different the testimonies of PW1 and the complainant corroborated each other in several aspects and sufficiently covered the particulars of the charge. The minimal error can therefore be reconciled by the application of **Section 382** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya.

26. As to the alleged witnesses who did not testify, my attention has been drawn to **Section 143** of the **Evidence Act, Cap. 80** of the Laws of Kenya which gives discretion to the prosecution to decide on the number of witnesses to call in proof of any fact. I find that the evidence of the prosecution was sufficient to prove the principal charge. The usual adverse inference does not hence arise in this matter. I also find the contention that the trial court did not allow an application for withdrawal of the case as not supported by the record. If any event, even if the application was made the court had the discretion over it.

27. Having found all the ingredients of the offence of defilement in favor of the prosecution and that none of the other issues raised are holding, this Court finds that the Appellant was properly found guilty and convicted. The appeal on conviction hereby fails.

Sentence and Disposition:

28. On **sentence**, the complainant was slightly below 10 years old at the time the alleged offence was committed. The Appellant was rightly sentenced under **Section 8(2)** of the **Sexual Offences Act**. The life sentence remains legal as it is the only prescribed sentence. The appeal against sentence also fails.

29. I therefore find no merit in the appeal and it is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of February, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Joseph Mogesa Nyambega 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