



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.167 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2568of 2014 by: Hon. V, A, Ochanda – R.M.)

ELIUD OENGA GITILI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

This is an appeal filed by **Eliud Oenga Giteli (the appellant)** against the decision of the Hon. Ochanda.

The appellant was charged with two counts of defilement. In Count 1, he faced a charge of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act.

The particulars of the charges are that on diverse dates between 1st and 30th September, 2014 in Laikipia, unlawfully and intentionally caused his genital organ, the penis to penetrate the vagina of RM a girl aged 13 years.

In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act in that he unlawfully and intentionally caused his penis to come into contact with the vagina of RM a child aged 13 years.

In the second count, the appellant was charged with the offence of defilement contrary Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charge are that on diverse dates between 1st 30th September, 2014 in Laikipia County unlawfully and intentionally caused his genital organ, the penis, to penetrate the vagina of CW a girl aged 10 years old.

In the alternative, the appellant also faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act in that he allowed his penis to come into contact with the vagina of CW a child aged 10 years.

After a full trial, the appellant was convicted on the main counts and sentenced to serve 20 years imprisonment on Count 1, while on count 2, he was sentenced to serve life imprisonment.

Being aggrieved by the conviction and sentence, the appellant filed this appeal based on the following summarized grounds:

- (1) That the offence of defilement was not proved to the required standard;***
- (2) That the complainants did not identify the perpetrator;***
- (3) That the prosecution evidence was full of contradictions;***
- (4) That the ages of the complainants was not proved;***
- (5) That no DNA was done to connect the appellant with the offence nor was there medical evidence to prove the offence;***
- (6) The trial court failed to consider the delay in bringing the charges against the appellant;***
- (7) That the sentence is harsh.***

The appellant therefore prays that the conviction be quashed and sentence set aside.

This is a first appeal and it is required of this court to examine all the evidence that was tendered before the trial court, analyze it and arrive at its own conclusions. See *Okeno v Republic (1972) EA 52*. This court will of course, bear in mind that it neither saw nor heard the witnesses testify but the lower court did.

PW1, EW testified on oath told the court that she lived with her uncle, grandparents and her sister RM as her mother had died; that in 2014 one night when her grandparents were not home, her uncle came home with the appellant; that the uncle went where they slept, told them to remove their clothes but they refused and then threatened to kill them. He then defiled them in turn; that Eliud, the appellant went to their home at night and defiled them in turn starting with RM. When she tried to run, he caught her and threatened to kill her, placed her on the bed, put his thing for urinating into hers for urinating. PW1 said that she knew the appellant as her uncle's friend and one time he took them to his house and asked them to wash his house and wash his utensils; that when there, the appellant exposed his penis to them but did defile them that day. He defiled them two days later on a Friday.

Later, they informed the nun that the uncle used to defile them daily and so did the appellant.

PW2 RM, a child born in 2002, confirmed that she lives with her grandparents and her uncle; that their uncle would go to their house, forcefully defile them; that the appellant once went to their home, knocked on their door and when PW2 opened, the uncle got hold of her, undressed her and defiled her and after he finished, he went on to defile PW1. When PW2 tried to intervene, he threw her against the wall and injured her. PW2 said they had a small lamp in the house, that she knew the appellant well even by name of Eliud, that after he finished, he left. PW2 was unable to go to school next day and it is then the nun went to check on PW2 at her home and later reported the matter to the police. PW2 said that the appellant defiled them at their home and another time, he picked them up on a motorcycle, took them to his house and defiled them there.

PW3 Peter Wachiuri Waweru, Assistant Chief Githima Sub-Location received a call from a sister (nun) called D on 25/10/2014. She informed him that two people had been defiling two children and she wanted them to be arrested, and that one was called Eliud. He was shown where the girls were defiled at Mathenge's house. He was also taken to Minjore to Eliud's house. Next day, they arrested the appellant, Eliud at his house and the girls identified him on a parade at the police station. He arrested both the appellant and Mathenge, the girls uncle.

PW4 Dr. Joseph Kinyua of Nyahururu County Hospital examined the complainants on 26/9/2014. He found that RM aged 13 years had an inflamed vagina, hymen was broken CW who was aged about 10 years had bruises on the right labia majora, absent hymen. The doctor opined that there was penetration of both complainants. He produced the P3 forms as exhibits.

PW5 Sgt. Lawrence Weru received a report from sister D that the complainants who were then with her, had been defiled by Joseph Mathenge and Eliud Oenga between 1st September, 2014 and 30th September, 2014. He carried out investigations and found that the girls lived with the grandparents and the uncle who were drunkards; that the children's parents were dead; that the children's uncle used to send the appellant to pick the children on his motor cycle and take them to his house where he would defile them.

The appellant in his unsworn defence said he was arrested from his home on 27/10/2014 when officers went there. asked for "**Sammy wa Bodaboda**" and he denied knowing him. He was taken to Maralal where he found two girls who touched Mathenge but not him. But he was the one who was charged.

To prove an offence of defilement, the following ingredients must exist:

- (1) *That there was penetration;*
- (2) *That the victim was a child;*
- (3) *The identity of the perpetrator.*

PW1 testified that she was born on 10/4/2014 while PW2 was born in 2002. This evidence was corroborated by the production in court of immunization cards in respect of both complainants, P.Ex.3(a) and (b) indicating that they were born on 27/8/2009 and 1/2/2004 respectively.

As of the time the offence was committed, the 1st complainant (PW2) was about 15 years while the 2nd complainant (PW1) was about 10 years old. There is overwhelming evidence to prove that the complainants were minors.

Whether the offence of defilement was committed; both complainants vividly narrated what happened to them; that the appellant put them on the bed and put his thing for urinating into theirs and he did it in turns. Both of them told the court that Eliud did not do it once but several times, sometimes in their house and once at his house after he carried them on his motor cycle. Both PW1 and 2 said they felt pain.

PW4 examined the children on 1/10/2014 and found the 1st complainant's vagina to be inflamed and the hymen was broken. As for the 2nd complainant, the hymen was missing and the labia majora was bruised. These were young children and the presence of injuries to the vagina and labia majora and missing hymen. Penetration was proved.

As respects the identity of the perpetrator, PW1 and 2 told the court that they knew the appellant as a friend of their uncle; that he had once taken them to his house where he asked them to wash his dishes and later exposed his genital organs to them. About 2 days later, he went to their house at night and defiled them. PW2 told the court that there was a small lamp in the house and they knew his voice and heard his

voice when he threatened to kill them if they screamed. It did not end there, he again picked them on his motor cycle, took them to his house where he defiled them again. It is the children who directed the Assistant Chief were the appellant was found.

I agree with the trial court that the complainants identified the appellant whom they referred to as Eliud or Sammy as the perpetrator. They knew him before as a friend to the uncle and the incident happened on several occasions.

The appellant complained that the prosecution failed to adduce any medical evidence in support of the charge. That allegation is not true because PW4, a doctor, examined PW1 and 2 and confirmed that they were injured in the vagina and labia majora which is evidence of penetration.

The law is that the offence of rape or defilement is not necessarily proved by DNA or medical evidence, but can be proved by way of oral or circumstantial evidence. In *AML v Republic (2012) eKLR*, the court stated “*The fact of rape or defilement is not proved by a DNA test but by way of evidence.*”

The same position was echoed in *Kassim Ali v Republic (MSA) Cr.A.84/2005* where the court said “*...Absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.*”

The appellant complained that the delay in reporting of the case was not explained. These children are orphans. They live with drunk and irresponsible grandparents and an uncle who had also turned against them. If it was not for the nuns who discovered this heinous act, it may have taken longer to discover.

In the end, I find no merit in any of the grounds raised by the appellant. The conviction is well founded and I affirm it.

The appellant also complained that the sentence was harsh.

As respects count 1, the complainant was 15 years old and under Section 8(3) Sexual Offences Act, if the victim of defilement is between 12 years and 15 years, upon conviction, one is liable to sentence of 20 years. The appellant was handed the minimum sentence of 20 years imprisonment.

On count II, the minor was only 10 years and under section 8(2) of the Sexual Offences Act, upon conviction, one is liable to life imprisonment. The court properly sentenced the appellant to life imprisonment on that count. The alternative charges were left in abeyance.

The sentences are lawful and this court has no discretion to intervene. The sentences were ordered to run concurrently.

The appeal is not merited and is hereby dismissed in its entirety.

Dated, Signed and Delivered at NYAHURURU this 30th day of May, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Appellant – present

Shiundu – Court Assistant