



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 58 OF 2018

MORRIS ORERO NYANGOKO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. S. Ouko Resident Magistrate in Migori Magistrate's Court Criminal Case No. 5 of 2015 delivered on 16/10/2018)

JUDGMENT

1. **Morris Orero Nyangoko**, the Appellant herein, was charged with the offence of **Defilement** contrary to **Section 8(1)(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 11th February 2018 at [particulars withheld], intentionally caused your penis to penetrate the vagina of TAO a girl aged 12 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 the victim one **TAO**. A friend to the victim's mother one **YBO** testified as **PW3**. A Senior Clinical Officer attached to Karungu Sub-County Hospital testified as **PW4**. **PW2** was the arresting officer one **No. 2008050431 APC Daniel Chacha**. The investigating officer one **No. 55639 PC Silas Lusweti** attached to Macalder Police Station who 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 the victim (PW1) whom I will refer to as '**the complainant**'.
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 16/10/2018 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 31/10/2018. Through **Messrs. E. Kisia & Co. Advocates**, the Appellant further filed a '**Draft Memorandum of Appeal**' in challenging the judgment on grounds that the trial court erred in not finding that the offence was not proved, there was no corroboration and that mitigations were not considered in rendering the life sentence.
7. Directions were taken and the appeal was disposed of by way of written submissions where **Mr. Kisia** appeared for the Appellant and expounded on the grounds of appeal. 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 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 **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. 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.

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 not contested in this appeal. The prosecution relied on a Certificate of Birth No. 6098303 which placed the age of the complainant at 11 years and 2 Months old. The complainant was hence 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 that there was no evidence of penetration as the evidence of PW4 was at variance with the medical documents. I have carefully perused and considered the documents and the evidence on record. The documents were the P3 Form for the complainant issued by the Karungu Police Post on 12/02/2018 and the treatment notes for the complainant from Karungu Sub-District Hospital dated 11/02/2018 at 11:30 pm. The notes captured the physical appearance of the complainant at the hospital and a detailed physical examination of the complainant's vagina. It was recorded that at the time of examination both the *labia majora* and *labia minora* were bruised. There was mucoid discharge at the vaginal opening suggestive of semen. The vaginal walls were bruised and hematized suggestive of penile penetration and that the hymen membrane was perforated. The complainant further underwent a laboratory high vaginal examination where the presence of spermatozoa was confirmed together with the presence of epithelial cells. A look at the P3 Form confirm similar injuries as those in the treatment notes. Respectfully, I do not see the alleged contradiction.

17. The complainant gave a narration of the events and how she was attacked and forced into a sexual act by a known assailant. The evidence of the complainant on penetration was hence corroborated by that of PW4 and the medical exhibits. Therefore, going by the evidence of the complainant coupled with the evidence of PW4 and 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:

18. The issue of identification was hotly contested as well. Counsel submitted that as the incident was alleged to have occurred at night then there was no evidence to connect the Appellant as the assailant and that the Appellant was mistaken amongst the group that went to assist the complainant. The issue of time was raised by PW3. It was her evidence that by around 7:00pm as she was at her business her nephew one **Paul Ogutu** (not a witness) went and told her that the Appellant had done something bad to the complainant. As PW3 rushed home she found the Appellant having been arrested by some youths and was asked to go home. It therefore means that the incident had long happened before PW3 learnt of the same at around 7:00pm.

19. The complainant did not talk of darkness. She testified how she went to look after their calves only to see one of them lying as if about to die. Perplexed, the complainant sought the assistance of three people, who included the Appellant and the complainant's teacher, who were passing near their home. That, the complainant was duly assisted and the teacher and the other person left leaving the Appellant behind. It was when the Appellant remained with the complainant that the complainant alleged that she was forced into a sexual act.

20. The complainant knew the Appellant well who hailed from their village and that everybody knew him as Orero. She further described the Appellant as one who used to shout when drunk. When the complainant managed to escape from the assailant she ran into the home of **Mama Beryl** (not a witness) and reported that she had been sexually assaulted by the Appellant and that Mama Beryl raised alarm. When PW3 eventually met the complainant at her co-wife's home it was the complainant who told her that the Appellant was the assailant and narrated the ordeal. PW2 also testified that when the Appellant was arrested by members of the public and escorted to the AP Post he interrogated the complainant who told him that she had been forced into a sexual act by the Appellant. PW5 also interrogated the

complainant who confirmed that the assailant was the Appellant.

21. The circumstances under which the incident occurred cannot be said to have been in the dark. The incident occurred well before 7:00pm and there was no suggestion that visibility was hampered in any way. It was the time where the complainant went to see how their calves were; she saw that one of them required assistance; saw her teacher in the company of the Appellant and another person; had the calf assisted and the ordeal then followed. I therefore find and hold that the incident occurred during day time and the complainant was able to clearly identify those she dealt with.

22. As to whether the Appellant was mistakenly identified, I find the evidence of the complainant consistent. The trial court did not make any adverse findings on the demeanor of the complainant. She withstood cross-examination and narrated the ordeal with precision and at length. Like the trial court, I find that the defence of *alibi* not to have outweighed the prosecution evidence as the complainant placed the Appellant at the scene. There was also the alleged grudge between the Appellant and PW3. The issue only came up at the defence stage when the Appellant was tendering an unsworn defence. The Appellant did not examine PW3 on their relationship when she testified therefore denied the prosecution an opportunity to interrogate the issue further more so from PW3. The issue was not even brought to the attention of the police so as to accord PW5 an opportunity to investigate the same in light of the allegations. I hence find the issue of grudge to be an afterthought and is hereby rejected.

23. I have carefully weighed the evidence and the defence by the Appellant. Taking caution as required in law since the complainant is the only identifying witness 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.

24. The Appellant was properly found guilty and convicted. The appeal on conviction hereby fails.

25. On **sentence**, the Appellant contended that the sentence was severe and did not take into account the mitigations tendered and that the court applied the mandatory life sentence. The **Sexual Offences Act No. 3 of 2006** is a pre-2010 statute and introduced a raft of mandatory, sole and/or minimum sentences in sexual offences. It is therefore one of those statutes which must be applied in light of the **Constitution** which was promulgated in 2010. The issue of mandatory and sole nature of sentences was well settled by the Supreme Court in the much celebrated case of **Francis Muruatetu & Another -vs- Republic 2017 eKLR** where the Court stated in part thus: -

.....On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare Section 204 shall, to the extent it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision.

.....Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right." (emphasis added).

26. Applying the foregone reasoning, the Court of Appeal in **Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR** while considering an appeal against life sentence imposed under **Section 8(2)** of the **Sexual Offences Act** had the following to say: -

.....In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) 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. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

*Needless to say, pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic**(supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.*

27. **Section 8(1)** and **(2)** of the **Sexual Offences Act** states as follows: -

8(1). A person who commits an act which causes penetration with a child is guilty of an offence

termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

28. It therefore goes without say that the mandatory life sentence imposed by **Section 8(2)** of the **Sexual Offences Act** cannot stand. However, that is not to say that a court cannot render a life sentence upon convicting an accused person where the victim is of the age of 11 years old and below. A court must always reserve its discretion to consider the circumstances of each case independently and set an appropriate sentence. What the **Constitution** contemplates is that the sentence of life imprisonment cannot be the only sentence as currently proclaimed by **Section 8(2)** of the Sexual Offences Act. A court has discretion to render a life sentence as one of the lawful sentences upon consideration of mitigations and properly directing its legal mind on the factors for consideration in sentencing. The appeal on sentence is hereby allowed for the reason that the trial court stated that it had no discretion in sentencing in view of the mandatory nature of **Section 8(2)** of the Sexual Offences Act. The life sentence is hence set-aside.

29. To enable this Court arrive at a fair and a balanced sentence I am of the very considered view that this is a case where a Pre-Sentence Report ought to be considered. Given the power of this Court to take additional evidence on appeal I hereby direct that a Pre-Sentence Report be filed for consideration.

30. Sentencing on 11th /07/2019.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of June 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Kisia Counsel for the Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant