REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 22 OF 2018

JEO..APPELLANT

VERSUS

REPUBLIC................................. RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat Magistrate

in Rongo Magistrate's Court Criminal Case S. O. A No. 22 of 2017

delivered on31/10/2006)

JUDGMENT

1. The Appellant herein, **JEO,** was charged with the offence of **Defilement** contrary to **Section 8(1)(3)** 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 day of August 2017 at [Particulars Withheld], unlawfully and intentionally caused your penis to penetrate the vagina of MA a girl aged 13 years old*'.'

3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

4. Six witnesses testified in support of the prosecution's case. **PW1** was the victim one **MA** A Clinical Officer attached to Awendo Sub-County Hospital testified as **PW2.** A niece to the victim one DSA testified as **PW3** whereas a village elder one **LO** testified as **PW4.** A brother to DSA and an uncle to the victim and who was also the victim's guardian one **GO** testified as **PW5**. The investigating officer one **PC Maimuna Makokha** attached to Awendo Police Station testified as **PW6**. The Appellant appeared in person during the trial was the victim's uncle. 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'**.

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 31/10/2017 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 preferred an appeal by filing a Petition of Appeal on 22/06/2018 (albeit out of time, but with leave of this Court) in challenging the judgment on the following four main grounds: -

1. THAT I pleaded not guilty to the charge.

2. THAT the prosecution failed to prove their case beyond reasonable doubts.

3. THAT the medical evidence adduced in Court did not disclose /prove penetration as one of the ingredients of defilement.

4. THAT the age of the complainant was not proved to be below the age of 18 years.

7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant 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 that none of the grounds tendered are holding. Counsel 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 hotly contested in this appeal. The Appellant contend that the age was not properly settled as the age assessment did not indicate the exact date of birth of the complainant.

13. The prosecution availed an Age Assessment Report in proof of the age of the complainant. The Report is dated 03/08/2017 and the age assessment was conducted at Awendo Sub-County Hospital by PW2 who is a Clinical Officer. PW2 used the Tunners Age Assessment criteria and physically examined the complainant including her breast development and pubic hair distribution. PW2 then settled for 13 years as the age of the complainant.

14. The Appellant contend that PW2 was to give the exact date of birth. Whereas the argument is desirable that may not be possible in age assessment. The assessment usually avails an approximate age as opposed to the exact date of birth. PW2 used a well settled medical criteria in the assessment and so indicated in the Report. His deduction was therefore based on a sound medical basis and was not arbitrary. I therefore find that the age of the complainant was rightly settled at 13 years old and the complainant was a minor 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. Penetration is hotly contested. The Appellant contend that there was no evidence of penetration since PW2 did not subject the pus cells allegedly in the Appellant's urine to a D.N.A. examination. My response to this argument has always been that D.N.A. examination may be one of the ways of proving the ingredient of penetration but cannot be said to be the sole one. The prosecution in this case relied on the evidence of the complainant, PW2, PW3, PW5 and PW6 in such proof.

19. The witnesses testified before the trial court and the court had an opportunity of observing their demeanour. Whereas an appellate Court is to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter, it must always bear in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and it should give allowance for that. The trial court evaluated the evidence of the witnesses and said the following about the complainant: -

> ***…..For the above reasons and having examined her demeanor in court I have no doubt in her evidence and I believe she was telling the truth. …***

20. Be that as it may, the complainant narrated the events that unfolded on the 01/08/2017. She stated that as she was washing some clothes

at the river and near the house of the Appellant who was her uncle, the Appellant called her into his house and requested her to clean his house. While inside the house the assailant grabbed her, undressed her and himself as well and had sex with her. The complainant clearly explained the act she said was sex to be the insertion of the assailant's penis into her vagina. The assailant then closed the door from outside and left.

21. PW3 was informed that the complainant was inside the house of the Appellant and immediately proceeded there with her other sister. PW3 found the door to the Appellant's house locked from outside, but without a padlock and opened it. PW3 entered into the house and found the complainant weeping while naked. PW3 asked what had happened and the complainant narrated. PW3 then examined the complainant and noted that she was bleeding from her private parts and took her home.

22. When PW5 eventually received the news of what had happened to the complainant he took her to Awendo Police Station and reported the incident. As it was late into the night PW5 was asked to return to the station early the following morning and he obliged. The following morning PW6 and PW5 escorted the complainant to Awendo Sub-County Hospital where the complainant was examined and treated. Treatment notes were filled including a Post Rape Care Form which were produced by PW2 together with the P3 Form and the Age Assessment Report. It was PW2 who filled in the P3 Form.

23. PW2 testified on how the complainant was examined and treated. He stated that upon examination of the complainant's vagina there were bruises on the *labia minora* which was proof of a forced penile penetration. There was also the presence of puss cells in the vagina which was a further proof of a sexual act. Similar puss cells were found in the urine of the Appellant on examination. Based on the findings PW2 concluded penetration.

24. The evidence of the complainant, PW2 and PW3 therefore went a long way into proving penetration. I therefore 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:

25. The issue of identification was contested given that the Appellant denied committing the offence. The Appellant admitted in his defence that he was at his house at around 09:30am which was the time the complainant alleged the incident took place. PW3 as well so confirmed the time. The Appellant also admitted calling the complainant and sent her to go buy breakfast for him. That, he thereafter took his breakfast and returned to work only to return to his home around 05:00pm.

26. The relationship between the Appellant and the complainant is not denied. The complainant stated that the Appellant used to call and send her on many previous occasions hence she was used to him. The incident happened in the morning and there is no evidence that visibility was then hindered. Further, PW3 found the complainant inside the house of the Appellant while the door was locked from outside.

27. The complainant also readily gave the name of the Appellant when she was asked of what had happened by PW3 and also when she was confronted by PW5. She 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. (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).

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 by way of recognition 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: -

29. The Appellant further raised the issue that the scene was not visited by the police. Whereas that is the position, I must say that in the circumstances of this matter the failure did not occasion any miscarriage of justice on the Appellant neither did it water down the prosecution's case as the prosecution was able to prove the commission of the offence even without the scene visit. However, I must reiterate that it is always desirable and important for an investigator to visit the crime scene and in appropriate cases such failure may led to an adverse inference on the prosecution.

30. On the contention that the complainant's under pant was not produced in evidence I find that since there was no indication from the medical personnel that the under pant contained any iota of evidence in support of the charge its failure to be produced did not therefore in any way affect the prosecution's case.

31. In sum I find and hold that the Appellant was properly found guilty and convicted of the offence of defilement. The appeal on conviction hereby fails.

32. On **sentence**, the Appellant was sentenced to 20 years' imprisonment sentence under **Section 8(3)** of the **Sexual Offences Act**. The record is however clear that the court did not give the sentence because it was the minimum sentence in law. The court stated that it had considered the mitigation by the Appellant and took the age of the complainant into account in arriving at the sentence. That being the case this Court, being an appellate Court, must act within the settled legal principles in appeals against sentence.

33. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in

sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

34. Looking at the nature of the offence and the relationship between the complainant and the Appellant and in consideration of the Appellant's mitigations I do not see how the sentencing court erred in arriving at the sentence of 20 years' imprisonment. The appeal on sentence is likewise dismissed.

35. The upshot is that the appeal is unmerited and is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 26th day of July 2019.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

JEO, 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