REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 35 OF 2018

WILSON OLUOCH OKINYI.....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 No. 543 of 2015 delivered on 28/06/2017)

JUDGMENT

1. The Appellant herein, **Wilson Oluoch Okinyi,** was charged with the offence of **Defilement** contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006. The Appellant denied the offence.

2. The particulars of the offence of defilement were that '*on the 10th day of August 2015 at [particulars withheld], intentionally caused his penis to penetrate the vagina of BA. a girl aged 14 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 **B.A.** The mother to B.A. testified as **PW2**. **J.O.** who was a neighbour to B.A. and **V.A.** who was a cousin to B.A. and who were both in the company of B.A. testified as **PW3** and **PW4** respectively. A Clinical Officer attached to Awendo Sub-County Hospital testified as **PW5.** The investigating officer one **Corp. Stephen Mulumba** attached to Awendo Police Station testified as **PW6**. 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'**.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and remained silent. Thereafter the court rendered its judgment on 28/06/2017 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 26/07/2018 (albeit out of time, but with leave of this Court) in challenging the judgment on the following six main grounds: -

1. THAT I pleaded not guilty to the charge.

2. THAT the learned magistrate failed to consider that the medical evidence adduced by PW1 was not tight and cogent to warrant a conviction.

3. THAT the learned trial Court failed in its findings to convict without complying to Section 200 of the CPC.

4. THAT the trial court erroneously convicted me by failing to find that the age of the victim was not exhaustively established beyond reasonable doubts to assist in reaching at a fair decision.

5. THAT there was no further medical examination conducted to ascertain my complicity in the alleged offence in question.

6. THAT my defense statement was not given due consideration whereas the same was capable of awarding for an acquittal.

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 challenged the sentence as most severe and excessive and that the court did not take into account the sentencing

guidelines, that the Certificate of Birth was not authenticated, that the medical evidence did not disclose any penetration, that the complainant's garments were not produced, that the prosecution witnesses were coached, the prosecution did not avail the evidence it intended to rely on prior to the trial and that charge was not explained to him and relied on **Charo vs. Rep (1982) KLR 308**. The Appellant urged this Court to re-evaluate the evidence and find that the appeal is merited that the conviction be 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 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 was 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 Certificate of Birth was not authenticated. If I understand the Appellant correctly he contends that the copy of the Certificate of Birth for the complainant did not comply with the law on secondary evidence.

13. I have carefully perused the Certificate and the record. When PW2 testified she informed the court that she had a copy of the Certificate of Birth for the complainant and the same was admitted as an exhibit.

14. **Part III** of the **Evidence Act, Cap. 80** of the Laws of Kenya (**Sections 64** to **78A** inclusive) provides for documentary evidence. **Section 64** provides that the contents of documents may be proved either by primary or by secondary evidence. **Section 66** defines what constitutes secondary evidence and **Section 67** states as follows: -

> ***Documents must be proved by primary evidence except in the cases hereinafter mentioned.***

15. **Section 68** completes the latter part of **Section 67** by giving **seven** instances where the law allows the production of secondary evidence. In essence the law will only allow secondary evidence within the confines of **Section 68.** For ease of understanding of this discussion I here below reproduce **Section 68** verbatim: -

> ***(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases-***
>
> ***(a) when the original is shown or appears to be in the possession or power of -***
>
> ***i) the person against whom the document is sought to be proved; or***
>
> ***ii) a person out of reach of, or not subject to, the process of the court; or***
>
> ***iii) any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;***
>
> ***(b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;***
>
> ***(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from h9is own default or neglect, produce it in a reasonable time;***
>
> ***(d) when the original is of such a nature as not to be easily movable;***
>
> ***(e) when the original is a public document within the meaning of Section 79 of this Act;***
>
> ***(f) when the original is a document of which a certified copy is permitted by This Act or by any written law to be given in evidence;***
>
> ***(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.***

(2) (a) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.

(b) In the case mentioned in paragraph (b) of subsection (1) of the section, the written admission is admissible.

(c) In the case mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence is admissible.

(d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents.

16. In this case PW2 only stated that she had a copy of the Certificate of Birth and the same was admitted as an exhibit. Being a copy thereof, the prosecution was under a legal duty to lay a basis for production thereof by aiding PW2 to explain the absence of the original Certificate of Birth for the complainant and thereafter the prosecution was to apply for the production of the secondary evidence with liberty to the Appellant to respond thereto. However, that did not happen. Therefore, the effect of failure to lay a legal basis for secondary evidence is that such evidence cannot stand and is for rejection. I hence expunge the evidence on the copy of the Certificate of Birth for the complainant and the copy thereof from the record.

17. Having done so, the record still has reliable evidence on the age of the complainant. The complainant herself stated that she was born in 2001 and that she was 14 years old in 2016 when she testified. PW2 who was the mother of the complainant stated that she gave birth to the complainant on 05/07/2001. The P3 Form also gave the apparent age of the complainant at page 3 thereof as 14 years old as well as the Post Rape Care Form which were both properly produced in evidence.

18. This Court therefore has no doubt that from the record the age of the complainant is well settled at 14 years old as at the time the offence was allegedly committed and that the complainant was by then a minor within the meaning of the law.

(b) <u>On the issue of penetration:</u>

19. **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.

20. This position was fortified in the case of **<u>Mark Oiruri Mose vs R (2013) eKLR</u>** 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. <u>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</u>….

(emphasis added).

21. Later the Court of Appeal, then differently constituted, in the case of **<u>Erick Onyango Ondeng v. Republic (2014) eKLR</u>** 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.

22. Penetration is hotly contested in this appeal. The Appellant contends that there was no evidence of penetration since PW5 did not appreciate that it is not only a penis which can cause penetration into a girl's vaginal hence his conclusion that there was a penile penetration lacked any basis.

23. The Appellant's argument sounds solid from the outside. However, PW5 arrived at the conclusion after examining the complainant and undertaking tests. There was a detailed Post Rape Care Form which was filled and produced in evidence. Several injuries were confirmed including the loss of hymen, bruises on the *labia majora* and *labia minora*, active bleeding from the vagina among others. Further, the examinations were conducted only 4 hours after the ordeal. PW5 also interviewed the complainant. It cannot hence be said that the conclusion by PW5 that the complainant's vagina was penetrated by a penis was without any basis and the argument fails.

24. The witnesses also 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 found the same to be consistent and well corroborated.

25. The Appellant further contends that PW3 and PW4 being minors were unreliable and were coached to give similar evidence. I must start by saying that the law provides safeguards upon which witnesses must testify within and trial courts are vested with powers to ensure that the ends of justice are met. The essence of a criminal trial is to accord a constitutionally-guaranteed fair opportunity to an accused person facing a charge. A criminal trial is not aimed at punishing an accused person until one is found guilty. Among the safeguards in a trial relate to how the evidence of minors is to be taken. The law for calls for a *voir dire* examination of witnesses who are minors so as for a court to determine

the whether the minor shall give sworn or unsworn testimony. The rationale of this requirement is to accord the court an opportunity to assess whether the minors know the essence of being truthful and if so whether they will so undertake to be truthful before court and to also ascertain whether the minor understands the nature of an oath. It is however now settled courtesy of the Court of Appeal that there is no need of carrying out such a *voir dire* examination for a witness of 14 years and above.

26. Any witness, including a minor, must be examined-in-chief, cross-examined by the accused person or the Counsel for the accused person and may be re-examined if need be. One of the reasons for such is to accord an opportunity to the court to determine the demeanor of the witness. In this case PW3 and PW4 were subjected to *voir dire* examinations although it was not so necessary for PW3 who was aged 16 years old. In both instances the court found that they were intelligent and understood the importance of telling the truth and the meaning of an oath. They both gave sworn testimonies.

27. The trial court did not make any adverse notes on any of the witnesses. Likewise, the Appellant did not raise any issue with the way the *voir dire* examinations were conducted or how the minors testified. The Appellant was accorded an opportunity and cross-examined all the witnesses and did not raise any such concerns. I therefore do not agree with the Appellant's submission that since the minors gave similar evidence then they must have been coached. I say so because in essence PW3 and PW4 did not give similar evidence. For instance, PW3 stated that he knew the Appellant while PW4 stated that she did not know the Appellant. By any measure such testimonies cannot be said to be similar. The ground therefore fails.

28. A closer look at the totality of the evidence of the complainant, PW2 and PW5 proves penetration. I therefore find no difficulty in holding, which I hereby do, that peetration into the complainant's vagina by a penis was proved.

c) <u>On whether the Appellant was the perpetrator:</u>

29. The issue of identification was contested given that the Appellant denied committing the offence. The Appellant opted to remain silent after he had been placed on his defence. However, that is not to say that the prosecution's burden to prove its case beyond any peradventure was lessened.

30. PW3 knew the Appellant whom he had previously saw when he was with his friend Marcel. PW3 so confirmed when the Appellant asked the complainant, PW3 and PW4 whether any of them knew him when the Appellant caught up with the three minors when they had gone to collect firewood in the hills. Whereas the complainant and PW4 did not know the Appellant they nevertheless saw him clearly as it was during the day and the complainant even remained with the Appellant for a longer period after the Appellant had sent PW3 and PW4 away. All the minors also identified the Appellant in court.

31. I am alive to the fact that the sexual assault happened when PW3 and PW4 were away and that the complainant was the sole witness thereto. That being so, the trial court complied with the calling in **Section 124** of the **Evidence Act** by stating the reasons why it believed that the complainant was truthful.

32. From the foregone analysis I have no doubt in my mind that there were no circumstances that may have led to any doubtful identification of the Appellant by the complainant, PW3 and PW4 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.

<u>Other issues raised by the Appellant: -</u>

33. There are four other issues which the Appellant raised and which I must deal with. The first one is the contention that the prosecution failed to disclose the evidence it had against him prior to the trial and as such the trial was fatally flawed. The record is clear that when the Appellant took plea on 19/11/2015 the prosecution informed the court that it had availed all the witness statements to the Appellant, then the accused person. The accused person did not raise any objection either at that point in time or any time during the entire trial. Therefore, the contention can only be regarded as unsubstantiated and is hereby rejected.

34. The other issue is that the charge was not explained to the Appellant and as such the trial was flawed. The Appellant denied the charge and a plea of not guilty was entered. The Appellant participated in the entire trial and accordingly examined witnesses in full glare of challenging a defilement charge. The proceedings were conducted in English and duly translated into Dholuo language which are the same languages the appeal was prosecuted in before this Court. The ground seems to be an afterthought and fails.

35. There was also the ground that **Section 200** of the **Criminal Procedure Code** was not complied with. Whereas the trial was initially conducted by a Magistrate who was transferred before its conclusion, the record is clear that the remainder of the trial was handled by another Magistrate who complied with **Section 200** of the **Criminal Procedure Code**. The subsequent Magistrate explained the provisions of **Section 200** of the **Criminal Procedure Code** and called upon the Appellant to make a choice and the Appellant elected to proceed on with the trial from where it had reached. The court made that order accordingly.

36. Although the record is silent on whether the Appellant wished to recall any of the witnesses who had previously testified before the former Magistrate, the record is clear that the Magistrate explained the contents of **Section 200** of the **Criminal Procedure Code** to the Appellant. The lapse by the court not to indicate whether the Appellant wished to recall any witnesses did not therefore visit any failure of justice given that the requisite law had been fully explained to the Appellant and the Appellant did not make such a request during the trial. The lapse is hence curable under **Section 382** of the **Criminal Procedure Code.**

37. The Appellant also contended that the failure to produce the complainant's garments was fatal to the trial. I find that since there was no indication from the medical personnel that the complainant's garments contained any iota of evidence in support of the charge, then the failure to produce the alleged garments did not in any way affect the prosecution's case.

38. 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.

39. 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.

40. The Appellant contends that the court did not take into account the Sentencing Guidelines in reaching the decision to render the sentence. On the other hand, the court stated that it had considered the mitigation by the Appellant, took the age of the complainant into account as well as the fact that the Appellant is a first offender, considered the lifelong trauma on the complainant and the need for a deterrent sentence in arriving at the sentence. The court therefore considered the sentencing principles as contained in the Sentencing Guidelines even though it did not expressly state as such.

41. Having said so, I am alive to the fact this is Court is an appellate Court. That being the case this Court must act within the settled legal principles in appeals against sentence. The Court in **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.

42. Looking at the nature of the offence and the way the Appellant executed the offence in such a ruthless manner and the lifelong trauma visited upon the complainant 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.

43. 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:

Wilson Oluoch Okinyi, 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