



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL APPEAL NO. 48 OF 2016**

**D K K O.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal arising from the conviction and sentence by*

*Hon. C. M. Kamau, Resident Magistrate in Rongo Senior*

*Resident Magistrate's Criminal Case No. 551 of 2015*

*delivered on 28/09/2016)*

**JUDGMENT**

1. The events constituting the offences in this case once again brings into focus how young children, and especially the girl child, can be vulnerable in the hands of people they know to be very close relatives and therefore trust and believe to be safe in their company.
2. When **D K K O**, the Appellant herein, was initially charged with the offence of incest contrary to **Section 20(1)** of the **Sexual Offences Act** No. 3 of 2006 and in the alternative committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006, he denied both counts. The charges were later substituted with the consent of the court to the offence of defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006 and in the alternative committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. The appellant again denied both counts.
3. The particulars of the offence of defilement were that on the 12<sup>th</sup> day of October 2015 at [particulars withheld] village in Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of L.M.A.B., a child aged 13 years.
4. The appellant was subsequently tried and convicted on the main count of defilement and sentenced.
5. The prosecution called a total of six witnesses. The minor testified as **PW1** (hereinafter referred to as '**the complainant**') whereas her father, **A B B**, testified as **PW2**. **PW5** was a police officer attached to Okumba Police Post and who was also the arresting officer. **PW4** was a Clinical Officer from Rongo Sub-County Hospital. **PW3** was **No. 88872 Corp. Brigid Asanta Baraza** attached at Kamagambo Police Station at the Children and Gender Desk. **PW3** was the investigating officer. It is on record that the appellant is a brother-in-law to **PW2** in that **PW2** is married to the appellant's sister. The appellant was hence an uncle to the complainant. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except for the complainant.
6. The prosecution's case was that in the morning of 12/10/2015, the complainant who had gone to visit her grandmother at xxxx village was on her way back to her home in xxxx. She woke up early at around 06:00am and walked for around two hours to board a bus at xxxx Bus Stage, which is along the main Kisii – Isebania road. She successfully managed to board the vehicle at xxxx, but before the vehicle left the appellant surfaced.
7. The appellant told the complainant that she was required back by her grandmother and asked her to disembark and offered to escort her back. The appellant then talked on his mobile phone. The complainant obliged. She disembarked and the two began their way back. The appellant instead used a short-cut which they had to cross a river at some point. They walked and successfully crossed the river and came to farm with guava trees. It is at that point where the appellant grabbed the complainant by the hand and removed the clothes the complainant wore which were a wrapper (lesso), a skirt, a biker and a panty. She only remained with her blouse. The appellant then laid the complainant on the grass besides the path as he also unzipped his trousers and removed his penis. He then laid on top the complainant and inserted his

penis into her vagina and began having sexual intercourse. The complainant felt pain and screamed. She was told to stop screaming but she so screamed more. The appellant then stopped, got off and went to the road. The complainant noticed she was bleeding. She put on her clothes and on reaching at the road she found the appellant waiting who threatened to beat her unless she gave him all the money she had. The complainant obliged and gave him the one hundred shillings she had as her fare back home. The appellant then left as the complainant struggled to walk back to her grandmother's home in pain.

8. The complainant managed to get a good Samaritan who escorted her to xxxx Primary School and advised her to report the incident to the police at Okumba. The complainant did so, and the police promised to assist her. The police advised her return to her grandmother's home. Reaching home, she found the appellant there who asked her to prepare some food for him, but she declined. The appellant then armed himself with a panga and left. Worried, the complainant decided to go back to the police and on the way, she met her grandmother returning home with a police officer. They all returned home and the Clan elder also went there.

9. The police took the clothes she had worn during the ordeal which were then blood-stained, and she led them to the scene where they found her wrapper still on the ground and blood-stained. The complainant was then led to the Migori County Referral Hospital where she was treated. The complainant identified all the clothes at the trial.

10. PW2 was called by a brother to the appellant in the evening of 12/10/2015 and informed of the incident. He then went to xxx, recorded his statement with the police at Okumba Police Post and then went to Kamagambo Police Station where he saw the complainant under police care. PW2 was given an order of arrest of the appellant which he delivered to the Assistant Chief.

11. It was PW5 who dealt with the case at Okumba Police Post and recovered the exhibits. He then arrested the appellant and handed him over to PW3 who charged him accordingly. PW4 filled in the P3 Form at Rongo Sub-County Hospital on 13/10/2015 upon relying on his physical examination on the complainant and the other medical documents from the Migori County Referral Hospital. He saw a tear which was bleeding in the complainant's vagina but could not ascertain whether the hymen was broken as the private part was swollen and so painful that the complainant resisted any intrusive examination. Other usual tests including urinalysis, pregnancy and VDRL were undertaken and all yielded in the negative. Coupled with the other medical notes, which were treatment notes and a Post Rape Care Form, PW4 concluded that there had been a penile penetration into the complainant's vagina. He produced all the documents as exhibits.

12. PW4 also assessed the age of the complainant and settled for 12 years old. He also produced the requisite P3 Form as an exhibit.

13. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant opted to and gave sworn defence and denied any involvement in the commission of any of the alleged offences. He of essence denied knowing the complainant and explained how he was arrested by the police who were led by his brother whom they had serious family differences over a land issue. He discredited the prosecution's evidence and alleged that he was being fixed by his family over a land dispute. He prayed that the charges be accordingly dropped and called no witnesses.

14. By a judgment rendered on 28/09/2016 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 40 years imprisonment.

15. Being dissatisfied with the conviction and sentence, the appellant timeously lodged an appeal and in his Petition of Appeal filed on 10/10/2016 challenged the conviction and sentence on the following grounds of appeal: -

**1. THAT the learned trial magistrate grossly erred both in law and facts in conviction and sentencing I the appellant without centering that I pleaded not guilty to the offence charged and plea of not guilty entered.**

**2. THAT the learned trial magistrate grossly erred in law and facts in convicting and sentencing I the appellant on the offence charged when the salient ingredients were not established to the required standard in the entire proceedings.**

**3. THAT the learned trial magistrate further grossly erred both in law and facts in convicting and sentencing I the appellant without considering that the respondent case was not proved beyond any reasonable doubts.**

**4. THAT the learned trial magistrate further grossly erred both in law and facts to misapprehend the tenor and/or otherwise extend the nature of offence contrary to the provisions of section 8(1) and (3) of the sexual offences Act No. 3 of 2016.**

**5. THAT the learned magistrate further grossly erred both in law and facts convicting and sentencing I the appellant in the absence of the key witnesses whom were not summoned to come and clear doubts against the respondent case.**

**6. THAT the learned trial magistrate further grossly erred both in law and facts convicting and sentencing I the appellant on the contradictory evidence on the entire proceedings.**

**7. THAT the learned trial magistrate further grossly erred both in law and facts by not warned himself on the dangers of the offence charged before delivering his judgment by not complied with the provision of section 43 (1) a, b and c which states inter – alia thereof.**

**8. THAT the learned trial magistrate's judgments' are not supported with the evidence on record on entire proceedings at any rate the judgment is wrought and / or fraught hence to be taken into consideration.**

16. The appellant further filed supplementary grounds which expounded the foregone grounds. The appeal was heard by way of written submissions where the appellant reiterated his innocence. The State opposed the appeal and prayed that the same be

dismissed.

17. The role of this Court as the first appellate Court 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, analyze 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.

18. 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 written submissions

19. 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. On looking at those aspects in this judgment, this Court shall consider each of them.

**(a) On the age of the complainant:**

20. The age of the complainant was not contested in this appeal. The same was settled by the age assessment report produced by PW4 which assessed the complainant's age as 12 years old. The complainant was hence a minor in law.

**(b) On the issue of penetration:**

21. 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.'**

22. 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).

23. 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."**

24. Dealing with this issue, I will revert to the record. The complainant gave sworn testimony. She narrated the events as they unfolded between herself and the appellant. She vividly took the court through what happened in the guava farm as the two were on their way back to the complainant's grandmother's home. She was grabbed by the appellant thereto, laid on the ground, undressed, and inserted with a penile organ in her vagina and they engaged in a sexual intercourse until she screamed out of pains. That description of the events reveals that the complainant was aware of what was happening; a sexual intercourse.

25. The complainant was taken to Migori County Referral Hospital where she was examined, treated and Post Rape Care Form filled. She was later referred to Rongo Sub-County Hospital where she was re-examined, and a P3 Form filled by PW4. The Post Rape Care Form filled at the Migori County Referral Hospital on 13/10/2015 upon examination of the private parts showed that the complainant had lacerations on the *labia minora* and that the hymen was ruptured. She was also bleeding. The bleeding was also confirmed by PW4.

26. Both PW4 and the medical officer who filled in the Post Rape Care Form opined that there was a penetration into the complainant's vagina. The appellant however contested that the medical evidence did not state the organ used in the penetration and as such the records are incomplete and should not be used in determining the case. It is true the medical records did not so reveal the organ of penetration and that is how it was supposed to be otherwise that additional information would amount to hearsay evidence which is inadmissible evidence in law. As to the organ used, the complainant's evidence was clear that it was a penis.

27. From the above analysis and on an evaluation of the evidence of the complainant, PW4 and PW5 and the exhibits on record, this Court is satisfied that there was a penile penetration into the complainant's vagina. Penetration was hence proved.

**c) On whether the appellant was the perpetrator:**

28. The appellant vehemently denied any involvement in the alleged offence and contended that he was being framed because of a family grudge over a land matter. From the record, the evidence touching on the appellant was mainly by the complainant. It was hence a single-witness evidence which ordinarily calls for corroboration except in sexual offences where a conviction can stand even without any corroboration (See: **Section 124** of the **Evidence Act**, Cap. 80 of the Laws of Kenya).

29. Whereas the complainant alleged to know the appellant so well as her uncle (a brother to her mother), the complainant stated that he did not know her at all. The complainant described the relationship between the appellant and her mother so well. PW2 reiterated that the appellant was a brother to his wife, a fact which the appellant did not deny. The appellant admitted in his defence that his mother was the complainant's grandmother which evidence corroborated what the complainant had stated. It is therefore clear that there was a family relationship between the appellant, the complainant and PW2.

30. As to whether the complainant knew the assailant as the appellant, going by the said family relationship and the way the complainant described what happened from her encounter with the person at the xxx stage to how the ordeal unfolded, there is no doubt that the complainant was quite sure of whom she was dealing with.

31. Further, the offence was committed in broad daylight. The complainant and the assailant walked together for a while before the incident occurred. Naturally, they must have talked along the way. Even after the incident the assailant confronted the complainant and took away her money. The complainant also saw the assailant at her grandmother's home after she had reported the matter to the police.

32. The trial court also dealt with the issue and on evaluation of the evidence alongside the defence it was satisfied that it was the appellant who was the perpetrator of the offence.

33. I have carefully revisited the evidence on record and likewise find that the complainant was candid and vividly narrated the events as they unfolded. She managed to place the appellant at the scene of the crime as the assailant. I therefore agree with the analysis by the trial court on this issue and having equally considered the defence which I am unable to agree with since there is no link between the land dispute and the parties involved and how the incident was used to fix the appellant since it was only the complainant who firmly described and named the assailant immediately after the ordeal to the police even before meeting any family member.

34. I now return a finding that it was the appellant who sexually assaulted the complainant.

#### **On other issues raised on appeal: -**

35. On the issue that the court did not warn itself in relying on evidence of a single witness, I must say that **Section 124** of the **Evidence Act** describes how a court dealing with a sexual offence is to treat the evidence even in cases where the complainant is the only witness. The judgment is clear that the court fully complied with the legal tenets as required. The evidence was hence properly handled.

36. On the submission that the appropriate offence to have been preferred was **incest** under **Section 20(1)** of the **Sexual Offences Act** instead, the answer thereto lies in several reasons. One of the reason may be the way **Section 20(1)** of the **Sexual Offences Act** is tailored. The section instead does not expressly use the name 'uncle' but instead it uses the name 'niece'. Further, **Section 22(2)** of the **Sexual Offences Act** defines who an 'uncle' is but does not define who a 'niece' is. That is however not the position with **Section 21** of the **Sexual Offences Act** (*incest by female persons*) which clearly names an 'uncle'. Whereas the two names refer to the same relationship an investigator who prefers a charge against a person may not wish to wallow in the land of interpretation and easily settles on the more direct **Section 8** of the **Sexual Offences Act**.

37. Another reason may be the choice by an investigator and the prosecutor. It purely remains within the discretion of an investigator and the prosecutor to prefer any criminal offence against a person as long as the offence is known in law. That aside, the offence settled for must be proved beyond any reasonable doubt. Further, the choice may also be because of the sentence. For instance, on conviction, one charged under **Section 20(1)** of the **Sexual Offences Act** is liable to 10-year-imprisonment whereas the sentence for the one charged under **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** is a minimum of 20 years imprisonment. A prosecutor may opt for an offence with a serious sentence.

38. A further argument may be found in **Section 179** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya which provides for conviction on minor offences although not formally charged with as long as there is evidence to prove the minor offence. The sentence under **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** is a minimum of 20 years imprisonment whereas the sentence on conviction under **Section 20(1)** of the **Sexual Offences Act** is a minimum of 10 years imprisonment. It can hence be argued that if the offence of defilement is not proved but instead the offence of incest is proved a court may as well convict on the offence of incest hence the investigator's choice for the serious charge instead.

39. I therefore find and hold that the preference of the charge of defilement instead of the charge of incest by the investigator and the prosecution did not prejudice the appellant in any way.

40. As to whether all potential witnesses were called to testify, **Section 143** of the **Evidence Act**, Cap. 80 of the Laws of Kenya gives the prosecutor the discretion to choose the witnesses to testify. Not every witness interrogated must testify before court as long as the prosecutor has marshalled sufficient evidence to prove the case. However, if a crucial witness does not testify without any justification then an inference is made that the evidence would have been adverse to the prosecution. (See the cases of **Bukenya & Others -versus- Uganda (1972) EA 549** and **Nguku -versus- Republic (1985) KLR 412**). In this case, there was sufficient evidence adduced to support the charge and the adverse inference is not demonstrated.

41. As the appellant submitted that there were contradictions and inconsistencies on the record, I must state that I have carefully addressed my mind on the record. The alleged contradictions, if any, were adequately explained and reconciled by the court. Indeed, they were of a minor nature and cannot be said to have adversely affected the final finding of the court. In so finding, I echo the words of the Learned Judge in **R vs Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** when he stated thus: -

***"...It is trite law that minor discrepancies and contradictions should not affect a conviction."***

In any event the provisions of **Section 382** of the **Criminal Procedure Code Cap. 75 of the Laws of Kenya** safely comes into play.

42. Having considered all the grounds challenging the conviction, this Court finds that the appellant was properly found guilty and convicted of the offence of defilement.

43. On sentence, the appellant contends that the 40-year imprisonment term is excessive, harsh and very punitive. The offence of defilement under which the appellant was charged attracts the sentence under **Section 8(3)** of the **Sexual Offences Act**. That sentence is a minimum of 20 years imprisonment. The sentencing court upon receiving mitigations and in considerations of the facts of the case handed down the impugned sentence.

44. 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 upon in 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.

45. Revisiting the circumstances surrounding the commission of the offence herein and the mitigations tendered I do not see how the sentencing court can be faulted. The appellant was an uncle to the complainant and hence in a position of authority and trust. The complainant was rest assured that she was safe in the company of the appellant. What happened cannot be expected of an adult on an innocent 12-year-old girl. I do not see how I can fault the exercise of discretion by the sentencing court. The appeal on the sentence is unmerited as well.

46. The upshot is that the appeal is not merited. It is hereby dismissed, and the decision of the trial court is hereby affirmed.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of February 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**D K K O**, the Appellant in person.

**Miss Monica Owenga**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Miss Nyauke** – Court Assistant