REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 28 OF 2017

ASARIAH ODHIAMBO AGAO.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Lagat, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 258 of 2015 delivered on 13/09/2017)

JUDGMENT

Introduction: -

1. **Asariah Odhiambo Agao,** the Appellant herein, was arraigned before the Senior Resident Magistrate's Court at Rongo on 09/07/2015 and faced the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. He denied both charges.

2. The particulars of the offence of defilement were that on the 4th day of July 2015 at around 0300Hrs within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of M A, a child aged 13 years. The appellant was subsequently tried and convicted on the main count of defilement and sentenced.

The Criminal Case: -

3. The prosecution called a total of five witnesses. The minor testified as **PW1** (hereinafter referred to as **'the complainant'**) whereas her mother, **J A**, testified as **PW2**. **PW3** was the Area Chief for North Kamagambo Location who led the operation that ended up with the arrest of the appellant herein. **PW4** was a Clinical Officer from Rongo Sub-County Hospital. **PW5** was **No. 56625 PC(W) Maliline Kemboi** attached at Kamagambo Police Station who testified on behalf of Corp. Brigit Asanta Baraza who was the investigating officer but had been transferred. 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.

4. The prosecution's case was that PW2 had attended a funeral at their neighborhood in the company of the complainant in the night of 04/07/2015. That, PW2 later returned home and left the complainant at the funeral in the company of her two brothers. That, at around 03:00am the complainant decided to return home in the company of one Awuor (not a witness), a girl who was a relative to the appellant. That, as they walked home the appellant followed them and on catching up, held their hands. He escorted Awuor to her home and remained with the complainant. He took her to the nearby Baptist Academy and passed through the gate which was open into a classroom. The appellant then removed the clothes she wore and laid her on the floor, he also undressed and inserted the organ he uses for urination into her vagina. It was painful, and the act continued for a while. She bled. Her clothes, which she identified at the trial, were blood-stained.

5. The appellant then told the complainant not to inform her mother (PW2) of what had happened and promised to give her money once he worked. They parted ways. The complainant while crying rushed home and immediately told PW2 what the appellant had done to her. PW2 took the complainant to the appellant's home and met the appellant's mother but not the appellant. The appellant's mother denied her son's involvement in the alleged act. PW2 and the complainant began their journey back home. On the way they met the appellant riding his motorcycle from the direction of Baptist Academy. It was around 04:00am but there was sufficient moonlight to enable PW2 and the complainant recognize the appellant. On seeing them, the appellant branched off the road and sat under a tree. The appellant then called PW2 and PW2 asked him why he had defiled the complainant. The appellant threatened to beat up PW2 and they parted ways.

6. Shortly on PW2 and the complainant reaching home, the appellant also arrived in the company of his mother. They discussed the matter but did not reach any consensus. PW2 took the complainant to Rongo Sub-County Hospital where she was examined and treated. The appellant followed them to hospital and demanded to be examined as well but he was told that the equipment for such purposes was not functional. PW2 thereafter reported the matter to the police.

7. Police investigations began, and the appellant was arrested through an order of arrest which was effected by PW3. The appellant was then charged accordingly. The police issued a P3 Form which was filled and obtained treatment documents which were produced in evidence by PW4, the Clinical Officer who attended to the complainant at the hospital. PW4 also assessed the age of the complainant. Before PW5 testified the then judicial officer handling the case was transferred, and the appellant had no objection to the case proceeding from where it had reached before the other judicial officer who took it over. PW5 then testified and produced the statement of the initial investigating officer and a copy of the investigating diary as exhibits.

8. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant opted to and gave unsworn defence. He sought for forgiveness in that he had caned the complainant, who was his brother's daughter, after the complainant had gone to a disco and that PW2 was not happy of that. He called no witnesses.

9. By a judgment rendered on 13/09/2017 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 20 years imprisonment.

The Appeal: -

10. Being dissatisfied with the conviction and sentence, the appellant timeously lodged an appeal through **Messrs. Agure Odero & Company Advocates** who filed a Memorandum [Petition] of Appeal filed on 22/09/2017 alongside an application for bond pending the hearing and determination of the appeal. Upon concurrence of the parties and the Court, the application was abandoned, and the main appeal was heard.

11. The appellant challenged the conviction and sentence on the following grounds of appeal: -

> ***1. THAT the learned trial Senior Resident Magistrate erred both in law and fact by relying on the evidence of PW1 and PW2 without a corroboration of one Awuor and the complainant two brothers who were being purported to have been in the funeral on 4/7/2015.***
>
> ***2. THAT the learned trial Senior Resident Magistrate erred both in law and fact by failing to corroborate the evidence of a neighbor of purported funeral, and even the name of the purported neighbor was not disclosed necessitating obscurity in the whole episode.***
>
> ***3. THAT the learned trial Senior Resident Magistrate erred in law and fact by failing to note the contradiction of PW1 and PW2 evidence, whereas at one point PW1 failed to mention about her two brothers in her evidence, besides the time disparity thereof.***
>
> ***4. THAT the learned trial Senior Resident Magistrate failed to underscore that PW4 evidence was contradictory and not consistent with the record thereof.***
>
> ***5. THAT the learned trial magistrate erred in law and in fact by failing to underscore that the charge sheet was defective, an alternative charge was missing as the evidence was not pointing towards defilement, external genitalia was normal and there was no sperm cells found on the complainant.***
>
> ***6. THAT PW4 conclusion in the P3 form was contradicting, the whole examination thereof on the document.***
>
> ***7. THAT considering the contradiction in prosecution, case the jail term of 20 years was actually harsh, the appellant is young and by that harsh sentence the future of the appellant would be ruined and shall contravene article 51 (1) of the constitution.***

12. The appeal was heard by way of oral submissions where Mr. Agure Odera appeared for the appellant and Miss Monica Owenga appeared for the State. Mr. Agure combined grounds 1 to 6 inclusive and dealt with ground 7 separately in arguing that the key ingredients of the offence of defilement were not proved, that key witnesses did not testify, that the evidence was riddled with many contradictions, the charge was defective and that the sentence was too excessive and contravened **Article 51(1)** of the **Constitution**. He prayed that the appeal be allowed.

13. The appeal was opposed, and the State urged this Court to be properly guided by the evidence on record and the judgment of the trial court.

Analysis and Determination: -

14. 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.

15. 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 the submissions

16. 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 separately.

(a) <u>On the age of the complainant:</u>

17. The prosecution through PW4 produced an age assessment report which settled the age of the complainant between 13 and 14 years old. The report was produced by the consent of the parties. I have perused the report and noted the medico-scientific basis upon which PW4 arrived at the age of the complainant. I hereby disagree with the submission that the age of the complainant was not well settled. Age assessment is one of the very congent ways upon which the age of a person can be assessed, based on settled medical processes, with the highest possible degree of precision.

18. I therefore find and hold that the complainant was a minor in law at the time of the commission of the alleged offence.

(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. The complainant gave sworn testimony after a *voire - dire* examination. She narrated the events as they unfolded between herself and the appellant. She vividly took the court through what happened in the classroom at the Baptist Academy. She was grabbed by the appellant, laid on the floor, undressed, and inserted with a penile organ in her vagina and they engaged in a sexual intercourse for a long time. It was painful, she bled and identified the blood-stained clothes she had then worn in court. That description of the events reveals that the complainant was aware of what was happening and that she engaged in a sexual intercourse.

23. The complainant was taken to Rongo Sub-County Hospital where she was examined and treated. Treatment notes and a P3 Form were produced by PW4. Upon examination of the complainant's private parts, PW4 noted that the hymen was broken, there were tears and lacerations on the *labia majora* and *labia minora* and the presence of blood-stained vaginal discharge.

24. PW4 opined that there was a penetration into the complainant's vagina. Counsel for the appellant argued that the medical evidence indicated that the complainant had normal external genitalia and as such it was not possible that she was defiled on the alleged day. To me, the term '*Normal external genitalia'* used by PW4 in the P3 Form and in the context of the examination which was conducted by PW4 connotes the general external appearance of the female organ. That, it was a normal female organ which its physical appearance connoted normalcy. But that was not all. PW4 testified on how she conducted the examination and recorded her findings.

25. From the above analysis and on an evaluation of the evidence of the complainant and PW4 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) <u>On whether the appellant was the perpetrator:</u>

26. The appellant denied any involvement in the alleged offence and contended that he was being framed because PW2 was not happy that he had caned the complainant who was his brother's daughter in the name of instilling discipline. Having perused the record, it appears that the appellant did not bring up the issue when PW2 and the complainant testified. The issue only came up during his defence. That notwithstanding, a Court must always consider the defence tendered.

27. There is no dispute that the appellant and the complainant were related. The appellant so confirmed in his defence. There is as well no contention as to the circumstances that prevailed at the time the offence was committed as to hinder any positive identification or recognition of the assailant. The complainant described the assailant by his name. She reported the incident immediately thereafter to PW2 and again gave the same name. The complainant spent time with the assailant; they took Awuor home, went to the scene, talked, had sex and again the assailant asked the complainant not to tell PW2 in consideration of some money which was forthcoming later. The complainant gave the name of the assailant to PW2 and they readily went to the assailant's home which was the appellant's home.

28. 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 and rightly noted that if it was true the appellant had caned the complainant then the canning would not have caused the resultant injuries.

29. 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. Having equally considered the defence, I am as well unable to agree with the appellant since there is no link between the canning and the injuries sustained. It was also not demonstrated how PW2 was not happy with the alleged canning of the complainant and how PW2 fixed the appellant. The complainant knew the appellant well as a family member and readily gave his name. (See the Court of Appeal cases of **Simiyu & Another vs. Republic (2005) 1 KLR 192** and **Morris Gikundi Kamande vs. Republic (2015) eKLR** to the effect that giving the name of an assailant is the surest way of recognition or identification). The defence did not therefore create any reasonable doubt in the prosecution's case.

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

On other issues raised on appeal: -

31. 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.

32. 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 come into play.

33. On the submission that the charge sheet was defective since the alternative charge was not proved, I must state that whenever an accused person faces a main charge and an alternative charge, the alternative charge is only considered when the main charge fails. If the main charge is proved, then the prosecution is not under any duty to prove the alternative charge since an accused person cannot be found guilty of both the main charge and the alternative charge. The submission is therefore untenable, and it fails.

34. 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.

35. On sentence, the appellant contends that the 20-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 consideration of the facts of the case handed down the minimum sentence. The appellant has not however demonstrated how the sentence offends **Article 51(1)** of the **Constitution**. The appeal on the sentence equally fails.

36. 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 08th day of March 2018.**

A. C. MRIMA

JUDGE

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

Mr. Agure Odero instructed by Messrs. Agure Odero & Comppany Advocates for 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