REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 11 OF 2017

E O O.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. Odenyo,

Senior PrincipalMagistrate in Migori Chief Magistrate's Court

Criminal Case No. 100 of 2016 delivered on 28/02/2017)

JUDGMENT

1. **E O O**, 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 in the alternative committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006 over one year after the date of the commission of the alleged offence. The appellant denied both counts.

2. The particulars of the offence of defilement were that on the 14th day of January 2015 within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of L A O, a child aged 9 years.

3. The appellant was subsequently tried and convicted on the main count of defilement and sentenced.

4. The prosecution called four witnesses in support of its case. The minor testified as **PW1** (hereinafter referred to as **'the complainant'**) whereas her father, **N O O**, testified as **PW2**. **PW3** was a Clinical Officer working at Migori County Referral Hospital and **PW4** was **No. 67911 Corp. Evans Nyakiramba** attached at Migori Police Station Crime Branch. The appellant was one of the tenants to PW2 in a house which the family of PW2 used to stay hence a neighbor thereto. 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.

5. It was alleged by the prosecution that on 14/01/2016 the complainant was at home within Migori town playing with other children when the appellant, who was their neighbor and knew him as '*Baba Lady*', called and sent her to buy some sweets and share with her friends. The complainant obliged. Returning home, the appellant called the complainant into his house, held her, pushed her onto a bed, undressed her as well as himself and inserted his penis into her vagina, an ordeal which took around 5 minutes. The appellant covered the mouth of the complainant during the ordeal as she screamed. No one responded to the screams as there were no adults at that time. The appellant then threatened to stab the complainant with a knife if she ever disclosed what had transpired.

6. For fear of her life, the complainant endured the pain for around 4 days. She then reported the matter to her mother who immediately alerted the wife of the appellant who in turn called the appellant and asked him about it, but the appellant denied any involvement in the issue.

7. PW2 took the complainant, who was then looking sickly and tired, to Migori County Referral Hospital where the complainant was examined and treated. The complainant was also tested for HIV/AIDS which was negative, and a repeat test 3 months later confirmed that the complainant had been infected with the HIV/AIDS virus. PW2 then reported the matter at Migori Police Station. By then the appellant had fled and PW2 kept on looking for him until over a year later.

8. The police commenced investigations on receipt of the complaint. They recorded statements, issued a P3 Form which was filled and sent the complainant for age assessment. They then took custody of the treatment notes, the Post Rape Care Form, the P3 Form and the Age Assessment Report. Since the appellant was at large, the police issued a warrant for his arrest which was effected by the Administration

Police. Upon arrest the appellant was accordingly charged. PW3 produced the treatment notes, the Post Rape Care Form, the P3 Form and the Age Assessment Report as exhibits.

9. 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 called three witnesses who were then his fellow tenants; **Evelyn Achieng Opondo (DW2), Walter Onyango (DW3)** and **Daniel Ochieng Odhiambo (DW4).**

10. The appellant denied any involvement in the offence and narrated how he was arrested. He further stated that she had differed with the landlady (*the complainant's mother*) over payment of rent and the landlady vowed to fix him and that is how he was charged with the offences. All the defence witnesses testified on the issue of the rental arrears and denied that the appellant committed the alleged offences.

11. By a judgment rendered on 28/02/2017 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 30 years imprisonment.

12. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal with the leave of the Court and filed his Petition of Appeal filed on 04/04/2017 challenging both the conviction and sentence on the following grounds of appeal: -

> ***1. THAT I pleaded not guilty to the charge herein.***
>
> ***2. THAT the trial magistrate erred in law and facts in rejecting my plausible defense.***
>
> ***3. THAT the trial; magistrate erred in relying on the prosecution's evidence which was weak and incapable of sustaining a conviction.***
>
> ***4. THAT the trial magistrate erred in failing to give me benefit of doubt considering the flaws in the investigations and the generality of the circumstances of this case.***
>
> ***5. THAT the learned trial magistrate erred in law and facts by relying on evidence which was contradictory in breach of Section 163 of the evidence Act.***

13. 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 and vehemently contended that the ingredients of the offence of defilement were not proved. He also contended that the complainant's mother who was a crucial witness did not testify and that his defence was not considered. The State did not oppose the appeal as no Counsel turned up during the hearing of the appeal.

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 also the written 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.

(a) On the age of the complainant:

17. The age of the complainant was hotly contested in this appeal. The prosecution availed an age assessment report in proof of the age of the complainant. I have seen the report which settled the age of the complainant between 9 and 10 years old. The charge sheet indicated the complainant's age as 9 years old. The complainant as well as PW2 when testifying stated that the complainant was 9 years old. The P3 Form and the treatment notes indicated the age of the complainant as 8 years old. It is that variance that the appellant contends that the age was not properly settled.

18. The age of the complainant appearing in the P3 Form and the treatment notes as 8 years was an estimate made on 18/01/2015. The age of the complainant was formally assessed on 20/01/2015. The assessment therefore settled the aspect of the age. The contention that the P3 Form, the treatment notes and PW3 gave a different age does not therefore carry any weight because of the formal age assessment which was conducted. I say so because age assessment is a standing medico-scientific process and unless one can impugn how the process was undertaken the assessment stands. The report is clear on how the age was arrived at. I hence find and hold that the age of the complainant was rightly settled between 9 and 10 years old. Suffice to say, whether the age of the complainant was 8 years or 9 years or 10 years still it falls under the category of a minor of tender years.

(b) On the issue of penetration:

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 **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).

21. 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."***

22. The appellant strenuously contended that penetration was not proved. He relied on the P3 Form which indicated that the complainant's systems, on examination, were essentially normal, the outside of the genitalia was as well normal and there were no bruises on the *labias.*

23. The examination was conducted four days post the alleged incident. The complainant narrated the events as they unfolded between herself and the appellant. She vividly took the court through what happened in the room of the appellant. She was grabbed by the appellant thereto, laid on the bed, undressed, and inserted with a penile organ in her vagina and they engaged in a sexual intercourse until she screamed out of pain. The complainant could not withhold the pain which was increasing by the day and revealed to her mother who in turn informed PW2. It was the evidence of PW2 that he noticed that the complainant looked sickly and tired. He took her to hospital.

24. The examining doctor at the Migori County Referral Hospital was unable to penetrate the inside of the complainant's vagina as she was in great pain. He therefore made general outward observations. The hymen was however missing. Out of the other examinations undertaken including urinalysis there was no finding that the complainant had any infection of the HIV/AIDS virus or any venereal diseases. A further test undertaken three months later revealed that the complainant had contracted HIV/AIDS virus. If the complainant did not initially have any infection in her private parts, then the question which begs an answer is how come she had pains thereat. The only reasonable explanation must be an intrusion therein and that is what the complainant alluded to. There was also the issue of the complainant contracting the virus. When the complainant was tested on 18/01/2015 she was negative but three months later she had contracted the virus. Since the three months period is the incubation period for the virus, then chances are indeed high that the complainant contracted the virus during the period in issue herein.

25. This case reveals a scenario where the evidence including the medical evidence largely does not corroborate the evidence of the victim. However, pursuant to **Section 124** of the **Evidence Act**, **Cap. 80** of the Laws of Kenya no such corroboration is required in sexual offences. Be that as it may, a trial court prior to convicting in such instances is supposed to carefully interrogate the *proviso* to said **Section 124** and satisfy itself that it is safe to convict in the circumstances.

26. **Section 124** of the **Evidence Act** states as follows: -

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating of him.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

27. From the reading of the above section of the law and as said above, in a criminal case involving a sexual offence, unlike in all other criminal cases, a court can convict based on the victim's sole evidence without any form of corroboration. However, for that to happen the following two conditions must be fulfilled: -

> **(a) The court must be satisfied that the alleged victim is telling the truth; and**
>
> **(b) The court must record the reasons for believing that the victim is telling the truth.**

28. A trial court basing a conviction of the *proviso* of **Section 124** of the **Evidence Act**, that is convicting without any form of corroboration, must act so cautiously. The record must speak for itself with such clarity that one can interrogate if there were sufficient reasons for the court to be satisfied that the victim was telling the truth. Such a court should not make general statements but must clearly give the reasons for such belief. The court must also warn itself of the dangers of relying on the uncorroborated evidence of a sole witness.

29. But how did the trial court handle the issue in this case? The trial court revisited the evidence of the complainant. It also dealt with the defence. The court then had the following to say in its judgment: -

> ***"…..I have critically looked at the evidence of PW1 and find it to be very consistent and credible. Her description of the events on the day in question is convincing and leads me to only one conclusion: the evidence is that by person who was there and***

suffered the crime. Those details in her testimony cannot have been cooked.

Besides, PW1, aged 9 years make me believe her testimony. At 9 years, a child has usually not developed a mind to the lies of such nature. …….”

30. The trial court gave the reason for believing that the complainant was truthful. It carefully observed her demeanor as she testified and formed an opinion that she was truthful. This High Court, as an appellate court, did not have the advantage of seeing the complainant testify. It only proceeds on the basis and the contents of the record. The appellant has not alleged that the record is not a true reflection of how the trial was conducted. As stated above *'this Court [appellate] 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.'*

31. Having gone through the record, I have not come across anything that may make me impugn the demeanor of the complainant or to make a finding that the trial court made a wrong assessment of the demeanor of the complainant in the circumstances of this case. That being so, and as I find that observing the demeanor of a victim or witness is a sufficient reason for a court to arrive at a belief that the victim or witness is truthful or otherwise, I find and hold that trial court did not err in the way it handled the evidence of the complainant in this matter.

32. Given that the examination revealed that the complainant had lost her hymen and going by the undisputed evidence by the complainant that the incident was her first sexual activity and that the examination was conducted four days post the incident, the absence of any lacerations, tears and/or spermatozoa is not corroborative that no penetration took place; more so in view of the legal definition of what penetration is.

33. From the above analysis and on an evaluation of the evidence of the complainant, PW2 and PW3 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>

34. The appellant vehemently denied any involvement in the alleged offence and contended that he was being framed because of failure to pay house rent. The defence witnesses confirmed that the appellant was a tenant to PW2 hence under a duty to pay rent. They also alluded to rental arrears. However, the appellant neither raised the matter with any witness during cross-examination nor with PW4 during investigations for further inquiry with a view to ascertain whether he was being framed up. Further, none of the witnesses testified of the appellant's whereabouts on the 14/01/2015.

35. The trial court considered the defence and for good and further reasons declined to accept it as a holding defence. The complainant knew the appellant well since they lived in the same house. She knew him as '*Baba Lady'*. She also identified the appellant in court as the culprit. The offence was also committed in daylight.

36. 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, I am unable to agree with the appellant since there is no link between the alleged rent arrears and the offence in this matter and how the incident was used to fix the appellant. The complainant is the one who gave the name of the appellant as the one who had sexually assaulted her and on being asked by his wife the appellant denied and disappeared for over one year. It is also not known how and when the appellant left the PW2 's house if at all he did not run away after committing the offence and realizing that the complainant had disclosed what had transpired.

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

<u>On other issues raised on appeal: -</u>

38. As to whether all potential witnesses including the complainant's mother 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 **<u>Bukenya & Others -versus- Uganda (1972) EA 549</u>** and **<u>Nguku -versus- Republic (1985) KLR 412).</u>** In this case, there was sufficient evidence adduced to support the charge and the adverse inference is not demonstrated.

39. 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.

40. The appellant also appealed against the sentence. The offence of defilement under which the appellant was charged attracts the sentence under **Section 8(2)** of the **Sexual Offences Act**. That sentence is a mandatory life imprisonment. The appellant was however sentenced to 30 years imprisonment. The sentence rendered is therefore contrary to law and I hereby set it aside and substitute it with the mandatory life imprisonment.

41. Save that the appellant shall now serve a life sentence, the appeal is not merited. It is hereby dismissed and the decision of the trial court on the conviction 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: -

E O 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