REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 50 OF 2016

STEPHEN ODHIAMBO ONYANGO.............APPELLANT

-versus-

REPUBLIC.. RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. K. Kamau, Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 492 of 2012 delivered on 03/10/2016)

JUDGMENT

Introduction: -

1. This appeal avails an opportunity to interrogate a conviction based on the sole evidence of a victim or complainant in sexual offences more so in the absence of medical evidence.

2. The Appellant herein, **Stephen Odhiambo Onyango,** was initially charged before the Senior Resident Magistrate's Court at Rongo with the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006. He denied the charge. The appellant was released on bond and immediately absconded before the hearing began. He was re-arrested about three years later. The charge was amended with the leave of the court and concurrence of the appellant.

3. The appellant was then charged with the main charge of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006 and 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.

4. The particulars of the offence of defilement were that in the night of the 8th October 2012 and 9th October 2012 within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of J.A.L., a child aged 14 years. The appellant was subsequently tried and convicted on the main count of defilement and sentenced.

The Criminal Case: -

5. The prosecution called a total of five witnesses. The minor testified as **PW1** (hereinafter referred to as **'the complainant'**). **P L**, an Aunt to and the guardian of PW1 testified as **PW2**. **PW3** was **No. 2009030858 APC Martin Machira Mureithi** who was attached at Mariwa Administration Police Post and the arresting officer. **PW4** was a Clinical Officer from Mariwa Health Centre and **PW5** was **No. 55472 PC Reuben Guya** attached at Awendo Police Station who testified on behalf of Insp. Mutiso who was the investigating officer but had passed on. 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. It was the prosecution's case that the complainant was a Standard Six pupil at [particulars withheld] Primary School in Awendo in 2012 when the alleged incident took place. When the complainant testified before the trial court in May 2016 she was in Form 2 at [particulars withheld] Secondary School in Nyatike, then aged 18 years old. The complainant recounted the events of 08/10/2012 as she was on her way from school in the company of her two friends; L and G M, who are sisters and her schoolmates. They were also nieces to the appellant. The two friends told the complainant that they intended to pass by their uncle's home briefly *[meaning the appellant's home]* which was just next to the Mariwa trading centre before they proceeded home. The complainant accompanied them there. That was around 04:00pm.

7. The three girls found the appellant at his home and he welcomed them. The two sisters then talked to the appellant. They all remained in the appellant's home up to around 07:00pm when they intended to leave. As they were leaving the appellant's home, the appellant grabbed the complainant's hand and took her into his house. He locked her inside and escorted the two sisters. The complainant saw the appellant at around 08:00pm when he returned into the house with some food which she refused to eat. The appellant locked the house from inside and ate the food. He then undressed and remained fully naked. He told the complainant to likewise undress but she declined. The appellant approached the complainant who was in her school uniform and undressed her. He then put on a condom.

8. The appellant then ordered the complainant to lie on a mattress which was on the floor and she obliged. He threatened to kill her if she raised alarm. The appellant then inserted his penis into the complainant's vagina and they had sex for the whole night. Early the next morning at around 06:00am the appellant took the complainant to his mother's house which was within the homestead and woke up her mother. The appellant and his mother then left for the Mariwa trading centre leaving the complainant inside the house of the appellant's mother.

9. PW2 lived with the complainant at the Mariwa trading centre. She was an Education Officer in Kuria West. She had stayed with the complainant since the death of the complainant's father in 2002. The evening of 08/10/2012 rained heavily and the complainant did not return home. PW2 was worried and concerned that the complainant had not return home from school and she called the complainant's Class Teacher one **Madam N** (not a witness) and reported the issue. As it was raining heavily that evening PW2 decided to and spent the night at her home. PW2 called the Head Teacher of the complainant's school one **Mr. O** (not a witness) in the morning of the following day and again reported the complainant's failure to return home from school the previous day and informed Mr. O that she was looking for the complainant. Mr. O also undertook to likewise look around for the complainant.

10. PW3 was on duty at the station on 09/10/2012 when a parent reported the disappearance of her girl child. The reportee who knew where the girl was and with whom led PW3 and another police officer to the appellant's house which was around 50 metres away from the police camp. They found the appellant inside his rental house alone and the police interrogated him on the whereabouts of the girl. The appellant disclosed that the girl was at his mother's house and led them there. As they were approaching the appellant mother's house, the complainant who was inside the house, heard the appellant saying he had not slept with her. They found the complainant where the appellant directed them to. They escorted the appellant and the complaianant to the AP camp and then to the Awendo Police Station.

11. PW2 was called by Mr. O at around 01:00pm and informed that the complainant had been found and was at the Mariwa AP camp. She rushed to the AP camp and saw the complainant and the man who was allegedly found with her. PW2 knew the man before and even identified him in court. He was the appellant. PW2 accompanied them to the Awendo Police Station.

12. The police began investigations. They referred the complainant and the appellant to Awendo Sub-County Hospital where both were examined. The complainant was as well treated. It was PW4 and her colleague one **Peter Omware** (not a witness) who examined the two and treated the complainant. PW4 filled in a P3 Form for the complainant on 12/10/2012.

13. The police also recorded statements from various witnesses and on completion of investigations they charged the appellant. PW4 produced the P3 Form alongside the other treatment documents as exhibits. It was the complainant who produced her Birth Certificate during her testimony. PW5 produced the statement of the initial investigating officer as an exhibit.

14. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant in the first instance opted to give unsworn defence but later changed and gave a sworn defence. He explained how he was approached by police officers while at his workplace who told him that they wanted to search his house for lost items. That, he accompanied them his house, but they did not recover any of the alleged things. That, he was arrested and taken to Mariwa AP Camp where he was placed in custody up to around 11:00am when he was shown a lady and a girl and told that he will know his case. That, he was escorted to Awendo Police Station and later taken to hospital where he was examined. That, he was charged in court the following day with an offence he knew nothing about. He denied knowing any children who called him 'uncle' neither did he know G N. He called no witness.

15. By a judgment rendered on 03/10/2016 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 20 years imprisonment.

<u>The Appeal: -</u>

16. Being dissatisfied with the conviction and sentence, the appellant timeously lodged an appeal and filed a Grounds [Petition] of Appeal on 17/10/2016. The appellant challenged the conviction and sentence on the following grounds of appeal: -

> ***1. THAT the learned trial Magistrate failed to ascertain that there were coaching elements of the complainant's evidence adduced.***
>
> ***2. THAT the trial Magistrate erred in law and in fact to when he relied on irregular plea taking resulted to defective proceeding that nullify the conviction.***
>
> ***3. THAT the trial court erred in law and fact when failed to call vital witnesses e.g. L, G, N and the mother who could shade light to the allegation.***
>
> ***4. THAT the trial court erred in law by failing to arrive at a finding that I was not guilty as charged since the medical report show no defilement connection with the appellant and also never suggest a recent penetration.***
>
> ***5. THAT the trial court failed in law to discern that the complainant was compelled and threatened to adduce the evidence produced.***
>
> ***6. THAT I shall be equipped with the whole proceeding, I may be given room to supplement more grounds thereof;***
>
> ***7. THAT I wish to be present during the hearing of this appeal.***

17. The appeal was heard by way of written submissions where the appellant strenuously argued that penetration was not proved, that key

witnesses did not testify, that the evidence was riddled with many contradictions, that the court did not treat the evidence of the complainant properly and in line with **Section 124** of the **Evidence Act** and that the sentence was too excessive. He prayed that the appeal be allowed.

18. The appeal was not opposed in that the State did not appear during the hearing.

Analysis and Determination: -

19. 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.

20. 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

21. 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) On the age of the complainant:

22. The age of the complainant was not contested and as such it is not an issue for this Court's determination. The Certificate of Birth confirms that the complainant was born on 12/02/1998 hence she was aged about 14 years and 7 months at the time of the alleged incident.

23. The complainant was therefore a minor in law.

(b) On the issue of penetration:

24. **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.'***

25. 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).

26. 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."***

27. 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 appellant's house in the night of 08/10/2012. She was first grabbed by the appellant as she was leaving the appellant's home with the appellant's nieces, locked into the appellant's house, latter on she was undressed, laid on the floor, and inserted with a penile organ in her vagina and they engaged in a sexual intercourse for the whole night while the appellant used a condom.

28. The complainant was taken to Awendo Sub-County Hospital where she was examined and treated. Treatment notes and a P3 Form were produced by PW4. A laboratory high vaginal swab examination was conducted on 10/10/2012 and revealed the presence of epithelial cells and puss cells but no spermatozoa was present. PW4 noted that the hymen was already broken, there were no tears and lacerations and the external genitalia was normal. PW4 however saw a creamish-white discharge which to her was a sign of an infection. The presence of epithelial cells and puss cells was also noted in the urinal examination. PW4 did not opine of any penetration.

29. The appellant was also examined by PW4 and nothing was found which suggested that the appellant had engaged in any recent sexual intercourse.

30. I have perused all the medical documents and do concur with the trial court's finding that '*None of the above is overt evidence of recent sexual intercourse or forced penetration.*' Having so found, the trial court went on and interrogated the provisions of **Section 124** of the **Evidence Act**, **Cap. 80** of the Laws of Kenya in line with the sole evidence of the complainant. It is that analysis that I will revisit herein.

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

> ***'Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration 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 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'

32. From the reading of the above section of the law, 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.

33. 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. Short of that a conviction cannot stand.

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

'As earlier stated, in sexual offences, the court may rely solely on the evidence of the complainant to reach a guilty verdict. The only requirement is that the court satisfies itself that evidence is truthful and warns itself before it enters a conviction. (See MWANGI V. REPUBLIC (1984) KLR 595 at page 596) My observation of her demeanor as she testified satisfied me that she is a truthful and credible witness. I am convinced the victim gave truthful, credible and convincing evidence.'

35. 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 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.'*

36. 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 sole evidence of the complainant in this matter.

37. Given that the complainant had long lost her hymen, that the assailant used a condom and that the examination was conducted two days post the incident, the absence of any lacerations, tears and spermatozoa is not corroborative that no penetration took place; more so in view of the legal definition of what penetration is.

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

38. The appellant denied any involvement in the alleged offence or knowing the complainant and PW2. He also denied that no children referred to him as 'uncle'. As said, the trial court as well as this Court, believed the evidence of the complainant. Both the complainant and PW2, who lived within the Mariwa trading centre just like the appellant knew the appellant by name and readily so stated. The complainant met the assailant during the day and spent the whole night with him. They talked and had sex. The complainant was even able to recognize the voice of the appellant when he was inside the house of the appellant's mother while the appellant and the police officers were outside.

39. 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.

40. 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 that he knew nothing about the matter. I have also to say that when the appellant was released on bond he immediately absconded for a period of three (3) years. When he was eventually re-arrested he stated that he was not given a date the last time he was in court. He did not produce the bond document to confirm so neither did he make any efforts to attend court or the police station to find more about the case. Further, the police stated that the appellant had fled into Tanzania and he was only arrested when he came to Kenya to attend a funeral. The appellant ran a school in Mariwa and it is not possible that he was out of touch with his school for all that period if he was not running away from the court case against him. The appellant's conduct further waters down his defence. The defence therefore did not create any reasonable doubt in the prosecution's case.

41. I now return a finding that it is the appellant who sexually assaulted the complainant.

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

42. 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 does not arise.

43. 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.

44. 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.

45. 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 appeal on the sentence equally fails.

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 08th day of March 2018.**

A. C. MRIMA

JUDGE

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

Stephen Odhiambo Onyango, 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