



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. 19 OF 2017**

**WEGESA BARISERA MURATA.....APPELLANT**

**-versus-**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. P. N. Maina, Senior Principal Magistrate in Kehancha Senior Principal Magistrate's Court Criminal Case No. 242 of 2016 delivered on 29/06/2017)***

**JUDGMENT**

1. The Appellant herein, **Wegesa Barisera Murata**, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** 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 denied both counts.
2. The particulars of the offence of defilement were that on diverse dates between 20<sup>th</sup> day of September 2015 and 20<sup>th</sup> day of March 2016 within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of J.G.M., a child aged 13 years.
3. The appellant was subsequently tried and convicted on the main count of defilement and sentenced.
4. The prosecution called five witnesses in support of its case. The minor testified as **PW1** (hereinafter referred to as '**the complainant**') whereas her mother, **A M**, testified as **PW2**. **PW3** was the arresting officer one **No. 2008107262 APC Anthony Wanjama** from Chinato AP Post. **PW4** was **No. 42510 PC Kenya Mwaeni** attached at Nyamtiro Police Post. A Senior Clinical Officer working at Kehancha District Hospital one **Robi Waswi Abrahams Chacha** testified as **PW5**. 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 the prosecution's case that the complainant was on several days between the 20<sup>th</sup> day of September 2015 and 20<sup>th</sup> day of March 2016 waylaid by the appellant, then a *boda-boda* rider, into sexual intercourse for money in return. The complainant was then in Standard Five at [particulars withheld] Primary School. That, the appellant first met the complainant on her way back home from visiting her friend in Senta area sometimes in September 2015 and seduced her promising to give her money to buy mandazi if she agrees to having sex with him. The complainant agreed and on that very day the two had sex in a bush and the appellant gave her Kshs. 80/=. The trend continued weekly and the two would even meet when the complainant was on her way back from school. A time reached when the complainant missed her monthly periods since they engaged in unprotected sex. That led to a disagreement between the two. The complainant was then in Standard Six.
6. The complainant then underwent some body changes and unknown to PW2 used to take her to various medical institutions for treatment until when the complainant tested positive for pregnancy at Komotobo Mission Hospital. The complainant then disclosed to PW2 what had been going on between her and the appellant. PW2 reported the matter to the Headteacher of [particulars withheld] Primary School and the Area Chief. She also reported the matter to Nyamtiro Police Post. The complainant was taken to Kehancha District Hospital for examination where it was confirmed that she was pregnant. The appellant was arrested and charged accordingly. The complainant gave birth to a baby boy on 20/04/2016. Unfortunately, the baby died on 17/05/2016 due to an illness.
7. The complainant's Birth Certificate, the P3 Form filled at Kehancha District Hospital, the Birth Notification for the baby as well as the Burial Permit and the treatment notes from Chinato Health Centre and Kehancha District Hospital were all produced 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 statement. The appellant denied committing the offence and alleged that he was being framed by PW2 who had solicited for Kshs. 50,000/= from him to drop the case or alternatively the appellant was to marry the complainant. He denied both options hence the charges.
9. By a judgment rendered on 29/06/2017 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 20 years imprisonment.

10. Being dissatisfied with the conviction and sentence, the appellant timeously lodged an appeal and filed his Petition of Appeal filed on 10/07/2017 challenging both the conviction and sentence on the following grounds of appeal: -

**a. THAT I pleaded not guilty to the charge herein.**

**b. THAT the trial magistrate erred in both law and facts by relying on contradictory evidence from the prosecution sides, thus lacking the qualities of being an impartial arbiter.**

**c. THAT the trial magistrate erred in both law and facts by shifting the burden of proof to I the appellant; in that the prosecution failed to prove their case beyond any reasonable doubt.**

**d. THAT the trial magistrate erred in both and facts by meting a harsh and excessive sentence on a defective charge sheet.**

5. The appeal was heard by way of written submissions where the appellant expounded the foregone grounds. He reiterated his innocence and vehemently contended that the ingredients of the offence of defilement were not proved more so given that no D.N.A. examination was conducted. He also contended that his *alibi* defence was not considered. The State opposed the appeal and stated that the DNA examination was not a must and that is not a must that the hymen be broken to prove penetration. This Court was urged to dismiss the appeal.

6. 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.

7. 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.

8. 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:**

9. The age of the complainant was not contested in this appeal. The prosecution produced the complainant's Birth Certificate No. [particulars withheld] as proof of age which indicated that the complainant was born on 18/06/2003. The complainant was therefore aged 13 years old at the time of the commission of the alleged offence.

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

10. 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.'***

11. 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).

12. 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."***

13. The appellant strenuously contended that penetration was not proved. He submitted that there was need for a DNA examination to confirm the parentage of the child and that there was no evidence of sex since the complainant did not bleed during the first encounter with the appellant meaning that she had been with other men before. It was also submitted that since the complainant was found to suffer urinary infection, then it was incumbent upon the investigator to subject the appellant to such an examination as well to confirm if he also suffered such an infection.

14. There is sufficient evidence on record to prove that the complainant got pregnant and eventually delivered a baby boy who eventually died. That is evidence of penetration of the complainant's vagina by a penis unless it can be proved that the pregnancy was occasioned otherwise. Since there is no contrary assertion on how the pregnancy was otherwise occasioned I find and hold that penetration was proved.

15. As I come to the end of this issue I must state that it is not a must to conduct a DNA analysis or a urinal analysis to confirm penetration. Whereas the said examinations may be ways to so confirm, they are not the only ways given the legal definition of what penetration is.

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

16. The appellant vehemently denied any involvement in the alleged offence and contended that he was being framed because of failure to pay Kshs. 50,000/= and his failure to agree to marry the complainant. The appellant however neither raised the matter with any witness, especially PW2, during cross-examination nor with PW4 during investigations for further inquiry with a view to ascertain whether he was being framed up.

17. The trial court considered the defence then tendered, which was not an *alibi* defence, and for good and further reasons declined to accept it as a holding defence. The complainant knew the appellant well since they were friends for long and were also from the same neighborhood. The complainant easily so identified the appellant in court as the culprit. The offence was further committed on several occasions including in daylight when the complainant was from school.

18. 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 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. The complainant is the one who gave the name of the appellant as the only one whom she had severally engaged in sex with. I have also noted that there is no contention that the complainant had other known boyfriends apart from the appellant.

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

20. Having found all ingredients in favor of the prosecution, this Court finds that the appellant was properly found guilty and convicted of the offence of defilement.

21. The appellant also appealed against the sentence. 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 appellant was hence sentenced to the minimum sentence in law and as such the appeal on sentence must fail.

22. 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 19<sup>th</sup> day of April 2018.**

**A. C. MRIMA**

**JUDGE**

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

**Wegesa Barisera Murata**, 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