



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 26 OF 2017

W O O.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Court Criminal Case No. 37 of 2017 delivered on 25/07/2017)

JUDGMENT

1. **W O O**, the Appellant herein, was charged with the offence of defilement contrary to **Section 8(1)(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 between the 17th and 19th day of January 2017 within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of J A O, a child aged 14 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 the complainant's grandmother and the guardian one **E A O**, testified as **PW3**. **PW2** was a Clinical Officer working at Rongo Sub-County Hospital and **PW4** was **No. 56625 PC Lanolite Kerubo** attached at Kamagambo Police Station Gender Office who was the investigating officer. **PW5** was one **R O** the Deputy Headteacher of [particulars withheld] Primary School where the complainant was a pupil. The appellant was a first cousin of 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.
5. It was the prosecution's case that the complainant used to stay with **PW3**, her brother one **A O** (not a witness) and her uncle in Awendo. That, sometimes in July 2016 the appellant herein met the complainant at [particulars withheld] trading centre where he seduced her into a love relationship. The appellant used to see and talk to the complainant as she regularly passed through the trading centre on her way to school as the appellant used to work at the trading centre.
6. That, on 16/01/2017 the complainant left school and changed her school uniforms into civilian clothes and gave the clothes and her books to her friend and classmate one **I** (not a witness). The complainant did not return to her home but instead proceeded to Rongo township and to the house of the appellant who was by then working at Rongo Township as a barber. The complainant had previously visited the appellant's place which was next to a Catholic Church. I parted ways with the complainant as the complainant boarded a motor cycle and left for Rongo township. I proceeded to her home and went back to school the following day. That was not the case with the complainant who did not show up in school on 17/01/2017.
7. The complainant spent at the house of the appellant. They engaged in sexual acts that night. In the morning the appellant left for work and asked the complainant not to leave the house and that he will return in the evening. The appellant returned at around 09:00pm and again spent the night with the complainant but they did not engage in any sexual act as the complainant was tired and menstruating. The appellant again left the complainant in his house for the second day as he went to his work the following morning.
8. Obviously alarmed by the failure of the complainant to return home as expected, **PW3** rushed to the school where the complainant was learning and enquired of the complainant's whereabouts. **PW5** called and interrogated I on the whereabouts of the complainant who revealed that the complainant had left for Rongo township the day before to meet the appellant herein whom she knew as O. I also disclosed that O was a barber in Rongo township and gave the directions to the barber shop. **PW3** knew the appellant as he was a son to her brother in-law and they lived in the same village. **PW3** was then given a letter by **PW5** to take to the Assistant Chief. **PW3** also reported the matter to the Kwoyo AP Post where she was directed to Kamagambo Police Station in Rongo township.

9. While in the company of her son, PW3 proceeded to where the appellant worked in Rongo and met the appellant. PW3 asked the appellant where the complainant was, and the appellant told her where the complainant was. PW3 then proceeded to Kamagambo Police Station where she reported the matter to PW4. After booking the report, PW4 accompanied PW3 together with her colleague one **PC Langat** (not a witness) to where the appellant worked. They found the appellant thereat and arrested him. The appellant took the police officers to his house, but the complainant was not there. Shortly, the complainant returned to the appellant's house and she was also arrested. They were all taken to the station and later to Rongo Sub-County Hospital for examination and treatment.

10. It was PW2 who examined both the appellant and the complainant at the hospital. On examining the complainant physically and through a laboratory high vaginal swab analysis, PW2 noted that the vagina was tender, there was an infection and the presence of red blood cells. PW2 stated that the presence of the red blood cells in the vagina confirmed sexual intercourse. PW2 administered pain killers and gave the complainant some post care drugs. She prepared and signed a P3 Form which she produced in court alongside the treatment notes. PW2 also examined the appellant and produced the treatment notes in court.

11. On conclusion of investigations which also entailed recording of statements from witnesses, PW4 preferred the charges against the appellant. PW3 produced the Birth Certificate for the complainant as an exhibit.

12. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant opted to and gave an unsworn defence without calling any witnesses. The appellant narrated how he was arrested and eventually charged with offences he knew nothing about.

13. By a judgment rendered on 25/07/2017 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 20 years imprisonment.

14. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal with the leave of the Court and filed his Petition of Appeal on 15/09/2017 challenging both the conviction and sentence on the following three grounds of appeal: -

THAT this honourable High Court to consider reviewing the trial process.

THAT the honourable high Court to regard that appellant's rights and fundamental freedom was contravened.

THAT the matter be considered urgent.

15. The appellant further filed supplementary grounds which were also his written submissions and expounded on the foregone grounds. 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 character of visiting him was not commensurate with that of a minor and wondered what the complainant had gone to do in his house. The State opposed the appeal.

16. 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.

17. 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.

18. 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:

19. 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 11/01/2003. The complainant was therefore aged 14 years old at the time of the commission of the alleged offence.

20. However, the appellant hotly contended that the behavior of the complainant was not commensurate of that of a minor and that he was made to believe that the complainant was not a minor. I will however deal with that issue substantively later.

(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:

23.

‘...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).

24. 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."

25. The appellant does not strictly contest the issue of penetration. He stated in his submissions the ‘...Your Lordship, penetration in the instance is not disputable, the main issue is about the minority of the complainant....’

26. I have considered the evidence of PW1 alongside that of PW2 on the aspect of penetration. I have further considered the medical documents produced as exhibits during the trial and I am satisfied that the prosecution proved penetration into the complainant's vagina by a penile organ.

c) On whether the appellant was the perpetrator:

27. Going by the position taken by the appellant that the complainant was a willing party in the act and given that the appellant and the complainant are close relatives who stay within the same village, there is no doubt that the complainant was so sure she was referring to the appellant as the one she had been engaged in sexual relations with for a time. The complainant was also arrested as she was about to enter the house of the appellant.

28. 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.

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

On other issues raised on appeal: -

30. The main contention in this appeal by the appellant is that going by the behavior of the complainant the appellant had reasons to believe that she was not a minor. The appellant drew the attention of this Court on the conduct of the complainant and when the complainant travelled all the way from Awendo to Rongo searching for the appellant, waited for the appellant at his house for over two hours and that she had left school and changed the school uniform into civilian clothing. The appellant posed the question as to what would have happened suppose the complainant did not go to his house. To the appellant the behavior depicted by the complainant is far beyond that of a minor and he prays to benefit from the being lured into a sexual act.

31. The appellant seems to take refuge in the defence provided under **Section 8(5) and (6) of the Sexual Offences Act**. I had an occasion and dealt with the said defence in **Migori High Court Criminal Appeal No. 59 of 2015 Sammy Chacha Chacha vs. Republic** (unreported) and since I have not changed my legal mind on the issue I will reiterate what I stated therein as follows: -

19. The other cardinal issue of consideration relates to the defence raised by the appellant. As earlier on stated, if successfully proved the same amounts to a complete defence in law and the appellant will be entitled to an automatic discharge. That is the defence provided for under Sections 8(5) and (6) of the Sexual Offences Act. The said sub-sections provides as under: -

“8(5) It is a defence to a charge under this section if:

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that child was over the age of eighteen years

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.” (emphasis added).

20. From the above provisions it can be seen that whenever an accused person opts to rely on the said defence then the evidential burden of proof shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate that: -

a. That it was the child who deceived the accused person into believing that he/she was over the age of eighteen years at the time of the alleged commission of the offence;

b. That the accused person reasonably believed that the child was over the age of eighteen years; and

c. That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the

belief on the part of the accused person was reasonable.

21. *The accused person will first have to prove deception by the child in respect of the child's age. That deception can be by way of words or actions on the part of the child. In this case, the appellant stated that the deception was by way of words given that it was PW1 herself who told him that she was 19 years old.*

22. *The other condition relates to how the accused person handled alleged the deception. **Section 8(6)** requires the accused person to further demonstrate how he/she reasonably believed the deception including the steps taken by that accused person to ascertain the age of the complainant.*

23. *In discharging that onus, it must be remembered that the actions of the accused person must be weighed against what a reasonable person would have been expected to do in such circumstances.'*

32. The appellant relied on the complainant's behavior in demonstrating the defence. The appellant knew the complainant very well as his cousin. He knew that the complainant was in primary school since the appellant used to see her go to school through [particulars withheld] trading centre where the appellant then worked before moving to Rongo township. The appellant has not demonstrated how he ascertained that the complainant was not a minor even after believing that the complainant was of age. **Section 8(6)** of the **Sexual Offences Act** specifically places the onus on the appellant to disclose the steps he took to ascertain that the complainant was not a minor.

33. All the issues raised by the appellant taken in totality fall so far short of satisfying the conditions in **Section 8(5)** and **(6)** of the **Sexual Offences Act**. What infact the appellant seems to suggest is that the complainant took herself to him and as a man he had no option than to have sex with her. That is a dangerous approach since it is not in consonance with the law. The appellant was a close relative and knew that the complainant was a school-going pupil. He was hence under a duty to certainly satisfy himself that the complainant was not a minor and more so not within the unacceptable degree of consanguinity to engage into sexual relations with. The appellant was indeed a keeper of his cousin, the complainant. That, the appellant failed to do. He cannot therefore loosely take refuge on the flimsy argument that he was lured into sex by the complainant.

34. The appellant cannot therefore benefit from the defence in law. He was properly convicted of the offence of defilement.

35. On sentence, the appellant was imprisoned for 20 years. 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.

36. In the end, the appeal is hereby dismissed, and the decision of the trial court affirmed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of April 2018.

A. C. MRIMA

JUDGE

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

W 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