REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 32 OF 2017

G O A.....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. 89 of 2017 delivered on 04/10/2017)

JUDGMENT

1. This is an appeal which once again rests on an allegation of sexual abuse of a young girl by a very close relative; a step father. The Appellant herein, **G O A,** married the mother of the victim who is the complainant herein upon the demise of the biological father to the complainant. They lived near [particulars withheld] Primary School and the family generally related well.

2. Resulting from a disagreement between the mother of the complainant and the Appellant herein, the mother to the complainant did not spend at her said home that very night. She left behind the Appellant and the complainant as she took refuge at the home of her mother-in-law. She only learnt in the morning of the following day that the complainant had been sexually abused by the Appellant.

3. The matter was eventually reported to the police who on conclusion of investigations charged the Appellant 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.

4. The particulars of the offence of defilement were that on the 26th day of December 2016 within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of J O a child aged 13 year.

5. The appellant was subsequently tried, convicted on the main count of defilement and accordingly sentenced.

6. The prosecution called five witnesses in support of its case. The minor testified as **PW1** (hereinafter referred to as **'the complainant'**) whereas her mother, **R A A**, testified as **PW2**. **PW3** was the investigating officer one **No. 56625 PC Lanline Kerubo** from Kamagambo Police Station. **PW4** was a Clinical Officer then working at Rongo Sub-County Hospital one **Lilian Nyaboke**. The Assistant Chief of Kodero Bara Sub-Location one **Edward Otieno** testified as **PW5**. He was the arresting officer. The Appellant appeared in person during the trial. 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.

7. The prosecution alleged that it was routine that whenever PW2 was not able to spend at her home with her family the complainant would also and always leave her home with her siblings and spend at her uncle's home which was within the neighborhood; around 50 metres away. That is exactly what the complainant did in the evening of 20/06/2016 when the Appellant had chased away PW2, locked the family house and left with the keys. As the complainant joined her cousins and siblings in watching some television programmes, the Appellant who had gone for a drink with the complainant's uncle came to the home of the complainant's uncle in the company of the complainant's uncle. It was night; at around 09:00pm.

8. The Appellant ordered the complainant to go with him back home to prepare supper for him. The complainant obliged. She prepared the meal and the Appellant graciously had his fill. The family house consisted of two rooms; the sitting room-cum-dining room and the bedroom. It was also connected with solar power. After the complainant had finished her chore she wanted to return to her uncle's home and spent there and as usual. Things however took a different turn that night. The Appellant declined the complainant's request and instead asked the complainant to accompany him to a disco. The complainant declined on grounds that she was still in school. The Appellant then locked the main door of the house from inside with a key and hid it.

9. The complainant had no option but to sleep on a mattress at the sitting room but did not undress. The Appellant who was then seated on the couch at the sitting room watched her retire on the mattress and cover herself with a blanket. The Appellant then switched off the lights

and went into his bedroom. Shortly, the complainant heard someone coming from the bedroom and walked to where she slept. The person lay down next to her and covered self-using the same blanket. The complainant had no doubt that it was the Appellant. The person started touching the complainant's breasts and told her to remove her clothes on an undertaking that he was not going to do anything. The complainant sensed danger and cried. The Appellant covered her mouth with his hand and carried her into the bedroom. He laid her on the bed, switched on a radio and took a knife and threatened to kill her if she screamed. He undressed her and pulled her legs apart and had sex with her using a condom and while covering her mouth. The complainant felt a lot of pain and bled from her vagina. By the time the Appellant was through with the intercourse, the condom was stuck inside the vagina of the complainant. He then took the complainant back to the place she had slept and warned her against disclosing what had happened.

10. In the morning the complainant fled to her uncle's home and reported the matter to her uncle. By then she was limping. The uncle took the complainant to where the complainant's mother was. On learning what had befallen her daughter, PW2 cried and reported the incident to PW5. The complainant was taken not Rongo Sub-District Hospital where she was examined and treated. The condom which had stuck was also removed. The matter was then reported to the police.

11. The police commenced investigations. A P3 Form was filled in and the age of the complainant was assessed. Statements from potential witnesses were recorded. The police apprehended the Appellant with the aid of PW5 as he had fled to Sori in Homa Bay. The Appellant was eventually charged. PW4 confirmed that the complainant had been penetrated with a penile organ and produced the P3 Form, treatment notes and the Age Assessment Report as exhibits.

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 sworn statement. The appellant denied committing the offence and while confirming that he had differed with PW2 on 26/12/2016 he stated that he was served food that evening, ate and went to sleep. That, the following day PW2 and the complainant ran away from home for one week and he was surprised to be charged.

13. By a judgment rendered on 04/10/2017 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 30 years imprisonment upon mitigations.

14. Being dissatisfied with the conviction and sentence, the appellant timeously lodged an appeal and filed his Petition of Appeal filed on 16/10/2017 challenging both the conviction and sentence. He later instructed **Mr. Gembe Capis Omolo** Counsel who filed a Supplementary Petition of Appeal and preferred the following grounds of appeal: -

a) THAT the conviction by the learned Magistrate was imaginary as the same was not based on the evidence on record.

b) THAT the charge as drawn and prosecuted is at variance with the charge reasoned in the judgment.

c) THAT the learned magistrates erred in law and fact as he failed and/or omitted to analyze the evidence on record vis-avis the charge.

d) THAT the learned Magistrates erred in law as he convicted the appellant on contradictory evidence

e) THAT the sentence was based on improper conviction.

5. The appeal was heard by way of written submissions where Counsel for the appellant expounded the foregone grounds. Counsel submitted that the charge of defilement had not been proved and that the evidence was so contradictory that it could not sustain a conviction. It was also contended that trial court spiced up the judgment and introduced particulars to the charge that were not initially part of the charge and that the Appellant was prejudiced. There was a further contention that the defence was not considered. The State opposed the appeal and relied on the record to support the conviction. 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 Age Assessment Report as proof of age which indicated that the complainant was 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. Counsel further submitted that the absence of the hymen and the presence of the lacerated *labia minora* were not sufficient proof of penetration and that there was need for congent medical evidence on penetration. That, the issue of the condom did not add any value to the case neither was it produced as an exhibit.

14. If I understood the Counsel well on the issue of penetration, he must have been alluding to corroborative medical evidence. In response to that, first **Section 124** of the **Evidence Act** comes to play. The section is clear that no corroboration is necessary in criminal cases involving a sexual offence. Infact a court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth. Second, the Court of Appeal decisions I have referred to above are so clear on the issue.

15. In this case the complainant narrated how the ordeal unfolded. She partly stated as follows: -

'…..He pulled my legs apart; he did 'tabia mand' He used a condom and inserted his penis on me. Condom stuck in my vagina …..He inserted his penis to vagina. Vagina is for urination. Condom was worn on his 'Dudu'. Dudu is called 'maud' – penis…….I felt a lot of pain in my vagina. I bled……'

16. PW2, who was the mother stated that she also examined the complainant who was walking with difficulties. That, the complainant felt a lot of pain in her vagina. PW4 is the one who physically examined the complainant at the hospital. She found a condom in the vagina and removed it. She also noted lacerations on the vagina and that the hymen was missing. PW3 witnessed the examination which was conducted by PW4 on the complainant. She also saw the condom which was stuck in the vagina of the complainant and which was removed by PW4 in her presence.

17. The lacerated vaginal walls, the presence of the used condom in the vagina and the missing hymen corroborated the testimony of the complainant that a penis had penetrated her vagina. There was also the evidence that the complainant could not walk properly due to the pains. PW2 corroborated that evidence of the complainant. Further, the clear narration by the complainant described a male-female genital sexual intercourse.

18. There is therefore sufficient evidence on record to prove that the complainant's vagina was penetrated by penis since the then status of the complainant cannot reasonably be explained otherwise in the face of the evidence. I find and hold that penetration was proved.

c) On whether the appellant was the perpetrator:

19. The witnesses testified before the trial court. That court had the following to say about the complainant: -

"…I listened keenly to the testimony of the complainant and observed her demeanor. I have no doubt that she was telling the truth. She vividly recalled what happened on the fateful night……..

…..For the above recorded reasons I believe and find that her evidence was truthful."

20. I have as well gone through the evidence of the complainant and find it well corroborated by the other witnesses. There is hence no doubt and I find no difficulty in holding that the Appellant is the one who forced the complainant to spend in the family house, locked the house using a key while both the complainant and the Appellant were inside and hid the key and later had sexual intercourse with the complainant. It is open that the Appellant planned to have sex with the complainant after PW2 had left the home when they differed.

21. I have also considered the fact that the complainant knew the Appellant so well as her step father and they lived together coupled with the fact that they were only two people in the house that night hence no chances of possible mistaken identity. It is again the Appellant who gave the complainant the key in the morning to open the door after which the complainant fled.

22. In arriving at the foregone holding I have also considered the defence. It appears like the Appellant remotely alluded to being framed up by PW2 and the complainant since he had disagreed with PW2. Without seen as shifting the burden of proof which rests on the prosecution throughout, the Appellant did not raise the issue with any of the witnesses including PW3 who would have investigated the same. The issue came up at the very tail end of the trial. Be that as it may, the trial court considered the defence in the judgment. The court addressed its mind

so well in finding that despite not raising the issue with the witnesses the Appellant disappeared on committing the offence and was only arrested much later. I concur with the analysis of the trial court on the defence. The defence was not a holding one and is hereby dismissed.

Other issues raised by the Appellant:

23. There was the contention that the evidence did not support the charge in that the complainant alleged that she was defiled on 20/06/2016 whereas all the other witnesses settled for the 26/12/2016. I have seen the date given by the complainant in the proceedings as 20/06/2016. The rest of the evidence of the complainant is however consistent with that of the other witnesses. My attention is outrightly drawn to the provisions of **Section 214(2)** of the **Criminal Procedure Code**, Cap. 75 of the Laws of Kenya which states that: -

> ***"Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof".***

24. Further, **Section 382** of the **Criminal Procedure Code**, Cap. 75 of the Laws of Kenya provides as follows: -

> ***"Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

25. As said, apart from the date the rest of the evidence of the complainant tallied with the evidence of the other witnesses. Now, was the charge instituted within the timelines and did that error or irregularity cause any injustice to the Appellant? The charge was timeously instituted against the Appellant and I do not see how the error or irregularity prejudiced the Appellant. The Appellant understood the matter before court and even cross-examined the complainant all the other witnesses. He also had an opportunity of raising the objection earlier in the proceedings but did not. The issue is hence squarely taken care of by **Sections 214(2)** and **382** of the **Criminal Procedure Code.**

26. The other issue was that the court spiced up the particulars and added that the act was intentional and unlawful whereas the charge which was not amended only stated that the act was intentional. I have unsuccessfully struggled to see how the alleged issue can possibly hold for the Appellant. The contention is the use of the word 'unlawful' by the court. It is true the word does not appear in the particulars of the charge. However, the charge as framed is 'D*efilement contrary to Section 8(1)(3) of the Sexual Offences Act*.' That connotes the unlawful nature of the act complained of such that even if the word 'unlawful' is not expressly used in the particulars still the unlawfulness of the act remains. The ground lacks merit and is dismissed.

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

28. The appellant also appealed against the sentence claiming that the sentence was based on an improper conviction. Since I have upheld the conviction then the ground challenging the sentence fails and is also dismissed. The upshot is that the appeal is not merited. It is hereby dismissed, and the decision of the trial court is affirmed.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 24th day of May 2018.**

A. C. MRIMA

JUDGE

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

Mr. Gembe Counsel for the Appellant.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Miss Nyauke – Court Assistant