



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 44 OF 2017

DO.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. E. Muriuki

Nyagah, Principal Magistrate in Migori Chief Magistrate's Court

Criminal Case No. 3 of 2017 delivered on 04/12/2017)

JUDGMENT

1. **DO**, the Appellant herein, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(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. The Appellant denied both counts.

2. The particulars of the offence of defilement were that *'on the 12th day of February 2017 within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of JAO., a child aged 10 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 mother, **NA**, testified as **PW2**. **PW3** was a Clinical Officer working at Karungu Sub-District Hospital. **PW4** was **No. 55639 PC Lusweti Libesa** from Karungu Police Post who was the investigating officer. The Appellant was a relative to **PW2** and the complainant and their neighbour as well.

5. The witnesses variously testified and 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 defence and called two witnesses who were his brother **FBW (DW1)** and **Samson Otieno Alisom (DW2)** who was the Appellant's fellow fisherman.

6. By a judgment rendered on 04/12/2017 the trial court found the Appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to life imprisonment.

7. Being dissatisfied with the conviction and sentence, the Appellant timeously lodged an appeal and filed his Petition of Appeal filed on 18/12/2017 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 court erred in both law and facts by shifting the burden of proof to the appellant.

(c) THAT the trial court erred in both law and facts by not putting into consideration that the ingredients of defilement were not proved to the required standard in law.

8. 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 prayed for the appeal to be allowed. The State opposed the appeal and prayed

for its dismissal.

9. 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.

10. 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

11. 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:

12. The age of the complainant was contested in this appeal. The prosecution availed a Certificate of Birth No. [Particulars withheld] in proof of the age of the complainant. The complainant was born on 17/04/2007 hence she was slightly below 10 years as at the date of the alleged offence. The complainant was hence a minor of tender years in law.

(b) On the issue of penetration:

13. **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.'

14. 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).

15. 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."

16. The Appellant strenuously contended that penetration was not proved. The complainant gave a sworn statement after a *voir dire* examination and narrated the events as they unfolded between herself and the assailant. She vividly took the court through what happened as she picked firewood and when the assailant appeared. The assailant seduced her, but she declined. She was then grabbed and threatened to be stabbed with a knife. She was dropped on the ground, undressed, and inserted with a penile organ in her vagina and they engaged in a sexual intercourse.

17. It was her mother, PW2, who noticed bad odor from the complainant's private parts two days later. PW2 counselled her and eventually the complainant opened up and narrated the ordeal. PW2 examined the private parts and noted whitish discharge. She took her to hospital and later reported the matter to the police.

18. PW3 was a Clinical Officer who examined and treated the complainant. She noted the complainant not walking properly and on examination he found whitish discharge from her vagina. There were bruises on the vaginal walls extending to the labia minora and majora. There was also the presence of pus cells and epithelial cells. He opined that there had been a penile penetration into the vagina of the complainant. He filled and signed a P3 Form which he produced as an exhibit.

19. The evidence of the complainant was hence corroborated. The trial court saw the demeanor of the witnesses and believed them. Having gone through the record, I have not come across anything that may make me impugn the demeanor of any of the witnesses or to make a finding that the trial court made a wrong assessment of the demeanor of the witnesses in the circumstances of this case. From the above analysis and on an evaluation of the evidence of the complainant and PW2 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) On whether the Appellant was the perpetrator:

20. The Appellant vehemently denied any involvement in the alleged offence and raised an alibi. He testified that he left for fishing at around mid-day with DW2 and returned at around 10:00am of the following day. DW2 so confirmed and DW1 who was a brother to the Appellant stated that he heard that the Appellant had gone fishing on the day in issue.

21. The complainant was a relative and a neighbour to the Appellant and the offence was committed during the day. She also gave her

evidence on oath and it was believable. There were indeed injuries on the private parts of the complainant and she explained how there were incurred. There was nothing on the record to show that there was bad blood between the Appellant and the complainant's family to impute that the Appellant was being framed. It was on that background that PW4 arrested and charged the Appellant.

22. By placing the defence and the prosecution evidence side by side I do not see how the defence created any doubt on the prosecution's evidence. The trial Court did not shift the burden to the Appellant as alleged. The court was cautious and was even guided by binding decisions. I wholly concur with the trial court that the defence was not holding and was for rejection.

23. I now return a finding that it was the Appellant who sexually assaulted the complainant.

24. 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 and the appeal on conviction is hereby declined.

25. On 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 so properly sentenced and the appeal on sentence equally fails.

26. The upshot is that the appeal is not merited. It is hereby dismissed and the decision of the trial court affirmed.

Orders accordingly.

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

A. C. MRIMA

JUDGE

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

DO, the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant