



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 36 OF 2017

MARK ODHIAMBO NJOGA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No.84 of 2015 delivered on 30/11/2017)

JUDGMENT

1. The Appellant herein, **Mark Odhiambo Njoga**, was charged with defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006 He denied the charge and a trial was held.

2. The particulars of the charge of defilement were that *'On 6th day of March 2015 within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the anus of M.O.A., a child aged 8 years'*.

3. The prosecution called a total of five witnesses. **M O A** testified as the complainant. **J A**, an Administrator at [particulars withheld]Academy testified as **PW1**. **N J**, the mother of the complainant testified as **PW3**. **PW4** was a **Dr. Ruwa Sammy Mwatela** from Rongo Sub-County Hospital. **PW5** was **No. 63005 PC Evans Okumu** attached at Okumba Police Post who was the investigating officer. 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 save the complainant whom I will refer to as **'the complainant'**.

4. The witnesses testified variously and at the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave sworn *alibi* defence without calling any witness. Thereafter the court rendered its judgment where the Appellant was found guilty as charged and was convicted. He was sentenced to life imprisonment.

5. Being dissatisfied with the convictions and sentences, the Appellant timeously preferred an appeal by filing a Petition of Appeal on 11/12/2017 where he challenged the entire judgment and the sentences on the following three main grounds: -

(a) That I did not plead guilty to the charge herein.

(b) That the trial court erred in both law and facts by relying on contradictory evidence adduced by PW3 and P3 from adduced in court meaning it was not proved beyond any reasonable doubt.

(c) That the trial court erred in both law and facts by relying on testimony of a medical officer who read the P3 Form on behalf of his fellow and which evidence was totally exaggerated, in that the time and date of commission of the offence was not established to prove penetration.

6. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant filed his submissions and expounded on the foregone grounds. The appeal was opposed by the State through **Miss Atieno**, Learned Prosecution Counsel who prayed that the appeal be dismissed.

Analysis and Determinations:

7. This being the Appellant's first appeal, the role of this appellate Court of first instance 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, analyse 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.

8. 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.

9. 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. I must however confirm that the prosecution's evidence and the defence was well captured in the judgment under appeal and I hereby adopt the same as part of this decision by reference.

(a) On the age of the complainant:

10. The age of the complainant was settled by a Birth Certificate No. [particulars withheld]. He was born on 01/10/2006 and as such he was 8 years old at the time the offence was allegedly occasioned. He was hence a minor of tender age within the meaning of the law.

(b) On the issue of penetration:

11. **Section 2** of the **Sexual Offences Act** (hereinafter referred to as '**the Act**') defines '*genital organs*' and '*penetration*' as: -

"genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus; '**penetration**' means the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

12. 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).

13. 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."

14. The complainant gave unsworn testimony. He described his encounter with the assailant. He explained how he was called and locked into the office, undressed and had the assailant's penis inserted into his anus.

15. When PW3 reported the matter to the police, the complainant was escorted to Rongo Sub-County Hospital where he was examined. The anal examination for the complainant revealed the presence of bruises. PW4 testified that the bruises were evident of a forced anal penetration. The medical records were produced as exhibits after PW4 laid such basis and took the court through them with liberty to the Appellant to raise any objection.

16. I have carefully perused the medical exhibits and the considered the evidence of the complainant and in view of the provisions of **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya, I have no doubt that there was penile penetration on the complainant's anus. The ingredient was hence proved.

c) On whether the appellant was the perpetrator:

17. The Appellant denied any involvement in the alleged offence. He tendered sworn defence and narrated the events as from Friday the 5th March 2015 up to the 8th March 2015 when he was arrested at the Chief's Office. He explained that he was not in school on the 6th March as from noon and that he was not a Teacher but a School Cashier.

18. PW1 who was the School Administrator testified that the Appellant reported on duty on Friday and worked up to lunch time when he left. It is not in doubt that the complainant knew the Appellant so well. It is also not in doubt that PW1 was the one in-charge of the administration at the school. The complainant testified that he was called by the Appellant into his office and he was sodomized.

19. The totality of the evidence placed the Appellant at school during the period in issue. The trial court heard the matter and observed the demeanors of all witnesses. The court believed the witnesses and this Court must give an allowance for that. There is nothing placed before me to impugn that finding by the Court. Having carefully considered the evidence on record and the defence I concur with the trial court that the defence was an afterthought and a sham. There is credible evidence that the events complained about were committed by the Appellant. I therefore find and hold that it was the Appellant who penetrated the anus of the complainant with his penis.

20. The Appellant also raised another issue which I must consider. He contended that the evidence was riddled with contradictions and inconsistencies. I must state that I have carefully addressed my mind on the record and noted very negligible discrepancies 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.

21. Having considered all the grounds challenging the conviction, this Court finds that the Appellant was properly found guilty and convicted.

22. The Appellant was sentenced to life imprisonment. The life sentence is the only sentence provided under **Section 8(2)** of the **Sexual Offences Act**. The appeal on the sentence equally fails.

23. 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 22nd day of October 2018.

A. C. MRIMA

JUDGE

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

Mark Odhiambo Njoga, the Appellant in person.

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

Everlyne Nyauke – Court Assistant