REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 26 OF 2016

L O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

Wachira, Resident Magistrate in Migori Chief Magistrate's Criminal

Case No. 800 of 2015 delivered on 13/05/2016)

JUDGMENT

1. The Appellant herein, **L O** was charged with the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. He denied both counts.

2. The particulars of the offence of defilement were that on the diverse dates between 3rd October and 9th October 2015 in Migori County within the Republic of Kenya, intentionally caused his penis to penetrate the female genitalia of W 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 four witnesses. The minor testified as **PW1** (hereinafter referred to as **'the complainant'**) whereas ***J O***, the minor's father testified as **PW2**. **PW3** was a Clinical Officer from Migori District Hospital and the investigating officer one **No. 91813 PC Nahashon Akumu** testified as **PW4**. 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 otherwise stated.

5. It was the prosecution's case that on 03/10/2015 the complainant asked for some Kshs. 10/= from her mother (not a witness) but the mother became so enraged and asked her to go get the money from her male friends. The complainant got angry and left their home. She proceeded to the appellant's house where she met the appellant there. The complainant then left with the appellant to the Migori stage where they took a motor cycle to the appellant's home. On reaching the appellant's home the appellant took the complainant to a house in another homestead where she spent there.

6. In the morning of the following day the appellant sent a motor cycle rider to go and pick the

complainant from the house she had spent in but the owner of the house declined. The appellant then went there later on and took the complainant to Ogwethi where they stayed for like one hour and then left for the appellant sister's home in Kisendi where they stayed there from 04/10/2015 to 08/10/2015. During that period the appellant and the complainant shared a room and engaged in sex every night. The complainant felt pain but she could only cry in low tones. The complainant and the appellant were both arrested by the police with the aid of PW2. They were then taken to the KisendI Police Post and later to Uriri Police Station. The two were then escorted to hospital where they were both examined and further the complainant's age was assessed.

7. On examining the complainant at the Migori District Hospital PW3 noted that the complainant's hymen was missing although there was no evidence of fresh rapture as the examination was done several days post the incident. He also found pus cells. He confirmed that the complainant had engaged in penetrative sex. The appellant was also examined and found to be HIV positive whereas the complainant was HIV negative even after a repeat examination three months post the initial examination. PW3 explained that possibility to be that the Complainant was a discordant person; one who can engage in sex with a HIV victim but she will not get infected. PW3 produced the treatment notes and P3 Form as exhibits whereas PW4 produced the Age Assessment report. The complainant identified the appellant as the one whom she had engaged in sex with for all those days and that she knew him very well.

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 an unsworn defence and denied any involvement in the commission of any of the alleged offences. He raised an alibi defence that on the alleged dates he was in Migori making bricks for PW2's brother and not in Kisendi. He also blamed PW2 who had a grudge with his brother whom the appellant used to make bricks for. The appellant did not call any witnesses.

9. By a judgment rendered on 13/05/2016 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 lodged an appeal by filing the Petition of Appeal on 23/05/2016 and challenged the conviction and sentence on four grounds.

11. At the hearing of the appeal the appellant appeared in person and filed six more supplementary grounds of appeal which he expounded in his written submissions. For clarity purposes I will reproduce the supplementary grounds of appeal:

> ***1. That I the appellant herein pleaded not guilty to the offense charged and plea of not guilty entered.***
>
> ***2. That the learned trial magistrate grossly erred both in law and fact in convicting and sentencing I the appellant on the contradiction evidence in the respondent case.***
>
> ***3. That the learned trial magistrate grossly erred both in law and fact in convicting and sentencing I he appellant when the salient ingredients were not proved beyond reasonable doubts.***
>
> ***4. That the learned trial magistrate further grossly erred both in law and fact to misapprehend the tenor and/or otherwise extend the nature of offence charged in shifting the burden of proof to I the appellant.***
>
> ***5. That the learned trial magistrate grossly erred both in law and facts by disapproved my defense evidence and mitigation which could have led to my acquittal."***

12. The State through Learned State Counsel Miss Owenga vehemently opposed the appeal and relied on the evidence on record.

13. As this is 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.

14. 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 with all the decisions referred to therein.

15. 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 singly.

(a) On the age of the complainant:

16. The age of the complainant was settled by the age assessment which was done. I have perused the Report and noted that the examining Dental Officer from Migori District Hospital laid the sound medical basis of his findings. It was confirmed that the complainant was 14 years old. The complainant was hence a minor within the meaning of the law.

(b) On the issue of penetration:

17. **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.'***

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).

18. 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."***

19. In dealing with this issue I will revert to the record, When the complainant gave her sworn testimony she stated as follows:

> ***"....It was accused sister's home. It was at 6pm on 4/10/15 we went to sleep. Accused told me to remove my clothes and started touching me all over. He then put his penis in my vagina.....***
>
> ***Accused's sister and his husband and children were present. We slept in a separate room with accused only.....I was crying in low tone no one could hear.***
>
> ***He had sex with me from 4th to 8th October 2015 every night....."***

20. The complainant was then taken to the Migori District Hospital where she was examined and treated. PW3 examined the complainant and filled in the P3 Form which he produced in evidence together with the treatment chits. I have carefully perused the P3 Form which indicates that upon examination of the complainant's private parts it was revealed that the hymen had been raptured. Although there was no sign of fresh rapture due to the time taken prior to the examination pus cells were seen. It was confirmed that there had been a penile penetration into the complainant's vagina.

21. From the medical evidence on record and on an evaluation of the evidence of the complainant and PW3 as well as the contents of the P3 Form, this Court is satisfied that there was penile penetration into the complainant's vagina. Penetration was hence proved.

c) <u>On whether the appellant was the perpetrator:</u>

22. Although the appellant vehemently denied any involvement in the alleged offence and in his unsworn defence raised an alibi defence which he had not earlier on raised or laid a basis for, I will nevertheless weigh the prosecution's evidence in light of the alibi.

23. The complainant took the court through what happened from when she left her home until when they were arrested. Upon leaving her home she headed straight to the appellant's house. It was the appellant who took her to his home and led her to a certain place to spend the night. The appellant then took her to his sister's place in Kisendi where they stayed together for a couple of days until they were arrested. It is not possible therefore that the complainant was mistaken on whom she was with. It is the complainant who personally went to the appellant. She therefore knew where she was going to.

24. On taking the foregone evidence on one hand and the alibi on the other hand, I find that the alibi does not cast any reasonable doubt on the prosecution's evidence. Further there is no evidence that the complainant was engaged in any other sexual activity with any other person between the days in issue. I hence find that it was the appellant who had sex with the complainant for all those days.

25. The above finding is further anchored in the fact that the trial court also had an opportunity and noted the demeanor of the witnesses and formed an opinion in its judgment that the complainant was consistent and truthful. I also noted from the proceedings that the complainant was very clear and candid on what happened to her. She described how the events unfolded and stated that it was the appellant whom she had sex with.

26. I therefore find that there is adequate evidence in proof that the appellant was guilty of defilement as charged and convicted of.

<u>On the other grounds raised by the appellant:</u>

27. The appellant contended that there was no corroboration to the complainant's evidence and as such her evidence could not be relied upon to sustain a conviction. I believe the rejoinder to that lies on the proviso to **section 124** of the **Evidence Act,** Chapter 80 of the Laws of Kenya which states that:

> ***" 124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

28. The trial court analysed the evidence of the complainant so well. It carefully laid a basis as to why it

believed the complainant. The court gave its reasons for such and that was in line with the law. The foregone legal position was well reiterated in the Court of Appeal decision of **Mohammed vs. R** that Courts are no longer hamstrung by the need for corroboration in sexual offences.

29. The appellant also argued that the case was not well investigated at all as crucial witnesses did not testify in court. The prosecution has a duty to prove its case but not necessarily that it avails all the people mentioned in the course of the investigations. Evidence which tend to prove the charge as required in law is but sufficient. I have perused the evidence tendered before the court and I have no doubt that the same was enough to find a conviction even without the evidence of the other potential witnesses. That is why **Section 143** of the **Evidence Act**, Chapter 80 of the Laws of Kenya gives the prosecutor the discretion to chose the witnesses to testify. (Also see the cases of **Bukenya & Others -versus- Uganda (1972)EA 549** and **Nguku -versus- Republic (1985)KLR 412).**

30. On sentence, as the complainant was aged 14 years old, the appellant was sentenced to the minimum prescribed sentence under **Section 8(3)** of the Sexual Offences Act. The 20-year prison sentence remains legal.

31. As I come to the end of this judgment I wish to point out an issue which I came across on the record. The trial of the case began before ***Hon. L. K. Sindani, Resident Magistrate***, who was then transferred before completing the case. By then only the complainant and PW2 had testified before her. Further proceedings were taken before ***Hon. M. M. Wachira, then Resident Magistrate.*** **That** being the case **Section 200(3)** of the **Criminal Procedure Code** was to be complied with. That was however not done. The said section of the law states that:

> ***"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

32. The learned magistrate was under a mandatory duty to inform the appellant of that right so that the appellant may make a choice on the part-heard matter. Whereas such an omission is generally fatal, the events that followed in the matter make a perfect exemption. On realising that the trial court had changed the appellant made an application to recall the two witnesses who had earlier on testified for further examination. The application was allowed and truly the two witnesses were recalled and examined accordingly. To me that cured the irregularity on the record. I further take refuge in **Section 382** of the **Criminal Procedure Code** since the appellant cannot be heard to say that he was prejudiced in any way.

33. Since there is no reason to disturb both the conviction and sentence, the decision of the trial court is hereby affirmed and the appeal dismissed accordingly.

DELIVERED, DATED and **SIGNED** at **MIGORI** this **23rd** day of **February 2017.**

A. C. MRIMA

JUDGE