REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 49 OF 2016

KENNEDY OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. P. K. Rugut, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 418 of 2014 delivered on 30/09/2016)

JUDGMENT

1. **KENNEDY OTIENO**, 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. 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 24th day of October 2014 at around 10:00am at [Particulars withheld] Sub-location East Kamagambo location within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of A. O. a child aged 12 years.

3. The appellant was subsequently tried and convicted on the main count of defilement and sentenced.

4. The prosecution called a total of six witnesses. The minor testified as **PW1** (hereinafter referred to as **'the complainant'**) whereas **B O O**, the minor's grandfather and guardian testified as **PW2**. **PW4** was a Clinical Officer from Rongo Sub-County Hospital whereas **PW3** was **No. 234761 APC Kennedy Opondo. PW5** was **No. 1986008028 Corp. Simon Tinga** and the investigating officer one **No. 70204 PC Ronald Nyamweya Makori** testified as **PW6**. 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. Briefly the prosecution's case was that on 24/10/2014 the complainant, who was a known epileptic case, went to school and as her friends she was playing with left her behind the appellant appeared and pulled her into a nearby sugar cane plantation as her friends rushed back into class. The appellant, it is alleged, eventually had a sexual act with the complainant before he ran away. The complainant was later on rescued by some women who took her to the school's head teacher and PW2 was called. Members of the public arrested the appellant and handed him over to PW3 who was manning some national examinations in a nearby School. PW3 called his colleagues who took the complainant, PW2 and the appellant to Kamagambo Police Station before the complainant was taken to Rongo Sub-County Hospital where she was a attended to and a P3 Form filled by PW4. PW4 later on produced a P3 Form she had filled and a Post Rape Care Form which had been filled by her colleague as exhibits. Upon completion of the investigations PW6 preferred the charges against the appellant.

6. 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 defence and denied any involvement in the commission of any of the alleged offences. He stated that he truly went to the school on the said day for special prayers for Standard 8 candidates before they sat the national examinations and sat under a tree as he waited for the session. As he was so waiting amid greeting other people who had also attended, PW3 came and arrested him on allegations of defilement. He was surprised and was later on taken to Kamagambo Police Station and later charged. The appellant however confirmed that he had constructed a latrine at the school as alleged by the complainant. The appellant did not call any witnesses.

7. By a judgment rendered on 13/09/2016 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 20 years imprisonment.

8. Being dissatisfied with the conviction and sentence, the appellant through the firm of P. R. Ojala & Company Advocates lodged an appeal by filing the Petition of Appeal on and evenly dated the 12/10/2016 and challenged the conviction and sentence on four grounds. The appeal was however deemed to be properly on record by an order of this Court. The grounds of appeal are as follows: -

1. ***That the sentence is excessively harsh/higher.***

2. That the Trial Magistrate erred in law and facts in her finding that the appellant had committed the offence

3. That the Trial Magistrate erred in law and fact in shifting the burden of proof upon the appellant

4. That the Trial Magistrate based her findings on hearsays and arrived at a wrong decision in finding that the appellant had committed the offence.

9. The appeal was heard by way of oral evidence. Mr. Ojala, Learned Counsel who appeared for the appellant consolidated all the four grounds of appeal and argued them together. It was his submission that the charge of defilement was not proved and contended that the appellant was not identified as the assailant, if at all the complainant was defiled and that the women who allegedly saw the appellant were never called to tender such evidence. Counsel also submitted on the inadequacy of the medical evidence which included the P3 Form which was for one E A aged 30 years and referred to a complaint on assault. It was also argued that even the evidence of PW4 did not confirm any defilement. Further discrepancies on the treatment notes and the record were pointed out. It was also argued that the trial court shifted the burden of proof by requiring the appellant to prove his innocence. This Court was urged to allow the appeal.

10. The State through Learned State Counsel Miss Owenga conceded to the appeal and pointed out that the evidence was riddled with many loopholes which made a conviction unsafe.

11. Despite the concession by the State, this Court as the first appellate Court is called upon to fully discharge its calling as such. 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.

12. 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 oral submissions made.

13. 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:

14. The age of the complainant was settled by the complainant's Dedication Certificate from the Seventh Day Adventist Church which showed that she was born on 06/06/2002 and was dedicated on 10/07/2002. This Court accepts the Certificate as proof of the complainant's age. That is in line with the Sexual Offences Act under which some rules were promulgated towards the achievement of its objectives. Those rules came to be known as ***"The Sexual Offence Act (Rules of Court) 2014*** which came into force on 11/07/2014 under Legal Notice No. 101.

15. Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or any other similar document. It is therefore the finding of this Court that on the Dedication Certificate falls under the category of the documents described as **'or any other similar document.'** From the foregone evidence, the age of the complainant at the alleged time of commission of the heinous act on her was 12 years and 4 months old. The complainant was hence a minor within the meaning of the law.

(b) On the issue of penetration:

16. **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.'

17. 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-in-chief, she stated as follows:

"....he pulled me inside a sugarcane plantation he dropped me down, removed my pant, when I screamed he beat me up, he then

laid on top of me, he told me not to tell anybody, he did bad manners to me. The accused had his trouser, he removed it, he did not wear anything as he did bad manners, I felt pain as he did the bad manners, and did it for a long time. He then left me saying he did not want to be caught, my private parts were aching. I saw a liquid in there. I wore my clothes and went to class.

20. On being cross-examined by the appellant, the complainant had the following to say:-

"....You held me, and pulled me into the sugarcane, I screamed, people heard the women who came; they came later after I stopped screaming. You dropped me into the plantation, you pushed me, and I fell down. You then lay on top of me. You removed my pant first, I was swollen when you hit me, and the doctor saw the injuries."

21. The complainant was then taken to the Rongo Sub-County Hospital where she was examined and treated. PW4 examined the complainant and filled in the P3 Form which she produced in evidence together with the Post Rape Care Form which had initially been filled in by her colleague. PW4 stated that the contents of the Post Rape Care Form were the same as those in the P3 Form. On examination of the complainant's private parts it was revealed that the hymen had been previously raptured and that there was a whitish vaginal discharge with a urinal tract infection. There was also the presence of pus and epithelial cells. The *labias*, cervix and vagina were however normal. Syphilis, H.I.V. and pregnancy tests yielded negative results. On explaining the absence of sperms, PW4 stated that sperms usually do survive for 3 - 5 hours only. It was then confirmed that there had been a penile penetration into the complainant's vagina.

22. That being the case, there was a turn of events when the appeal came up for hearing. The P3 Form and the Post Rape Care Form which were produced as exhibits by PW4 and referred to in the judgment by the trial court were not on record. Instead another P3 Form for one E A was in place. The said P3 Form revealed that the complaint was an assault and the victim was aged 30 years old and the same was filled in on 10/01/2014 long before the incident in issue arose. The same therefore had no relevance to the matter in issue.

23. It was submitted by the Counsel for the Appellant that the P3 Form for one **E A** went further to show that there was no nexus between the appellant and the alleged defilement on the complainant. On the issue of the missing P3 Form and the Post Rape Care Form, this Court decries the need for all players in the justice system to ensure that the integrity of court files is always upheld otherwise our clients shall lose confidence in the institution of the Judiciary. In this case, although the actual P3 Form and the Post Rape Care Form are not on record, this Court finds comfort in relying on the evidence of PW4 which took the trial court through the said documents until their production and in the judgment of the trial court which made express references to the documents.

24. Counsel for the Appellant further submitted that there were some irreconcilable discrepancies on the dates in the treatment notes and the evidence since the treatment notes did not show that the complainant had been defiled. Again I have carefully perused the record and did not find anywhere where the said treatment notes were produced in evidence and by whom. The said notes are therefore improperly on record and are hereby expunged accordingly. But even if one is to look at the said treatment notes, it is visibly clear that the same was a photocopy that was allegedly stamped with a poorly-done stamp of Rongo District Hospital. The notes bear the complainant's name which was inscribed in a different hand and in a blue ink whereas the rest of the document remains a photocopy in black writings. The stamp was also inscribed with a date; 17/11/2014 whereas the notes has entries as from 15/11/2014. All said and done, even if the said notes were for the complainant the same related to dates long after the occurrence of the incident in issue in this matter. The incident alleged occured on 24/10/2014 instead. However as aforetasted the said treatment notes remain expunged from the record.

25. It was further argued that the appellant was not examined to ascertain if he was the one who had infected the complainant with the urinal tract infection. Whereas the argument may appear to be reasonable it has to be remembered that such alleged examination of the appellant cannot be held to be the only way in proving a case of defilement. In other words a case of defilement can still be proved even without such an examination on a suspect.

26. From the above analysis and on an evaluation of the evidence of the complainant and PW4, this Court is satisfied that there was a penile penetration into the complainant's vagina. Penetration was hence proved.

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

27. The appellant vehemently denied any involvement in the alleged offence and explained why he had gone to the school on that day. It was not denied that the school wherein the complainant was a student was holding a prayer session for its candidates that day and that the appellant attended. It was also admitted by the Appellant that he had previously worked at the complainant's school where he dug a latrine for the school. From the record, the evidence touching on the appellant was solely by the complainant although there was a mention of some women and pupils who never testified.

28. The complainant however stated that she knew the appellant so well and described him and the day's events as follows in examination-in-chief: -

".....I was playing with my classmates. It was outside class, my classmates ran and left me. I was sick. It was behind the school. The playground was outside the school compound. Otieno Odero found me going to class behind the school. Otieno is the accused, (pointed at accused) I knew him, he was a mason in school he pulled me inside a sugarcane plantation.....

...The accused was a builder in school. I use to see him every morning, he was constructing a pit latrine.....

29. And on cross-examination by the appellant the complainant stated as follows:-

"....You found us playing outside the compound when the other children left me, you came to me.....you were not armed. You said 'you girl come here'. We were 5 girls, the other 4 ran away. I remained behind.....

30. The complainant took the court through what happened from the time she was playing until when she was defiled and eventually taken to the head teacher. She described the assailant by his name althrough. Despite the fact that the evidence of the complainant was the sole evidence of identification by way of recognition and that the same was not corroborated as such, the trial court could still convict the appellant upon believing the evidence of the complainant and giving its reasons accordingly. Needless to say the incident occured in daylight and there is nothing in the evidence to show that the complainant's visibility was hampered in one way or the other.

31. But how did the trial court handle this aspect? The court expressed itself as follows:-

> ***"On the second issue of whether PW1 was defiled on 24/10/14 by the accused, PW1 told the court that the accused led her from school into a sugarcane plantation where he defiled her. PW1 knew the accused a mason in the school. The accused in his defense had described himself as a contractor who had even constructed a toilet for that school. PW1's description of the accused is therefore credible.***
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> ***I have considered the chain of events from the time that child is alleged to have been defiled, to the arrest of the accused and his arraignment at the police station, the chain is consistent with the evidence of PW1. The fact the accused was arrested by PW3 at the school and the fact that PW3 sought for reinforcement from his superior is supported by the evidence of PW5.***
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> ***From the consistencies and the demeanor of the child, I had no reason to doubt her since by law and precedence a court has power to receive and convict even on uncorroborated evidence of a child where for reason set down, the court is cautiously satisfied that the child spoke the truth. See section 124 of the Evidence Act and as echoed by the Court of Appeal in MOHAMED VS. REPUBLIC (2006) 2 KLR 138,***
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> ***"It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender year if it is satisfied that the child is truthful."***

32. Having re-evaluated the evidence on record, this Court is satisfied that indeed the trial court handled the aspect of the appellant's identification well and arrived at a correct finding. The appellant's recognition was therefore free from error. I say so because the court had the opportunity of seeing the witnesses testify and their demeanors and gave its reasons for believing the complainant. I am not persuaded that sufficient reasons have been furnished to warrant this Court differ with the trial court's finding. Needless to say the appellant's defence did not cast any reasonable doubt on the prosecution's evidence to warrant any interference.

33. This Court therefore finds that the appellant was the one who had sex with the complainant on 24/10/2014 and as alleged by the prosecution.

On the other grounds raised by the appellant:

34. The appellant also argued that some crucial witnesses did not testify in court and as such the case had many loose-ends which ought to be reconciled in favour of the appellant. Such witnesses included the women who alleged caught up the appellant in the act, the complainant's fellow students and the members of public who allegedly arrested the appellant. I hereby reiterate that 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).**

35. On sentence, as the complainant was aged 12 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.

36. This Court therefore affirms the decision of the trial court and the appeal is hereby dismissed accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 21st day of March 2017.

A. C. MRIMA

JUDGE