



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 45 OF 2016

KEVIN ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by

Hon. Z. J. Nyakundi, Principal Magistrate in Rongo Senior Resident

Magistrate's Criminal Case No. 468 of 2012 delivered on 04/02/2013)

JUDGMENT

1. When **KEVIN ODHIAMBO**, 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** 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, he denied both counts.
2. The particulars of the offence of defilement were that between the 10th day of September 2012 and 20th September 2012 within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of E. 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 a total of five witnesses. The minor testified as **PW1** (hereinafter referred to as '**the complainant**') whereas **S A O**, a Primary School Teacher and a volunteer Children Officer covering Rongo, Awendo and Uriri Sub-Counties of the Migori County testified as **PW2**. **PW3** was a Clinical Officer from Rongo Sub-County Hospital whereas **PW4** was the arresting officer **No. 94028561 AP Corp. Richard Terer**. **PW5** was the investigating officer one **No. 77320 Corp. Hellen Nyaga**. 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 between the 10th day of September 2012 and 20th September 2012 the appellant eloped with the complainant and took the complainant away to his home in Gem where he stayed with her as her wife. The two engaged in unprotected sex each single day of their stay at Gem. They then moved to and lived in a house in Rongo Township as such a couple. Through the aid of a

Clan Elder PW2 was informed of the prevailing situation and was requested to take action and rescue the complainant. Similar information was received by PW2 from the area social worker as well. PW2 went to the DC's office at Rongo where he requested the assistance of the police in the rescue mission. She then proceeded to the scene where she found a large gathering of members of the public together with the complainant and the appellant. The police shortly arrived and arrested the two and took them to Kamagambo Police Station where the complainant was taken to Rongo Sub-County Hospital for examination and treatment. On examination of the complainant's private parts PW3 confirmed the presence of lacerations on the walls of the vagina and the absence of the hymen. There was some whitish discharge too. PW3 concluded that the complainant had engaged in penetrative sex. She produced the P3 Form and treatment notes as exhibits. PW5 carried out the investigations and eventually 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 unsworn defence and denied any involvement in the commission of any of the alleged offences. He however contended that he was framed as he had a dispute with PW2's son. He wondered why the complainant's parents and members of public did not raise alarm but PW2. He prayed that the charges be accordingly dropped and called no witnesses.

7. By a judgment rendered on 04/02/2013 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 lodged an appeal out of time by filing the Petition of Appeal and the grounds of appeal sometimes in October 2016 and challenged the conviction and sentence accordingly. The appeal was however deemed to be properly on record by an order of this Court in Migori High Court Misc. Criminal Application No. 15 of 2016..

9. The appeal was heard by way of written submissions and the appellant filed some more supplementary grounds as well as the written submissions. He deeply expounded the five supplementary grounds in the written submissions. The supplementary grounds were tailored as follows:

1. THAT I the appellant herein pleaded not guilty to the offence charges and plea of not guilty entered.

2. THAT the learned trial magistrate grossly erred both in law and facts in convicting and sentencing I the appellant on the contradiction evidence in the respondent case thereof.

3. THAT the learned trial magistrate grossly erred in both in law and facts in convicting and sentencing I the appellant when the salient ingredients of the offence charged were not proved beyond reasonable doubts.

4. THAT the learned magistrate further grossly erred both in law and fact to misapprehended the tenor and or extend nature of the offence charged in shifting the burden of proof against I the appellant.

5. THAT the learned trial magistrate further grossly erred both in law and facts to disapprove my defense evidence minus mitigation evidence which could have lead to my acquittal.

10. The State through Learned State Counsel Miss Owenga opposed the appeal and prayed that the same be dismissed.

11. 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, 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 written submissions

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 Child Health Card from the Onyuongo Medical Centre which showed that the complainant was born on 05/05/1998. This Court accepts the Child Health Card 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 the Child Health Card 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 14 years 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 she narrated the events as they unfolded between herself and the appellant. She took the court through what happened at the appellant's home in Gem for a whole week; that the two used to sleep on the same bed and had sex every single day of their stay there amid the appellant promising to marry the complainant.

20. When the complainant was taken to the Rongo Sub-County Hospital she was examined and treated. PW3 examined the complainant and filled in the P3 Form which she produced in evidence together with the other treatment notes. On examination of the complainant's private parts it was revealed that the

hymen was missing and that there was a whitish vaginal discharge with lacerations on the vaginal wall. It was then confirmed that there had been a penile penetration into the complainant's vagina.

21. From the above analysis and on an evaluation of the evidence of the complainant, PW2 and PW3, 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:

22. The appellant vehemently denied any involvement in the alleged offence and contended that he was framed up by PW2 whose son they had differed. He wondered why the complainant's parents and members of public did not raise alarm but PW2. From the record, the evidence touching on the appellant was solely by the complainant.

23. The complainant however stated that she knew the appellant so well and that the complainant had agreed to marry the appellant. The two moved from Rongo and went to the appellant's home at Gem where they stayed together for a couple of days before returning to Rongo where they continued living together until their arrest. The complainant stated that the man she had stayed with, had sex with and agreed to marry him was the appellant. She identified him in court.

24. Having re-evaluated the evidence on record and having taken caution of relying on the evidence of a single witness and by dint of the provisions of **Section 124** of the **Evidence Act**, Chapter 80 of the Laws of Kenya, 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 further to the fact that 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. The appellant was properly placed as the perpetrator.

25. This Court therefore finds that the appellant was the one who had sex with the complainant and as alleged by the prosecution.

26. 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.

27. 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