REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 54 OF 2015

(Formerly Kisii High Court Criminal Appeal No. 79 of 2013)

EVANS MOMANYI AMENYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. S. M. Shitubi, Senior Principal Magistrate in Migori Senior Principal Magistrate's Criminal Case No. 552 of 2011 delivered on 24/04/2012)

JUDGMENT

1. **EVANS MOMANYI AMENYA**, 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 on the 24th day of August 2011 at [*particulars withheld*], intentionally caused his penis to penetrate the vagina of D.A.O. a child aged 11 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 the complainant's brother one **L.O.O**. testified as **PW2.** The father to the complainant one **G.O.O**. testified as **PW3**. A village elder who arrested the appellant testified as **PW4. PW5** was a Clinical Officer from Ogwedhi Health Centre and the investigating officer one **No. 55842 PC Stephen Chebo** attached at Migori Police Station 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. The prosecution's case was that on 24/08/2011 at around 1:00pm the complainant, then a Class 4 pupil at [*particulars withheld*], Primary School, took some food to her brother, PW2, who was then working in a parcel of land they had rented from the employer of the appellant. The appellant was then working as a herdsman. On delivering the food, the complainant went into the farm to get some raw maize as she was on her way back home. As the complainant was getting the maize she met the appellant who was herding some cattle. The appellant called her and told her to go to where he was so as to collect some more raw maize but the complainant refused and set off to her home. The appellant then rushed and caught up with the complainant whom she accused of stealing the maize. The appellant pulled the complainant into the

maize field and undressed her. He also undressed and forcefully had sex with her. The complainant raised alarm and PW2 heard the screams and rushed to the direction the screams came from. PW2 managed to spot the appellant, whom he knew too well, having sex with the complainant from about 50 metres away. He raised alarm as well. The appellant then ran away. PW2 gave chase but returned to assist the complainant who was in deep pain. He rescued the complainant. He observed her and saw her bleeding from her private parts as she was crying in deep pains.

6. PW2 called and informed their father, PW3, of what had happened and disclosed that it was the appellant who was the assailant but had run away. PW3 then immediately informed PW4. PW2 took the complainant to Ogwedhi Health Centre where she was examined and treated, but also referred to the then Migori District Hospital where she received further medical intervention. PW3 linked up with the complainant and PW2 at the Migori District Hospital later on. PW3 reported the matter to Migori Police Station.

7. PW6 investigated the matter. He recorded statements from witnesses and gathered the treatment notes and the P3 Form which were of the opinion that the complainant had engaged in sex. He also gathered the complainant's Certificate of Sacrament Received from Ulanda Catholic Church in Sare Awendo which indicated that the complainant was born on 12/01/1999. He then preferred the charges against the appellant who had disappeared after the incident but was later on arrested by PW4 on 16/10/2011 and handed over to the police.

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 unsworn defence and called no witnesses. He denied any involvement in the commission of any of the alleged offences. He described how he was arrested by PW4 on 30/09/2011 as he was from church. He prayed that the charges be accordingly dropped.

9. By a judgment rendered on 24/04/2012 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 in the High Court at Kisii. By the Petition of Appeal filed on 31/05/2013 the appellant challenged the conviction and sentence on the following grounds of appeal: -

> ***1. THAT the learned trial Magistrate erred in law and fact when he failed to establish that I was not subjected to any medical examination that would link me to the alleged offence.***
>
> ***2. THAT the trial Magistrate erred in law and facts when he relied on a single evidence that was not corroborated by any other independent evidence.***
>
> ***3. THAT the trial Magistrate erred in law and facts when he failed to realize that the age of the alleged victim was not established by means on either a birth certificate or age assessment report by a medical doctor.***
>
> ***4. THAT the trial Magistrate erred in law and facts when he failed to detect that the prosecution evidence was marred by contradictions ie. Between PW1 and PW2***

11. The appeal was thereafter deemed as properly on record by an order of this Court made on 31/01/2017 and was set for hearing. The appeal was heard by way of written submissions where the appellant expounded on the grounds. The State through Learned State Counsel Miss Owenga opposed the appeal and prayed that the same be dismissed.

12. 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.

13. 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

14. 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) <u>On the age of the complainant:</u>

15. The age of the complainant was settled by the complainant's Certificate of Sacrament Received from Ulanda Catholic Church which showed that she was born on 12/01/1999. 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.

16. 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 Certificate of Sacrament Received 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 around 11 years and 7 months old. The complainant was hence a minor within the meaning of the law.

(b) <u>On the issue of penetration:</u>

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.'***

18. This position was fortified in the case of **<u>Mark Oiruri Mose vs R (2013)eKLR</u>** 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. <u>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</u>….'*** (emphasis added).

19. Later the Court of Appeal, then differently constituted, in the case of **<u>Erick Onyango Ondeng v. Republic (2014) eKLR</u>** 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."***

20. In dealing with this issue I will revert to the record. The complainant gave unsworn testimony. She was in Class 4 and narrated the events as they unfolded between herself and the appellant. She vividly took the court through what happened in the maize farm. She was held and pulled into the farm, undressed, laid on the ground, inserted with a penile organ in her vagina and they engaged in a sexual intercourse. That description of the events reveals that the complainant was well aware of what was happening; a sexual intercourse. When PW2 answered to the complainant's call for help and rushed to the scene, he saw the appellant having sex with the complainant. Although the complainant ran away, PW2

observed the complainant and saw that she was bleeding from her private parts. The complainant stated that it was her maiden sexual act.

21. When the complainant was taken to the Ogwedhi Health Centre she was examined and treated. It was PW5 who examined the complainant and filled in the P3 Form and the Post Rape Care Form which he produced them in evidence together with the other treatment notes. On examination of the complainant's private parts it was revealed that the hymen had been freshly broken and there were rugged tears on the *labia majora* and *labia minora* of the vagina. Fresh blood was also noted as oozing from the vaginal tears. A high vaginal swab was conducted and examined in the laboratory which revealed the presence of spermatozoa, red blood cells and epithelial cells.

> 22. From the above analysis and on an evaluation of the evidence of the complainant, PW2 and PW5, 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>

23. The appellant vehemently denied any involvement in the alleged offence. From the record, the evidence touching on the appellant was by the complainant and PW2.

24. The complainant stated that it was the appellant who pulled her into the maize farm and had sex with her. After the appellant finished the sexual encounter with her, he went and sat under a tree. The complainant then rushed back to where PW2 was and reported the incident. PW2 then hurried to the area where the alleged incident occurred and found the appellant seated under a tree. The appellant however ran away. PW2 on the other had had a different version of the events. According to him, he heard the complainant screaming and rushed only to find the appellant having sex with the complainant. The appellant then ran away. It is these two versions of what happened that the appellant vehemently submits that cannot be a basis of him being found as the perpetrator.

25. I have carefully revisited and given due consideration to the evidence on record. The complainant stated that the act was her maiden one. That was medically so proved. When she was rescued by PW2, she was in much pain. I find that it would not have been reasonably possible for the complainant to walk by herself to where PW2 was so as to report given the serious injuries she had sustained and which were so confirmed by PW5. I find the version that PW2 heard the complainant scream and followed the screams as credible and believable. I say so having warned myself on the dangers of relying on one version of such divergent evidence of the complainant and PW2. Further, the complainant gave unsworn testimony as she could not understand the nature of an oath. PW2 on the other hand gave sworn testimony. Having settled the difference, I further find that the evidence of PW2 to the extent that it was the appellant who was found having sex with the complainant in the maize farm was corroborated by that of the complainant. The incident occurred during the day. PW2 knew the appellant so well. The complainant as well knew the appellant. The complainant and PW2 stated that the appellant was a herdsman to the one who had given them part of his land to farm. The appellant also confirmed that indeed he was such a herdsman. PW2 called PW3 and gave the name of the appellant as the perpetrator he had seen and recognized at the scene. He so did to the police.

26. The defence of the appellant centered on how he was arrested. Without being seen as shifting the burden, I find that the defence did not create any doubt in the prosecution’s evidence. The contention by appellant that he was not subjected to any medical examination upon his arrest cannot stand. First, the appellant was arrested about three months after the incident and second, even if he was arrested at the scene or so soon thereafter, it would still not be mandatory that he was to be subjected to such an examination as the only proof of commission of the offence. Whereas the examination would have played a part in the matter, a case of defilement can still be proved without necessarily subjecting the suspect to a medical examination. The appellant was hence so properly placed as the perpetrator. This finding affirms the earlier finding of the trial court which had the opportunity of seeing the witnesses testify before it, observed their demeanors and believed their testimonies.

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

28. On sentence, as the complainant was aged 11 years and 7 months 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.

29. This Court now finds that none of the grounds of appeal put forth and supported by the written submissions is successful. The decision of the trial court is hereby affirmed and the appeal is accordingly dismissed.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of April 2017.

A. C. MRIMA

JUDGE