REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 61 OF 2016

PETER OCHOLA ODEDE.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal arising from the conviction and sentence by

Hon. C. K. Kamau, Resident Magistrate

in Rongo Senior Resident Magistrate's

Criminal Case No.234 of 2016 delivered on 09/12/2016)

JUDGMENT

1. This appeal challenges the conviction by the trial court on three fronts. That the age of the victim was not proved, that there was no evidence of penetration of the victim's private parts and that the Appellant herein, **PETER OCHOLA ODEDE,** was not satisfactorily identified as the assailant.

2. The Appellant was charged, tried, convicted and sentenced for the offence of defilement contrary to **Section 8(1)(2)** 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.

3. Four witnesses were called in support of the prosecution's case. They are the victim **A A A** who testified as **PW1** (hereinafter referred to as **'the complainant'**), the complainant's Teacher one **J A** who testified as **PW2**, the Clinical Officer from Rongo Sub-County Hospital who testified as **PW4** and **No. 101970 PC Dorah Mado** attached at Kamagambo Police Station who was the investigating officer and testified as **PW3**. I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except as otherwise stated above.

4. It was the prosecution's case that the complainant stayed with her grandmother. That on 31/03/2016 the complainant's grandmother had travelled and had left behind the complainant with her siblings including **J** and **P** who were younger to her. When the evening fell, the complainant took supper with her said siblings and went to sleep in **B's** house. B was one of the complainant's elder siblings. As the complainant prepared to sleep, one of her other elder siblings who had not been at home came in with his friend who was the Appellant. The complainant slept on a mat with her two younger brothers as his other brother and his friend the Appellant were still taking supper.

5. The complainant 's brother and the Appellant finally joined the three and slept on the same mat. The

Appellant first slept next to John but shortly changed position and slept next to the complainant facing the complainant's back. B and his wife also slept in the same house and they were separated from where the complainant slept by a curtain. Later in the night, the Appellant held the complainant's mouth and warned her that if she ever raised alarm he will kill her. The Appellant undressed the complainant by pulling her underpant to her knees and engaged her in sex. In the morning, the complainant woke up to find her mouth, the right shoulder and the left thigh swollen and painful. She however went to school at [Particulars withheld] Primary School where she was in Class 1 after serving the Appellant with some porridge.

6. At around noon and while at school, PW2 noticed that the complainant was not able to run. PW2 called and asked her if she was unwell. The complainant began crying. On further enquiry PW2 learnt that the complainant had engaged in sex with a man referred to as Peter the previous night and that her private parts were painful. PW2 reported the matter to the Headteacher and PW2 was asked to report the matter to the police. PW2 reported the matter at Kamagambo Police Station and the police referred her and the complainant to Rongo Sub-County Hospital where the complainant was examined and treated. A P3 Form was filled in later.

7. PW4 produced the P3 Form and the Post Rape Care Form she had personally filled in at the hospital on 05/04/2016 after examining the complainant on 04/04/2016. On examining the complainant's private parts PW4 noted that the hymen was missing, the presence of the epithelial cells, the urinary tract was infected and the *labia minora* had tears. PW4 concluded that the complainant had been defiled.

8. PW3 was not the initial investigating officer in the case. She however produced the statement of the initial investigator which reiterated the foregone and stated the Appellant had been arrested by members of public and had been locked in the staff room of [Particulars withheld] Primary School by the time PW2 went report the matter at the station. Two policers went and re-arrested the Appellant and took him to the police station. He was later charged.

9. 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. He denied the offences and explained how he was arrested. That on 01/04/2016 he was at Opapo where he resides and was called by someone and asked to go to a certain place within Opapo. On reaching there he was arrested by three people and led to Kosodo and then to Rongo police station without being told why he was under arrest. The Appellant contended that he had spent the night of 31/03/2016 at his rental place at Rodi after attending a Crusade at the said Rodi town. He prayed that the charges be dropped and called no witnesses.

10. In a well-reasoned and carefully researched judgment rendered on 09/12/2016 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to life imprisonment.

11. Being dissatisfied with the conviction and sentence, the appellant timeously lodged an appeal through **Messrs P. R. Ojalla & Company Advocates**. In a Petition of Appeal filed on 21/12/2016 the Appellant challenged the conviction and sentence on the following grounds: -

> ***1. The trial Magistrate erred in fact and law in his finding that the appellant had committed the offence.***
>
> ***2. That the trial Magistrate erred in law and fact in shifting the burden of proof upon the appellant.***
>
> ***3. That the trial Magistrate based his finding on a single evidence from the complainant and hearsays and arrived at a wrong decision in finding that the appellant had committed the offence.***
>
> ***4. That the sentence is excessively harsh/higher***

12. The appeal was heard by way of oral submissions where the Appellant's Counsel expounded on the first three grounds as he abandoned the fourth one. The State opposed the appeal and prayed that the same be dismissed.

13. This is the Appellant's first appeal. The role of this Court is now 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 that is beyond any reasonable doubt.

15. I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and the parties' submissions.

16. 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:

17. In sexual offences like the instant one, the age of the complainant remains very cardinal and must be strictly proved as the sentence on conviction vary with age. In this appeal, it is contended that the age of the complainant was not properly settled as the Age Assessment Report relied upon amounted to heresay since it was based on the information given by the complainant's mother who did not even testify.

18. It is true that the age of the complainant was settled by the said report. I have carefully perused the report and respectfully do not agree with the Appellant's submission. The report is dated 05/04/2016 and according to PW4 it was filled in by Dr. Morris Raute who had worked with PW4 for 2 years. The Doctor examined the complainant on various aspects including the breasts formation, presence of pubic hair, number of teeth and height. Based on those findings the Doctor concluded that the complainant was about 9 years old. That conclusion was reached at by a medico-scientific process. That process is not an ordinary process. It requires one to have undergone special medical training to be able to put up all what was examined and come up with an approximate age. The process cannot be said to have been a mere approximation. The issue of the complainant's mother only came up when the Doctor dealt with the background of the complainant before he carried out the examination on the complainant.

19. I therefore find no error on the part of the trial court in finding that the complainant was aged 9 years old on the guidance of the Age Assessment Report.

(b) On the issue of penetration:

20. **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.'***

21. 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).

22. 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."***

23. In dealing with this issue I will revert to the record. The complainant narrated the events as they unfolded between herself and the appellant. She vividly took the court through what happened that night. She was undressed by the Appellant and the Appellant '***inserted his thing used for urinating into my private part used for urinating and did bad manners to me'*** That description reasonably fits sexual intercourse between two people. PW2 also noted that the complainant was not able to run like the other children and on enquiry she learnt that she felt pain on the thighs and the private parts as a result of a sexual act. She reported the matter to her Head teacher.

24. The complainant was taken to Rongo Sub-County Hospital and was examined and treated. A Post Rape Care Form and a P3 Form were duly filled by PW4 on 05/04/2016. In carrying out the examination on the complainant's private parts it was revealed that the hymen was missing, there were tears on the *labia minora* and a urinal infection. There was also a normal vaginal discharge and on undertaking a laboratory high vaginal swab the presence of epithelial cells was confirmed. PW4 confirmed that there had been a penile penetration into the complainant's vagina.

25. From the above analysis and on an evaluation of the evidence of the complainant and PW4 and the exhibits on record, 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:

26. The appellant vehemently denied any involvement in the alleged offence. From the record, the evidence touching on the appellant was by the complainant, PW2 and PW4.

27. The complainant knew the appellant so well as a friend to her brother whom they had schooled together. The Appellant came home that evening with one of the complainant's brothers and took supper. They later joined the complainant and the other children and slept on the mat. The complainant had an opportunity to see the assailant the following morning when she served him with porridge before she left for school. The complainant also gave the name of the Appellant when she was interrogated by PW2 at school. She also gave the assailant's name to the police. The complainant later identified the assailant in court as the Appellant.

28. The Appellant argued that he was not properly and adequately identified as the assailant for various reasons. He argued that it was not possible for the complainant to be defiled amid all the other people without them sensing what allegedly happened. The complainant stated that the assailant blocked her mouth so hard that it was swollen in the morning. Further, the assailant threatened her with death if she raised alarm. Out of fear, the complainant did not resist what the assailant was doing and as such the possibility that the other people in the house did not hear any commotion is not far-fetched.

29. On the contention that there was no proof that the Appellant infected the complainant's urinal tract as the Appellant was not examined, I take the position that it is not necessarily a must that such an examination is carried out although undertaking it may be more beneficial to the prosecution. A sexual offence can be proved by any other form of evidence and not mandatorily by way of medical evidence and going by the legal definition of '**penetration**' it is not even necessary to prove that the insertion of the genital organ into the other person's genital organ was complete or achieved ejaculation or infected the other with a certain disease or condition.

30. It was also argued that key witnesses did not testify including those who slept inside the house with

the complainant and the complainant's mother. My response to that is in **Section 143** of the **Evidence Act**, Cap. 80 of the Laws of Kenya which states that: -

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

31. The above provision of the law gives discretion to the prosecution to call any numbers of witnesses it desires in proof of any fact which is in dispute in a trial. It is however settled that whenever the prosecution fails to call a crucial witness without any justification then an adverse inference is made against the prosecution that the witness(es) would have been adverse to the prosecution's case. (See the cases of **Bukenya & Others -versus- Uganda (1972)EA 549** and **Nguku -versus- Republic (1985)KLR 412** among many others**).**

32. In this case although the complainant was not alone in the house the offence was committed during the night when people are generally asleep. It is possible that none of those people heard what transpired and if so the witnesses were not crucial and could not serve any meaningful purpose even if they were called to testify. Further, the complainant testified that her mother and grandmother were not at home that night. The argument hinges on corroboration. That is a very sound argument in law. However, in sexual offences involving children there is an exception to corroboration under **Section 124** of the **Evidence Act** which provides that: -

> ***"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, he court is satisfied that the alleged victim is telling the truth."***

33. The trial court had the advantage of seeing the witnesses testify and noted their demeanors. The court made elaborate finding on the way the complainant testified and in explaining why it treated her as a truthful and credible witness. There is nothing placed before this Court to make me depart from the elaborate finding of the trial court.

34. There is also the appellant's defence. In essence, the Appellant raised an *alibi* when he was placed on his defence. As rightly pointed out by the trial court, it is always desirable that such a position is made know to the prosecution well in advance to give an opportunity to challenge it. That notwithstanding, when an *alibi* is raised at any time, a court must consider it alongside the other evidence. It is likewise settled in law that since the evidential burden of proof does not shift to the accused person in criminal cases at all then an accused person who raises an *alibi* does not need to prove it. The court must weigh that *alibi* against the prosecution's evidence to ascertain if it creates any reasonable doubt. The Appellant contended that he spent the alleged night in his rental room at Rodi. On the other hand, the complainant narrated how the appellant went to their home and spent the night there and even served him with some porridge in the morning before she left to school. The complainant knew the Appellant so well and I find the contention that she framed the Appellant probably on a revenge vendetta too speculative. The complainant was a reliable and truthful witness and as rightly stated, the *alibi* in the circumstances of this case did not create any doubt in the prosecution's case.

35. Having re-evaluated the evidence on record I am not persuaded that defence cast any reasonable doubt on the prosecution's evidence to warrant any interference. I have reached that finding while aware of the need to treat the evidence of the complainant who was the only identifying witness with a lot of caution and I have warned myself of the dangers of relying of such evidence. I have equally addressed my mind to several decisions which mainly deal with identifying a suspect in difficult situations including at night.

A court is called upon to exercise serious caution especially if the conditions then prevailing could reasonably hamper the identification of an assailant and moreso at night. For instance, the Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under;-

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

36. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said: -

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

37. The above does not mean that there cannot be safe identification or recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***
>
> *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

Again, the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night: -

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***

38. I am also aware of the need and effect of a witness in readily giving the name of the assailant to the

police or to other people immediately the incident arises. (See the Court of Appeal cases of **Moses Munyua Mucheru – v- R, Criminal Appeal No. 63 of 1987, Juma Ngodia – v- R, Criminal Appeal No. 13 of 1983, Peter Njogu Kihika & Another – v- R, Criminal Appeal No. 141 of 1986, Lesarau – v- R, 1988 KLR 783** and recently in the case of **Simiyu & AAnother vs. Republic (2005) 1 KLR 192**).

39. I am therefore satisfied that the appellant was properly placed as the perpetrator and that his identification was not in error.

40. This Court therefore finds that the appellant was properly found guilty and convicted of the offence of defilement.

41. On sentence, as the complainant was aged 9 years old, the appellant was sentenced to the only prescribed sentence under **Section 8(2)** of the Sexual Offences Act. The life sentence is legal.

42. This Court now finds that none of the grounds of appeal put forth and supported by the 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 29th day of June 2017.

A. C. MRIMA

JUDGE