REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 73 OF 2015

KENNEDY ODHIAMBO NYANGILE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

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

Kulecho, Resident Magistrate in Migori Senior Principal Magistrate's

Criminal Case No. 582 of 2014 delivered on 24/08/2015)

JUDGMENT

1. The Appellant was charged, tried, convicted and sentenced for 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.

2. Five witnesses testified in support of the prosecution's case. They are the victim **M.A.O**. who testified as **PW1**, the complainant's father one **JOR** who testified as **PW2**, the Chief of Central Karungu Location one **Isaac Ogayo Bungu** who testified as **PW3**, A Senior Clinical Officer from Karungu Sub-County Hospital who testified as **PW4** and **No. 92430 PC Ahmed Bishar Abdille** attached at Macalder Police Station who was the investigating officer and who testified as **PW5**. I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except PW1 whom I shall refer to as the **'the complainant'**).

3. It was the prosecution's case that at around 05:00pm on 21/04/2013 the complainant had been sent by PW2 to buy some '*omena*' from a shop in the neighbouring [Particulars Withheld] village. As the complainant passed through a bush towards the shop the appellant emerged from the bush armed with a panga and held the complainant by the neck telling her that he had been looking for her for a while and that time had come. The appellant then pushed the complainant down and dragged her into the bushes where he forcefully removed her underwear and had sexual intercourse with her.

4. After the ordeal, the appellant attempted to give the complainant Kshs. 1,000/=so as not to report him but she declined. While carrying her underwear in her hand the complainant rushed home and informed PW2 of what Kennedy Nyangile had done to her on her way to the shop. PW2 and the complainant rushed to the scene but did not find the appellant. The incident was reported to the Area Village Elder and then to PW3. it was PW3 who accompanied the complainant to Sori Health Centre where she was examined and treated. They then reported the matter at Luanda Police Post which is under Macalder Police Station. A P3 Form was filled in and the appellant who was arrested by PW3 was later charged accordingly.

5. 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. He denied the offences and raised an alibi that he was indeed at Kanyada village on the alleged date and not at Karungu. The appellant called a witness one **Peter Okeyo Amach (DW1)** and prayed that the charges be dropped.

6. In a well-reasoned judgment rendered on 24/08/2015 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 20 years imprisonment.

7. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal, with the leave of Court, by filing a Petition of Appeal on 22/09/2015 challenging the conviction and sentence on the following grounds: -

1. That the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant on the offence

charged without considering that I pleaded not guilty and plea of not guilty entered.

2. That the learned trial magistrate grossly erred both in law and fact in proceeding and/or taking the evidence of the respondent without affording I the appellant adequate and/or facilitate to acquit himself (Appellant) with the charge sheet which is patently defective, consequently the age of the complainant was below 16 years old contrary to the provision of Section 77(5) of the new constitution.

3. That the learned trial magistrate grossly erred both in law and fact in finding and holding that the respondent had proved the offence Act No. 3 of 2006 in the absence of any credible doubts pertaining the age of the girl (complainant without considered the section charged was contrary to the offence charged.

4. That the learned trial magistrate grossly erred both in law and fact in convicting and sentencing I the appellant on the basis of the offence charged when the salient ingredient of the offence charged had not been captured and/or proved beyond reasonable doubts as the law required.

5. Misapprehended the tenor, extend and nature of the offence charged consequently the judgment of the trial magistrate is coloured with errors of omission and commission thus rendering same manifestly unsafe.

8. The appeal was heard by way of written submissions where the appellant expounded on the grounds generally. The State opposed the appeal and prayed that the same be dismissed.

9. 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.

10. 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.

11. 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.

12. 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: -

13. 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. The age of the complainant was proved by the Certificate of Birth No. 1502926 which gave the date of birth as 25/01/1999. The Certificate was produced by the consent of the appellant. Going by the contents thereof the complainant was therefore around **14 years and 3 months old** when the incident allegedly occurred.

14. I find that the age of the complainant was properly settled.

(b) On the issue of penetration: -

15. **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.'

16. 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).

17. 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."

18. The complainant narrated the events as they unfolded between herself and the appellant. She vividly took the court through what

happened on her way to the shop. She was ambushed by an attacker holding a panga, pushed to the ground, pulled into the bushes, undressed her underwear and forcefully engaged in a sexual act. The complainant then rushed home and reported the matter to PW2.

19. Due to the lateness of the hour, the complainant was taken to Karungu Sub-District Hospital on the following day by PW2 and PW3 where she was examined and treated. A treatment chit was issued which was produced in court by PW4. The complainant upon lodging a complaint with the police was issued with a P3 Form which was filled in by PW4 on 24/04/2013. PW4 produced the P3 Form in evidence.

20. I have carefully perused the two documents. The said documents were interfered with. From the treatment chit, when the complainant was first seen and examined in her private parts by the medical officer it was noted that her vulva had lacerations and the presence of few spermatozoa was seen. By a different hand writing the word '**No**' was inserted before the words '**Lacerations on the ulva**' to read '**No Lacerations on the vulva**' and the word '**No**' was inscribed on top of the word '**Few**' to read as '**No spermatozoa seen**'. That was not countersigned for either. However, the laboratory results upon conducting a High Vaginal Swab were not interfered with and they appeared as follows on the treatment chit: -

> **'Epithelial cells seen**
>
> **Few spermatozoa seen**
>
> **RBC seen'**

21. On the P3 Form, **Section C** thereof was also interfered with. On the nature of the offence, the word '**SUSPECTED'** was inserted before '**DEFILEMENT**' to read '**SUSPECTED DEFILEMENT**' and the word '**No**' was inserted before the word '**Laceration**' to read '**No Laceration**….' Equally the word '**not**' was inserted between the words '**Whitish viginal (*read virginal)* discharge**' and **'Suggestive of viginal (*read virginal*) infection'** to read ''**Whitish viginal discharge <u>not</u> Suggestive of viginal infection**'.

22. Further alterations were made on items 5 and 6 of Section C which resulted to the following: -

> '**<u>No</u>** Few spermatozoa seen
>
> HVS **<u>No</u>** spermatozoa seen
>
> **….**It is **<u>not</u>** suggestive that the act (defilement) took place.'

23. The Learned trial magistrate dealt with the issue and found that the above insertions and overwriting's were meant to mislead the court into finding that there was no penetration into the vagina of the complainant. As indicated above, I have also addressed my mind on the two documents and wholly concur with the finding of the trial court. I add that the insertions and overwriting's were a result of very poor workmanship such that anyone looking at the documents will see the obvious additional writings. As noted by the trial court one wonders why would a whole trained medical officer indicate findings like '***<u>No Few spermatozoa seen'</u>*** if not with an intention to mislead.

24. From the above analysis and on evaluation of the evidence of the complainant, PW2, PW3 and PW4 and the relevant exhibits thereto, 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>

25. The appellant vehemently denied any involvement in the alleged offence. From the record, the evidence touching on the appellant was mainly by the complainant. There is no doubt that the complainant knew the appellant so well as a neighbour and that he hailed from Kanyada where the complainant's mother also hailed from. Further the incident occurred during the day at around 05:00pm and it took some time. The complainant explained with precision how the attacker carried out his ill-intentions until when he attempted to give her some Kshs. 1,000/- as to conceal what had taken place but the complainant refused to accept the money. The attacker also talked to the complainant during the ordeal.

26. When the complainant was eventually released by the attacker she ran back home and reported the matter to PW2 and readily gave the name of the attacker as the appellant herein. PW2 also knew him as one of their neighbours. PW2 hurried to the scene but did not find the attacker. When the matter was reported to PW3, PW3 summoned the attacker severally but declined. The attacker later presented himself to PW3 where he was arrested and taken to the police. Although the complainant was not present when the appellant was arrested she identified him in court at the hearing as the one who had attacked her and forcefully had sex with her.

27. The Appellant in an unsworn statement argued that he was not in Karungu on the alleged day as he had gone to his other home in Kanyada. According to the appellant the two places are quite far and one pays Kshs. 200/= one way as fare. He availed DW1 who corroborated the appellant's position and who stated that the appellant was in Kanyada from 05/04/2013 until 01/05/2013 as they both worked at their respective farms. DW1 also confirmed that the appellant had two homes; one at Kanyada and the other one at Karungu. The appellant further contended that PW2 was framing him up as they were embroiled in a land dispute.

28. As rightly pointed out by the trial court, it is always desirable that an alibi is raised early in the proceedings to give room to the prosecution to consider 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.

29. As said the complainant knew the appellant so well and the incident occurred in broad day light I find the contention that the appellant was framed to settle scores with PW2 too speculative. The complainant testified before court and the court observed her demeanor. The court treated her as a reliable and truthful witness. Likewise, I concur with the trial court that the defence was an afterthought since the aspect of the land dispute was not raised at all when all the witnesses testified. As there is nothing placed before me to enable me to depart from the findings of the trial court I return the verdict that the *alibi* in the circumstances of this case did not create any doubt in the prosecution's case. The appellant was correctly identified as the assailant who attacked the complainant and sexually assaulted her.

30. May I add that although the complainant was alone during the incident a conviction can still stand even without any corroboration as long as the trial court complies with **Section 124** of the **Evidence Act** which provides 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, he court is satisfied that the alleged victim is telling the truth."***

31. In this case there was the medical evidence which, although tempered with, was adequate corroboration of the complainant's testimony. The presence of the spermatozoa in the complainant's vagina left no doubt that the complainant had engaged in a sexual activity. I reiterate that 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. As said there is nothing placed before this Court to make me depart from the elaborate finding of the trial court. In arriving at the decision, I am fully 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.

32. 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 & Another vs. Republic (2005) 1 KLR 192**). The complainant in this case readily gave the name of the assailant to PW2, PW3 and the police.

33. The appellant further raised two other grounds which are worth consideration. The first one is that he was not provided with a copy of the charge sheet, P3 Form, the treatment chit and an Exhibit Memo Form. He however admits having been provided with the witness statements. On 01/10/2014 when the case came up for hearing before the trial court the prosecution indicated to the court that it had availed the appellant with all the witness statements. The appellant did not raise any issue at all in respect to the other documents which he now alleges not to have been provided with. He fully participated in the trial and cross-examined witnesses accordingly. I find this ground to be an afterthought and is for rejection.

34. The second ground relates to the defectivity of the charge sheet. It is however not clear how it is defective. The appellant contended that the age of the complainant was at variance with what PW4 stated. That is not the case as the issue of the age of the complainant was settled by a Certificate of Birth which was produced by PW5. But even if there was such a contradiction, still that cannot be a ground for a charge sheet to be defective. It is a purely evidential issue. The ground also fails.

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

36. On sentence, as the complainant was aged 14 years and 3 months old, the appellant was sentenced to the minimum prescribed sentence under **Section 8(3)** of the Sexual Offences Act. That sentence is legal.

37. 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 31st day of July 2017.

A. C. MRIMA

JUDGE