REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 31 OF 2016

ERICK OMONDI OGANDA.....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. 189 of 2013 delivered on 10/06/2016)

JUDGMENT

Introduction:

1. **ERICK OMONDI OGANDA,** the Appellant herein, was arrested over allegations of sexually assaulting C A a minor aged 8 years old. He was subsequently arraigned before the trial court at Rongo on 03/06/2013 and charged with defilement of the said minor 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. He denied both counts.

2. The particulars of the offence of defilement were that on the 27th day of May 2013 at [particulars withheld] within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of C.A. a child aged 8 years.

3. The appellant was subsequently tried, convicted and sentenced.

The Trial:

4. The minor testified on the day the appellant took plea and the matter was adjourned to a further date. Later the minor, being **the complainant**, was recalled when the appellant engaged the services of a Counsel. The complainant's mother then testified as **PW2** before the then trial magistrate was transferred from the station. The complainant was only recalled again upon compliance with **Section 200(3)** of the Criminal Procedure Code but the case did not start *de novo*. The evidence of **PW3** (the complainant's teacher) and that of a Clinical Officer, **PW4** and that of the investigating officer, **PW5,** then followed respectively.

5. At the close of the prosecution's case the appellant was placed on his defence and gave sworn defence where he denied any involvement in the commission of any of the alleged offences and raised the issue of *alibi* and a grudge with PW2, the complainant's mother. The appellant also called two witnesses.

6. By a judgment rendered on 10/06/2016 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to life imprisonment.

The Appeal:

7. As the appellant was dissatisfied with the conviction and sentence, he lodged an appeal in person. The appellant filed a Petition of Appeal on 24/06/2016 and raised the following grounds:

> **a.** ***That I pleaded not guilty to the charge herein***
>
> ***b. That the trial Court erred in in both law and facts by proceeding to convict I the appellant despite the facts that she had noted two different names of the complainant which implies, two different people.***
>
> ***c. That the trial court erred in both law and facts by failing to consider that, the actual age of the complainant was not properly established as per the available documents.***
>
> ***g. that the trial court erred in both law and facts by not considering my mitigation.***

8. At the hearing of the appeal the appellant appeared in person and relied on his written submissions filed on 15/11/2016. The State opposed the appeal and relied on the record in urging this Court to dismiss the appeal. This judgment is therefore the outcome of the appeal.

Analysis and Determinations:

9. As this is the Appellant's first appeal, the role of this appellate Court of first instance 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.

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; beyond any reasonable doubt.

11. 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:

12. The appellant contended that the age of the complainant's was not settled since no Certificate of Birth was produced and that the medical records produced were for another person and not the complainant. It was further submitted that no age assessment on the complainant was conducted.

13. It is true from the record that no Certificate of Birth was produced and even the alleged age assessment report was not produced. The only evidence on the complainant's age was the **Child Health Card** which was produced as exhibit 4. The said exhibit is also in the name of **T A** and not **C A.** That variance was however dealt with in evidence. PW2 in re-examination clarified that the names T A and C A refer to the complainant and even the complainant herself confirmed that she is called T A . at home. Further PW5 testified that when she called for the complainant's documents in proof of her age during the police investigations she was availed with the **Child Health Card** in the name of T.A. and on enquiry she was informed that *'....both names C.A. and T A belonged to the complainant'*. There was also consensus on the names of the complainant's parents as appearing in the said exhibit. The exhibit is an official medical record of the history of the bearer. It contains all the immunizations the bearer received and also

the general development of the bearer since birth. The same was also produced by the consent of the appellant's Counsel. The said exhibit states that the complainant was born on 19/08/2005 and that places her age at 8 years old at the time of the commission of the alleged offence.

14. I have considered the issue of the age of the complainant with a lot of patience. That is because in cases of defilement the age of the victim is so crucial since it goes to establish whether or not the offence was committed and more important the age has all the bearing in sentencing. In this case I have to concur with the assessment of the evidence on the issue of the complainant's age by the trial court. I say so because as rightly put the variance in the two sets of the names referring to the complainant was clearly reconciled by the complainant herself, PW2 and PW5. The trial court further had an opportunity to observe the demeanor of the witnesses and was convinced that they were indeed credible. Further the court also observed that the complainant was a minor of tender age. I therefore so find that the **Child Health Card** produced as exhibit 4 referred to the complainant.

15. Having found so, this Court has to go further and determine if the said exhibit is admissible evidence in so far as determining the age of the complainant is concerned moreso in the absence of a Certificate of Birth or age assessment report. The Sexual Offences Act promulgated some rules towards the achievement of its objectives. Those rules came to be known as ***"The Sexual Offences Act (Rules of Court) 2014*** which came into force on 11/07/2014 under Legal Notice No. 101. 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**.

16. In this case I have no hesitation in finding that the **Child Health Card** produced as exhibit 4 falls under the category of '**any other similar document'** under Rule 4 aforesaid and that the same is in proof of the complainant's age. If one is still in doubt, there is the evidence contained in the **P3 Form** at **page 3** where the age of the complainant was approximated as 8 years by the Medical Officer who filled in the same.

17. I therefore find that the complainant was born on 19/08/2005 and as such she was about **8 years old** when the offence was allegedly committed on 27/05/2013. The complainant was hence a minor of tender years within the meaning of the law.

(b) On the issue of penetration:

18. **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.'***

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).

19. This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

20. The appellant submitted that there was no evidence to prove penetration at all since no tests were conducted on him and the complainant to show that the appellant did infect the complainant with any sexually transmitted disease or HIV and that the semen was not confirmed to be his. He therefore prayed that he be set at liberty.

21. This Court has on several occasions reiterated the fundamental importance of the ingredient of penetration in sexual offences. It remains that the ingredient of penetration is so crucial in such cases such that without its proof no such offences are disclosed.

22. In dealing with this aspect I will venture into the record. The complainant testified on three occasions. The first time was when the plea was taken; that is on **03/06/2013**. She was recalled on **08/11/2013** where she was cross-examined by the appellant's Counsel. Again the complainant was recalled on **07/07/2014** when the matter was taken over by another magistrate. That cumulative evidence is crucial In dealing with this ingredient. The basis of reference to the previous proceedings in the circumstances of this case is **first** that the matter did not begin *de novo* but the complainant was only recalled. **Secondly**, even if the matter had began *de novo* still the previous proceedings are admissible by dint of **Sections 34** of the **Evidence Act,** Chapter 80 of the Laws of Kenya as read with **Section 200(4)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya.

23. The foregone was rightly so dealt with by my sister ***Nyamweya, J*** in the case of **Daniel Mutiso Ngui v. Republic (2015)eKLR** when the Learned Judge stated as follows:

> *"On the second issue as to whether it was necessary to produce the exhibits during the de novo trial, tis Court notes that the term de novo means that the case was to begin afresh from the beginning. Black's Law Dictionary, Eight Edition defines a de novo trial as follow:*
>
> ***" A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance."***
>
> *The Evidence Act in Section 34 also provides as follows as regards the admissibility of evidence given in previous proceedings:*
>
> ***"(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances-***
>
> ***(a) where the witness is dead, or or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable,***
>
> ***(b) the proceeding is between the same parties or their representatives in interest; and***
>
> ***(c) the adverse party in th first proceeding had the right and opportunity to cross-examine; and***
>
> ***(d) the question in issue were substantially the same in the first as in the second proceeding.***
>
> ***(2) For the purposes of this section -***
>
> ***(a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and***
>
> ***(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused"***
>
> *Lastly, Section 200 (4) of the Criminal procedure Code also provides as follows as regards conviction on evidence partly recorded by one magistrate and partly by another:*
>
> ***"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was***

materially prejudiced thereby, set aside the conviction and may order a new trial."

The import of the foregoing provisions is that even if a de novo trial is legally a new trial, evidence that was produced in previous criminal proceedings between the parties and where the accused were given an opportunity to cross examine on the same is admissible.

The Appellant was given the opportunity to cross-examine on the exhibits produced in the earlier proceedings and is thereby not prejudiced by the reference to and reliance by the learned trial magistrate on the said exhibits, even though the trial magistrate did not expressly refer to the enabling prov ions of the law. In any event the remedy for the Appellant under Section 200(4) of the Criminal Procedure Code if he suffers any prejudice in this regard is not quashing of his conviction, but a retrial."

24. Back to the record now, when the complainant testified on **03/06/2013** she stated on affirmation as follows:

> ***"...as I was to school in the morning, a person did bad manners to me, ...he took me inside the church and inside the church he put the bench well, he told me to lie, I did so, he removed his clothes and removed my clothes, I had uniform, I had my pants on, he removed the pants.....I know what a boy uses for urinating, he used that in doing bad manners. He told me to remain in the church and he went away..... Blood came out of my thing that I use for urinating, blood came out between my legs.***

25. When the complainant was recalled for cross-examination on **08/11/2013** by the appellant's then Counsel, she had the following to say again still on affirmation:

> ***"...There was a chair in the church which was red in colour. That is where he defiled, that was 7 am. I stayed in the church up to when I saw people going home, I did not go to school because I was late. I did not scream, no person came to the church. I went home and did not inform my mother of anything...."***

26. And finally when the complainant was recalled on **07/07/2014** she stated as follows in examination-in-chief:

> ***"....He told me to go to church and wait for him there since he wanted to send me to my mother. I went to the church....came....brought a chair that 3 people could sit on, he undressed me, he removed my school uniform, it was a full dress. He then removed his trousers and did bad manners to me. I had my pants, he removed them. He told me to lie on the chair and laid on me he took the thing he uses to urinate and inserted in the place I normally urinate from. I felt pain. I told him I was going to tell my mother, I cried. I saw blood at the place I urinate from....told me to dress up.....I dressed up and stayed in the church, I was not able to walk....I stayed there until noon when pupils were from school....."***

On re-examination, the complainant stated as follows:

> ***".....had threatened to kill me if I told anybody."***

27. When the complainant went to school on 30/05/2013, her English teacher PW3 noticed that the complainant was not walking properly when she took her book for marking. PW3 then deliberately asked the complainant to walk to the gate and observed her keenly. PW3 asked the complainant whether she was unwell and the complainant said that her hips were paining. PW3 then brought that observation to the attention of another female teacher and when they laid the complainant on a mat and looked at her private parts they were confronted with such a foul smell.

28. PW3 called the complainant's mother who readily went to school. PW3 asked PW2 to enquire from

her daughter, the complainant, what had happened as she listened. The complainant narrated the ordeal she underwent in the hands of a man she knew quite well and that she was warned not to tell anyone otherwise she will be killed. PW3 advised PW2 to take the complainant to hospital and then report the matter to the authorities.

29. When the complainant was taken to the Rongo Sub-County Hospital in the company of her mother (PW2) she was examined by PW4 who also filled in the P3 Form later. That was on 30/05/2016. PW4 conducted a physical examination and noted that the complainant's hymen was broken with tender tears on the *labia minora*, that the vagina was very tender, that the complainant had not started her menstrual cycles and that she had no previous sexual history. On conducting a high vaginal laboratory swab examination the results did not indicate the presence of any sperms but epithelial cells. Presence of syphilis and HIV were negative. PW4 also filled in the Post Rape Care Form which was also produced in evidence. PW4 was of a firm opinion that the complainant was defiled.

30. On an evaluation of the evidence of the complainant, PW2, PW3 and PW4 as well as the contents of the P3 Form and the Post Rape Care Form this Court is satisfied that there was penile penetration into the complainant's vagina. Penetration was hence proved.

c) On whether the appellant was the perpetrator:

31. The appellant vehemently denied any involvement in the alleged offence and in his sworn defence he raised an *alibi* and further alleged that he was being framed up by PW2 whom they had been friends but refused to marry her. He called two witnesses in support of his case.

32. It is not in dispute that the appellant, the complainant and PW2 are well known to one another having been neighbours as they occupied different houses in the same plot and that the appellant is known as Erick. It is also not in dispute that the alleged incident happened at 7am and as the complainant was on her way to school. It is equally not in dispute that the appellant was a tinsman at [particulars withheld] within Rongo and that indeed the complainant was sexually assaulted. What is in dispute is whether it was the appellant who so assaulted the complainant.

33. I will hence deal with the twin issues raised by the appellant. On the issue of the grudge arising from a breach of a promise to marry PW2, the appellant called a fellow tinsman as a witness. He testified as DW2 and only reiterated what the appellant had told him about an alleged relationship the appellant had with PW2 and that PW2 had threatened the appellant when the appellant had found another woman for a wife. DW2 did not expound on what he meant by PW2 and the appellant *'being friends'* neither did he elaborate what indeed transpired between the appellant and PW2 which was over and above a normal acquaintance for neighbours.

34. When PW2 testified, she stated that she had only known the appellant as a neighbour and that she was married to one F.O. who hailed from Oyugis. The complainant equally confirmed that her father was the said F although she did not know the other name. PW2 denied any further relationship with the appellant. The record reveals that the cross-examination of PW2 by the Counsel did not confront PW2 with the allegation of a breach of a promise by the appellant to marry PW2. Although the burden of proof in criminal cases squarely rests on the prosecution throughout the trial, taking up such a serious issue in examination may have had an impact on the prosecution's case and hence build up on the intended defence. The only time then when that issue was substantially raised was during the defence hearing thereby denying the prosecution an opportunity to confront such evidence. That would explain the effort taken by the prosecutor before the trial court in applying to open the prosecution's case and recall PW2 to clarify the issue. The application was rightly rejected and so on sound legal reasoning.

35. The upshot of such state of affairs is that the issue of grudge between the appellant and PW2 was not well founded, is an afterthought and is for rejection. That ground fails.

36. Turning to the issue of *alibi,* it is settled law that an accused person does not have to establish that the alibi is reasonably true. What such an accused person needs to do is to have the alibi create doubt as to the

strength of the prosecution's case. (See the Court of Appeal case of **Haro Guffil Jilo vs. R (2014) e KLR**.). The appellant again relied on the evidence of DW2 in contending that he was not at the alleged place and time when the incident occurred. He asserts that he left Rongo on 26/05/2013 at around 11 am in the company of DW2 and proceeded to Oyugis for the burial of his brother who had passed on. I have carefully considered the evidence of both the appellant and DW2 on this issue and again with a lot of patience. Both the appellant and DW2 indicated to have left Rongo on 26/05/2013 and returned the following day, The appellant did not however indicate the time they returned whereas DW2 stated that they returned to Rongo at around 1 pm. This evidence however has to be weighed against that of the prosecution to see if reasonable doubt arises.

37. By placing the evidence of the appellant and DW2 on one hand and the evidence of the prosecution on the other hand, this Court is not satisfied that the alibi raised any reasonable doubt. The prosecution evidence remained cogent and compounded thereby rendering the alibi untenable in the circumstances of this case.

38. Having dealt with the twin issues raised in the defence, I will now return to what exactly happened as per the record. The record has it that as the complainant was going to school in the morning of 27/05/2013 she met one man whom she knew well. His name was Erick and the complainant identified him as the appellant during the trial. Erick sent the complainant to buy for him airtime for Kshs.20/= and on return Erick told the complainant to go and wait for him at the nearby church as he wanted to send her to her mother. The complainant in obedience so did. The presence of the church was corroborated by PW2 as well as PW5 who visited the scene during the investigations. Equally defence witness, DW1, confirmed the presence of the church at the very place as indicated by the complainant. The said Erick then followed the complainant into the church building and had sexual encounter with her. He thereafter warned her of possible death in the event the complainant disclosed to someone else what had transpired. That explains why the complainant withheld the truth from PW2 at their home on being asked what had happened to her.

39. I have taken note of the consistency of the evidence of the complainant on who had engaged her into the sexual act. She maintained the name of Erick even when she was interrogated by PW2 in the presence of PW3. It is clear that the complainant knew whom she was referring to. Apart from knowing the name of the one who sexually assaulted her, the complainant gave a further description of the man as ***''...he was at his place of work. It is not far from the church. Erick makes jikos. I went there he sent me....'*** The complainant then identified the assailant in court as the appellant ***'...Erick called me, he is the accused (points at accused)...'***

40. In reaching the above finding this Court is alive to the provisions of **Section 124** of the **Evidence Act** which requires no corroboration of the evidence of a child of tender years if the child is the victim in sexual offences. However when a court makes a finding in those circumstances still the law requires the court to record its reasons and be satisfied that the child is truthful. That is what happened before the trial court. It is on record that the trial court noted the complainant's consistency and her demeanor and had no reason to doubt her testimony.

41. But is there a possibility of a different finding when the complainant's evidence is subjected to the settled principles in the case of **R –vs- Turnbull & Others (1973) 3 ALL ER 549?** 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 recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

33. As so stated elsewhere above, the complainant knew the assailant well and even by name and that the incident occured in day light. The Court of Appeal in the case of **Simiyu & Another vs. Republic (2005) 1 KLR 192)** re-emphasized that there can be no better way of recognizing someone you know than by giving the name. I therefore find that even by subjecting the complainant's evidence to the above settled principles, it remains that the recognition of the appellant as the assailant by the complainant was free from error.

Conclusion:

44. As I come to the end of this judgment I wish to point out that the appellant was sentenced to the only prescribed sentence under **Section 8(2)** of the Sexual Offences Act. The life sentence hence remains legal.

45. Consequently the appeal is unmerited and is hereby dismissed.

DELIVERED, DATED and **SIGNED** at **MIGORI** this **30th** day of **November** 2016.

A. C. MRIMA

JUDGE