REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 79 OF 2016

KENNEDY OKINYI OWINO.....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. 118 of 2014 delivered on 12/08/2015)

JUDGMENT

1. The Appellant herein, **KENNEDY OKINYI OWINO** was charged with 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. He denied both counts.

2. The particulars of the offence of defilement were that on the 13th day of April 2014 at [particulars withheld] in Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of F A O a child aged 7 years.

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

4. In a bid to prove its case the prosecution called eight witnesses. The minor testified as **PW2** (hereinafter referred to as **'the complainant'**) whereas the minor's mother testified as **PW1**. **PW3** and **PW4** were both female adults and close relatives of the complainant's and who lived with the complainant within the same homestead while **PW5** was a brother to the late complainant's father and who also lived with the complainant within the same homestead. **PW6** was an elder brother to the complainant, **PW7** was a Clinical Officer from Awendo District Hospital and the investigating officer testified as **PW8.**

5. Briefly the prosecution's case was that the appellant was employed at the complainant's home at [particulars withheld] within Migori County as a casual labourer and used to take care of some cows. The appellant had also been allocated a house within the homestead and used to live as part of the complainant's family. On the 13th day of April 2014 as the rest of the family members had gone for a funeral at [particulars withheld], the appellant was left at home with the complainant and some other children. At around 5:00pm as the complainant was cleaning some utensils while the other children including PW6 were playing just nearby, the appellant appeared and asked the complainant to follow him

to his house to take some other utensils for cleaning. PW6, then aged 14 years old, clearly heard the appellant speak to the complainant and even saw the complainant follow the appellant until she entered the appellant's house. As the appellant was heading to his house with the complainant he told PW6 that he was not going to take the cows back home that day. PW6 instead decided to go and take the cows home which were tied about 50 metres from the appellant's house.

6. As PW6 was returning home and as he approached the appellant's house he heard the complainant crying inside the house. PW6 hurried to the door and called out the name of the complainant but there was no response. He then entered inside the house and found the appellant putting on his trousers while the complainant was just standing nearby. PW6 asked the appellant what had happened but instead the appellant became very harsh to PW6 and chased him out of his house. PW6 ran towards his grandmother's house and hid himself behind the house. The appellant thinking that PW6 was inside the house waited for him at the door in vain.

7. When the evening fell, the other adult family members who had gone for the funeral returned home but since they were tired PW6 decided not to tell them of what had happened to the complainant until the next morning. In the morning that followed PW6 truly informed his step mother PW3 of what had happened the day before. PW3 called her Aunt PW4 and informed her of what PW6 had told her. PW3 and PW4 decided and so called the complainant for enquiries. When the complainant narrated what the appellant had done to her the previous day, PW3 and PW4 inspected the complainant in her private parts. They found some cracks on the vagina and a swelling near the anus. They also saw some dried blood. PW3 and PW4 raised alarm and villagers responded and gathered in the homestead. PW3 and PW4 informed them of what the appellant had done to the complainant and the villagers readily arrested and tied the appellant who was at home by then. The appellant was led to the Angaga Police Post while the complainant was taken to Awendo District Hospital for treatment.

8. PW7 produced two **P3 Forms** which one was for the complainant and the other one for the appellant. He also produced a **Post Rape Care Form.** PW7 confirmed that he jointly examined the complainant when she was brought to the hospital with his colleague one S A (not a witness). PW7 filled in the Post Rape Care Form while the P3 Forms were filled in by the said S A. On examining the complainant's vagina they found that the *labia majora* was stained with blood and that the vagina had lacerations. They also noted blood stain discharge from the vagina but the hymen was intact. The appellant was also examined but there were no abnormal observations on his penile shaft.

9. The investigating officer who testified as PW8 produced the complainant's **Child Health Card** which confirmed that the complainant was born on 08/05/2007. It was Serial No. [particulars withheld] and it bore the name '**Q.....**' which PW8 confirmed from the other witnesses that it also belonged to the complainant.

10. At the close of the prosecution's case, the trial court placed the appellant on his defence but before the defence case was heard the then trial magistrate was transferred from the station. Upon compliance with **Section 200(3)** of the Criminal Procedure Code the defence case proceeded before another magistrate from where it had reached without any recall of the witnesses who had earlier on testified.

11. The appellant gave sworn defence where he denied any involvement in the commission of any of the alleged offences and raised the issue of a grudge with the complainant's grandmother one P M (not a witness) which arose from the appellant's canning of the complainant and her other siblings who had uprooted some seedlings he had planted. The appellant did not call any witnesses.

12. By a judgment rendered on 12/08/2015 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to life imprisonment.

13. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal by filing the Petition of Appeal on 11/11/2015 with the leave of this Court granted on 10/11/2015. The appellant raised the following grounds:

a. That I pleaded not guilty to the charge

b. That trial court erred in both law and facts by shifting the burden of prove to I the appellant.

c. THAT the trial court erred in both law and facts by meting a sentence which was excessive in the circumstances.

d. THAT the trial court erred in both law and facts by failing to consider the mitigating factors, defence and other options while sentencing the appellant.

14. At the hearing of the appeal the appellant appeared in person and relied on his written submissions wherein he reiterated the grounds of appeal and added that he was not favored with any witness statements as to aid him in the preparation of the case. He further prayed for a retrial of the case claiming that he did not participate well in the proceedings on account of illness he suffered from the police brutality. 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.

15. 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.

16. 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.

17. 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:

19. From the record no Certificate of Birth or an Age Assessment Report were produced in proof of the age of the compliment. The prosecution relied on the **Child Health Card** which was produced as exhibit 2. The said exhibit however bore the name **'Q.....'** but it was satisfactorily explained that it was another name of the complainant. The said exhibit was also produced with the consent of the appellant. I am therefore satisfied that the document referred to the complainant. The said exhibit states that the complainant was born on 08/05/2007 and that places her age at slightly below 7 years old at the time of the commission of the alleged offence.

19. But was **exhibit 2** 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**.

20. In this case I have no hesitation in finding that the **Child Health Card** produced as exhibit 2 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 7 years by the Medical Officer who filled in the same.

21. I therefore find that the complainant was born on 08/05/2007 and as such she was about **7 years old**

when the offence was allegedly committed on 13/04/2014. The complainant was hence a minor of tender years within the meaning of the law.

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

22. **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 **<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).

23. 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.

24. 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.

25. Back to the record, when the complainant gave her unsworn testimony she stated as follows:

> ***"...On 14/4/14 I was in the house.....somebody came to the house by the name .....stays down. He normally comes to our home to remove cows from the paddock. That day he took me and told me to get inside his house. His house is within our homestead. I agreed and went with him to his house.....told me to lie down on his bed. I refused but he lifted me up and placed me on his bed. He did bad things to me. He took his organ which he uses for urinating and placed it on my organ for urinating. He then did bad manners to me and I cried, I felt pain/bad so I cried. ....later gave me 10 bob to buy mandazi. He told me to buy mandazi. O heard me crying and came to the window of the house. He called my name but I didn't respond, I left ..... house and went to my home....."***

26. PW3 and PW4 were some of the adult members of the complainant's family and who had general guardianship over the complainant given that the complainant's mother, PW1, worked and stayed in Narok which was far from their home. When PW3 and PW4 were told by PW6 of what had transpired between the complainant and the appellant the previous day they called the complainant and inspected her private parts. This is what PW3 said:

> ***"...We then inspected her, we checked her private parts and found some cracks on the vagina and swelling near the anus. I also saw some blood that had dried up....."***

27. PW4 on her part stated that:

> ***"....according to the way .....was walking I decided to inspect. I removed her clothes and looked at the vagina. I was able to notice dried blood and there were crack on the vagina....."***

28. When the complainant was taken to the Awendo District Hospital she was examined by PW7 and another Clinical Officer. On physical examination of the complainant's vagina they confirmed that the complainant's hymen was still intact but the *labia majora* was stained with blood and that the vagina had lacerations. They also noted blood stain discharge from the vagina. The findings by PW7 therefore

corroborated what PW3 and PW4 had seen.

29. On an evaluation of the evidence of the complainant, PW3, PW4 and PW7 as well as the contents of the P3 Forms 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) <u>On whether the appellant was the perpetrator:</u>

30. The appellant vehemently denied any involvement in the alleged offence and in his sworn defence he contended that he was being framed up by the complainant's grandmother who was not relating well with him and had refused to pay him his two months' salary arrears after she terminated his employment. The appellant traces the origin of the grudge from the day the complainant's grandmother saw the appellant canning the complainant and other children who had uprooted some seedlings which the appellant had planted.

31. It is not in dispute that the appellant, the complainant, PW1, PW3, PW4, PW5 and PW6 are well known to one another as they lived in the same homestead. Equally there is no dispute that the appellant was employed to take care of the cows in the homestead. It is also not in dispute that the alleged incident happened at around 5pm when the adult members of the complainant's family were not at home but for the complainant, PW6 and other children as well as the appellant. What is in dispute is whether it was the appellant who so sexually assaulted the complainant.

32. The complainant was very clear and candid on what happened to her. She described how the events unfolded and stated that it was the appellant who was the assailant. The complainant readily gave the appellant's name as **Kennedy** in her testimony and described what Kennedy used to do in their home and where he used to live. The complainant also identified the assailant as the appellant in court when she was testifying. PW6 was also present when the appellant asked the complainant to follow him to his house. Sensing that PW6 may be curious of what was happening in the house, the appellant cleverly informed PW6 that he was not going to take the cows back home that evening. That prompted PW6 to rush and bring the cows home. But PW6 must have been so fast for the appellant. PW6 stated in evidence that it took him about ten minutes to return home. On returning home PW6 heard her sister, the complainant, crying inside the appellant's house. PW6 called out the complainant's name but without any response. When he entered inside the house, PW6 saw the appellant putting on his trousers. PW6 confronted the appellant by demanding to know what was happening but the appellant did not answer him instead he became very harsh to PW6 and chased him away. PW6 ran to her grandmother's house as the appellant pursued him in vain. It is clear that PW6 corroborated the evidence of the complainant.

33. It is PW6 who reported the matter to PW3. When PW3 and PW4 interrogated the complainant, again the complainant was clear that the assailant was Kennedy. That led to the arrest of the appellant.

34. The record reveals that nothing was brought out during the prosecution's case by the appellant to confront any of the witnesses with the allegation of the grudge. 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. The upshot of such state of affairs is that the issue of grudge between the appellant and the complainant's grandmother was not well founded, is an afterthought and is for rejection. That ground fails.

35. 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 **<u>Simiyu & Another vs. Republic (2005) 1 KLR 192)</u>** re-emphasized that there can be no better way of recognizing someone you know than by giving the name. I am therefore satisfied that the recognition of the appellant as the assailant by the complainant and PW6 was free from error.

36. Before I come to the end of this judgment there is a further issue which the appellant raised and by

duty I have to deal with it. The appellant contended that he was not given the witness statements and that coupled with the injuries he sustained in the hands of the police made him unable to follow the proceedings properly. He therefore prayed for a retrial. I have carefully gone through the record and noted that on 01/10/2014 the appellant protested to the court that he had not been provided with some of the statements. The court made an order for supply of such statements on that very day. When the matter came up on 22/10/2014 the appellant confirmed to the court that he had been supplied with all the statements and the matter ended there. The appellant's contention that he was not provided with the statements can therefore be described as an act in bad faith and is hereby rejected.

37. On the contention that the appellant was unwell and did not properly follow the proceedings one wonders whether it is the same appellant who was tried before the lower court. I say so because the record is clear that every time the prosecution sought for an adjournment the appellant vehemently objected to amid claims that he was suffering in remand and that the case had taken unreasonably long to be concluded. That ground is likewise for rejection.

38. On sentence 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.

39. The upshot is that the appeal is unmerited and is hereby dismissed.

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

A. C. MRIMA

JUDGE