REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 27 OF 2015

J O O ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

JUDGMENT

Introduction:

1. When **J O O**, the Appellant herein, appeared before the Senior Principal Magistrate's Court at Migori on 30/06/2014, he was charged with the main charge of defilement and an alternative charge of committing an indecent act with a child.

2. The Appellant denied both charges which were tailored as follows:

"DEFILEMENT CONTRARY TO SECTION 8 (1) (3) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

J O O: On the night of 21st and 22nd June, 2014 in Migori County in the Republic of Kenya, intentionally and unlawfully caused your penis to penetrate the vagina of LAO a child aged 14 years.

Alternative Charge

COMMITTING INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11 (1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

J O O: On the night of 21st and 22nd June 2014 in Migori County in the Republic of Kenya, intentionally and unlawfully caused a contact with your penis to the vagina of LAO a child aged 14 years.

3. Having put himself up for a trial before the Court, the Appellant's trial was commenced on 14/08/2014 upto 13/01/2015 where six witnesses testified in a bid to prove the charges as laid against the Appellant.

4. **PW1** was the complainant aged 14 years known as **LA PW2** was **OWJ** who was the complainant's brother whereas the complainant's mother **AOA.** testified as **PW3.** The Arresting Officer tendered his evidence as **PW4** and **PW5** was a Clinical Officer. The prosecution's case rested with the evidence of the Investigating Officer, **PW6.**

5. When the Appellant was put on his defence, he opted to and gave sworn testimony and called two witnesses including his wife.

6. By a judgment delivered on 31/03/2015, the Appellant was found guilty of the charge of defilement and was accordingly convicted. He was then sentenced to a term of 20 years imprisonment.

7. It is that conviction and sentence which prompted this Appeal.

The Appeal:

8. By a Petition of Appeal lodged in this Court on 27/04/2015, the Appellant raised five grounds of appeal as under:-

" 1. THAT I Pleaded not guilty to the charge in question.

2. ***THAT the trial magistrate erred in both law and facts by failing to consider the evidence of a clinical officer who clearly stated the hymen was missing and no other injuries on the genitalia.***

3. ***THAT the trial magistrate erred in both law and facts by assuming the testimonies of the defence witnesses who were genuine witness.***

4. ***THAT the trial magistrate erred in both and law and facts by failing to specify where my defence and witnesses contradicted in their statements.***

5. THAT the trial magistrate erred in both law and facts by convicting and sentencing me a harsh and excessively on insubstantial evidences clearly demonstrated by the prosecution side".

9. Later on the Appellant filed a ***"Supplementary Grounds"*** to the foregone where he raised a total of six lengthy grounds of appeal which for purposes of ease of analysis in this appeal I shall reproduce as follows:-

"1. THAT I plead not guilty to whole trial.

2. ***THAT the learned trial magistrate erred in both law and fact failed to observe my defense and treated it as an afterthought. I pray to this court of justice to look at the true lie of the prosecution witness on this case. PW1 was with siblings at her home securing them after her mother who was somewhere at the funeral yet the same young girl was to give security to L who is a woman to a husband on the same day night. I failed to understand how the same girl to give security of the same was and even who was to secure another between the 14 years girl and a woman (L). It was nighttime 9:00p.m when PW1 could not perform this duty, making the evidence to be of doubt. The trial magistrate failed to observe this and treated it as a before thought.***

3. ***THAT the trial magistrate erred in both law and fact failed to observe the lost of hymen to confirm that external genitalia was normal pubic hair well distributed not even laceration noted, that could support the nature of the offence. The magistrate failed to observe the same, but used as evidence to convict me in.***

4. ***THAT the trial magistrate erred in both law and fact failed to observe the grudge leading to case. As I had said in my defence that I and other gold miners were keeping our working tools and even soil for some days at PW3 home, this is when PW1 Knew me from, I had no difference with her, also this evidence being supported by PW4, not as pw1 claimed to have 1st seen me on the alleged security duty night she was making us to have difference. The magistrate as well did not observe the same.***

5. ***THAT PW1, stated that she was defiled in a room, yet PW5 in his statement stated that the same lady was defiled at road. Also the uncorroborated evidence came when PW1 stated that it was until midnight, yet PW6 declared that the assailant gave PW1 50/= morning. Because of the uncorroboration of theses evidence, it is my pray that this honourable High Court let me to liberty.***

6. THAT I am an adult and sound mind person a husband to one and as well a father to many. I normally perform my duties as a family bread winner, whom I don't have time for such allegations. I bid to the law and this is a case / an offence I did not committee nor know prior to date. I pray for justice to prevail in this honourable high court of justice".

10. The Appellant maintained his prayers in the both sets of the grounds that the appeal be allowed, conviction set aside and that he regains his unfettered liberty.

11. At the hearing of the appeal, the Appellant appeared in person whereas Ms. Owenga Learned State Counsel appeared for the State.
12. The Appellant wholly relied on the grounds of appeal which he submitted that they be treated as his written submissions and added that he had requested the two people who were in the house with the complainant to testify before the trial Court but that opportunity was not availed.

13. The State opposed the appeal. It was submitted that although the complainant had not met the Appellant before the heinous act complained of, the complainant managed to positively identify him as the perpetrator of the offence and moreso during a family meeting called to resolve the matter. It was further submitted that indeed the complainant was in the company of other people in the house where the act was committed hence his identification was properly settled.

14. It is on the foregoing background that this judgment arose.

Analysis and Determinations:

15. This being 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:**

18. The prosecution produced a Certificate of Dedication of the Complainant in an attempt to prove her age. The same was issued on 03/05/2012 at the Pentecostal Evangelism Fellowship of Africa Church and sealed by Pastor Rosebella Onyando. It contains the date of the complainant's birth as 29/03/2000 hence translating to 14 years as the complainant's age as at the alleged time of the commission of the offence.

19. I have also seen the Outpatient Record Book from God Kwer Dispensary (Exhibit 3) and the Clinic Attendance Card from Migori County Referral Hospital (Exhibit 4) which indicate the

complainant's age as 14 years old as well. Of more paramount importance is the complainant's P3 Form (Exhibit 6) where at page 3, the Clinical Officer indicated that upon examination he assessed the complainant's age to be approximately 14 years. Further when PW5 was testifying in Court on this issue he indicated that he had examined the complainant and also seen her Birth Certificate and the MCH Card and confirmed her age to be approximately 14 years old.

20. There is also a letter from the complainant's School, [Particulars Withheld] Primary School dated 23/06/14 (Exhibit 5), by the Head Teacher which also indicated the complainant's age as 14 years old.

21. The Sexual Offences Act promulgated some rules 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.

22. 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.

23. It is therefore the finding of this Court that on the foregone evidence, the age of the complainant at the alleged time of commission of the heinous act on her was 14 years old.

b. **<u>On the issue of penetration of the Complainant's private parts:</u>**

24. **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 mine).

25. 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.

26. In demonstrating this particular ingredient of the offence, the complainant had the following to say:-

"…. The house is two-roomed. L and her husband went to the next room. In the living room there was a sofa set chair, the big one. I slept on the seat with the brother.

I tried to scream..... The Accused told me to remove my clothes when I refused he removed my clothes by force. L's brother had sex with me. It was only once. In the morning L told me to go and bath...

I washed my pant. Later I took L's bucket I fetched water and went home...."

27. The complainant's mother, (PW3) did not however examine her daughter on learning of the alleged sexual act in the morning.

28. PW5 was the Clinical Officer who filled in the P3 Form. He was however not the first officer to see the complainant from the time the alleged act was committed on her. It is on record that the complainant was first seen on 23/06/2014 at God Kwer Dispensary. That was about 2 days after the alleged sexual act.

29.The Officer who first attended to the complainant aforesaid recorded the following notes as appearing in Exhibit 3:-

"Hx of having involved into sexual intercourse with an adult on 20/6/14 and had done it previously".

30.PW5 while testifying before the trial Court stated as follows:-

"At the time I was examining her she was in a fair general condition and not under any substance. Examination of external genitalia – It was normal. Cervix was normal. I did not see any vaginal bleeding or any discharge. The hymen was absent. I was unable to ascertain when the hymen was broken....

When I examined the abdomen, it was not disdented (soft). There was no mass.

External genitalia was normal, pubic hair well distributed. I did not see any laceration in the genitalia. We did some investigations.

High vaginal swab – revealed epithelial cells

Urinalysis – negative

Pregnancy test – negative

Syphilis test – negative.....

I was examining the victim at three days after the incident but the hymen was not fresh."

31.The complainant in her evidence indicated that she had had no sex with any other person before the alleged encounter with the Appellant. She repeated that position when she was being examined by PW5. But when she was first attended at God Kwer Dispensary she indicated that she had had sexual intercourse previously.

32.Therefore going by the testimony of PW5 that on examining the complainant that the hymen was broken and that was not fresh, it therefore means that there is the possibility of the complainant having engaged in prior acts of sexual intercourse before the alleged day. I hence agree with the notes from God Kwer Dispensary that indeed the complainant had previously engaged in such sexual acts notably not with the Appellant.

33. There is also the issue of the presence of the epithelial cells when PW5 took a vaginal swab on the complainant. That indicated that the complainant had indeed engaged in a sexual act with a person of the opposite sex. However it was not revealed how long such cells can remain alive upon intercourse.

34.On a reconsideration of the evidence on this issue in totality, I have to return the finding that there was proof that the complainant had engaged in a sexual intercourse as evidenced by the presence of the epithelial cells in her vagina hence penetration was proved.

c. **<u>On whether the Appellant was the perpetrator:</u>**

35.As the Appellant has denied committing the alleged offence, that calls for an in-depth examination of the circumstances so as to settle the issue as to whether the Appellant was rightly identified as the perpetrator of the offence.

36.The offence was allegedly committed in the night of 21/06/14 in a house belonging to one L married to one O. It is on record that O was the complainant's brother and a son to PW3.

According to the complainant, the act took place from after 09:00p.m upto midnight when the assailant left the house and never returned. The complainant had never seen the said assailant before and only met him that night.

37. This was therefore an issue of identification as opposed to recognition. It is now well settled that evidence on identification, as well as recognition, ought to be carefully tested so as to be free from error and that in the event any reasonable doubt is cast, the Appellant (or Accused person as the case may be) must benefit therefrom.

38. 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.

39. 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."

40. Whereas the complainant stated that she had been asked by her brother's sister one L to go to her house and spend with her as L's husband was not there, on reaching there she found L's husband there as well as someone else whom L said was her brother. It is L who asked the complainant to *"talk to her brother"* and later told him to sleep with the brother and that happened on a sofa set chair at the living room as L and her husband were in the next room.

41. But there was no evidence which was led to the lighting in that house. It is not known whether there was electricity light or any other source of lighting or at all including the intensity thereof, if any, remains unknown. There is equally no evidence on whether the complainant had an opportunity to meet and talk with the alleged L's brother before the act or if the two only met when they were sleeping in the living room since it appears that it was L who was on the "***driving seat***" and took charge of all the events leading to the alleged act.

42. This issue rightly came into the mind of the trial Court and in its judgment the Court had the following to say:-

"..... I believe in any household there is a source of light and the fact that the complainant managed to mention the people who were in the house when she arrived, I am in no doubt she identified her assailant, Moreover L introduced her brother to her and she put up the whole night with the assailant who she identified as the accused in court. I believed her testimony in totality."

43. Whereas a Court of law is always called upon to make decisions or inferences on some set of circumstances, such a Court should endeavour to make such decisions or inferences on the basis of the available evidence as adduced before it and it ought to be slow in making assumptions not supported by facts as tendered before Court. The Learned trial Magistrate therefore, and with utmost respect, erred in the belief that in any household there must be a source of light and that the two spent the whole night together. It was therefore incumbent upon the trial Court to ascertain from the evidence whether there was light in the house and to apply the test as laid out in the various judicial precedents referred to above. The Court further overstepped in the finding that the two spent the whole night together contrary to the available evidence.

44. Apart from the issue of the lighting, it is also worth looking at some other aspects touching on the issue of the Appellant's identification. There is the letter which was produced as Exhibit 5. It was written by one OKOMO MIDICHA, the Head Teacher of [Particulars Withheld] Primary School where the complainant was a student. The said letter sought for assistance towards what was allegedly visited upon the Complainant. From the record the letter was issued when PW3 went to seek some assistance from the school on learning of the incident upon her daughter, the complainant. It is dated 23/06/2014. Surprisingly that letter tends to identify the alleged assailant as follows:-

"The above student is a pupil of our school. A man by the name of Mr. Obondo Opollo through his brother – a Mrs LO -who is the girl's brother's wife – lured her into sexual intercourse on the night of 21/6/14 between 10:00p.m and 6:00 a.m..."

45. The Appellant's name in this case is one J **O O**. The said letter talks about one **O O** as the assailant. There is no evidence that the Appellant herein is also known by that other name. But that aside, what creates questions is the mind of this Court is how the Head teacher came to know of the assailant's name. Could he have been so told by the complainant or the mother (PW3) or by any other person or did he overhear a talk in the neighbourhood? Those questions remain unsettled.

46. The other issue relates to the events leading to the issuance of the Police Order to Arrest (Exhibit 7) by the Investigating Officer (PW6). It is dated 26/06/2014 and has two suspects being O O and L O.

47. According to PW6, the complainant and PW3 reported the matter to the Police Station on 24/06/2014 and that it was the complainant who identified the person who had defiled her and was so recorded in her statement. Despite the fact that the statement was not produced in Court, PW6 did not go further to elaborately disclose how the complainant identified the assailant in her statement. Did the complainant identify the assailant by description or name? And, what was the source of the name which PW6 indicated in the Arrest Order (Exhibit 7)? Did PW6 get the said names from the complainant's statement or from PW3 or Exhibit 5; which was the letter from the School?

48. Another equally important issue relates to the events leading to the arrest of the Appellant.

PW3 stated that he did not know the person the complainant had sexual intercourse with and that she only saw him when that person had gone to her to apologize for his evil deeds. That was the very day that person was arrested by officers from Masara A.P. Camp whom she called and they come for the arrest.

49. According to PW3, when she learnt that her daughter, the complainant, had been defiled, she quickly went to see L and protested and when she demanded to know why L had allowed such a thing to happen, L told her to go to the Police. PW3 then left and went to the Head teacher and then to the hospital.

50. On being cross -examined, PW3 admitted that she called the Appellant on the day the Appellant

was arrested, that is 06/06/14. PW3 however did not disclose how she came to know that the Appellant was the assailant before the alleged reconciliatory meeting and further how she came to know of the Appellant's telephone contacts. It was her further evidence that on the day of arrest, the Appellant was accompanied by L to her home. The record however has it that it was the Appellant who was arrested and not L despite the fact that PW3 knew L very well and there was an Arrest Order against her which PW3 had procured from the Police.

51. The Appellant did not agree to the PW3's version aforesaid. To him, he knew PW3 before his arrest and that himself and others had been mining gold at PW3's son's home. There was then an understanding with PW3 that upon digging out the soil which was later on to be taken for cleaning for the gold to be harvested, the Appellant together with his three colleagues were to keep the soil at PW3's house. The soil was packed in bags.

52. The storage arrangement with PW3 was however conditional on the Appellant and his colleagues giving PW3 her share of the soil at the time of collection. The Appellant confirmed that it was him who knew PW3 and had led the others to store the soil at PW3 home and inside PW3's house.

53. In the course of time, the Appellant did not find some of the soil sacks which he had left at PW3's place with his colleagues. He enquired what had happened but instead PW3 began quarreling him and told him that she knew nothing about the soil. As a result of the loss, the Appellant kept on going back to PW3's place to make further enquires and one day PW3 cautioned him that if he continued with the search for the lost bags of soil she would cause her to spend at a place he had not so spent or go somewhere he had never gone into. The Appellant however kept on pursuing the lost soil bags undeterred and on 21/06/2014 he was accompanied by his three colleagues to PW3's home where they searched for the soil upto 03:00 p.m. in vain. The Appellant then informed PW3 that they had decided to sue her for the loss. He then left PW3's place and went to his home with his colleagues who spent with him that night.

54. It was the Appellant's further testimony that he stayed at his home as from 21/06/2014 to 27/06/2015 when he received a call from PW3 at around 08:00 p.m. asking him to go to PW3's place as the lost soil bags had been found and that the Appellant was to go and collect them.
55. The Appellant then contacted his colleagues who happily went with him to PW3's place to collect the soil. The Appellant was also accompanied by his wife whom she had shared all the unfolding events on the lost soil.

56. On reaching PW3's place on 27/06/14 the Appellant met around ten people who then convened into a house so as to discuss the lost and found soil. The Appellant then asked PW3 how the soil was lost and found and to his surprise PW3 responded that she will firmly deal with anyone who will raise the issue of the soil.

57. The Appellant further stated that there were some people who were drinking the local brew "***changaa***" outside the PW3's house and that he used to see the complainant sell the stuff to the partakers. He suddenly saw the police and he was arrested and taken to the station. It was the Appellant testimony that when he saw the police officers come into PW3's place he thought they had come to also partake of the local brew as they usually did. He was later falsely charged in Court.

58. The evidence of the Appellant was corroborated by one PHILIP OCHIENG AYIEKO who was a fellow miner. He was DW3. He firmly stated that on 21/06/14 they left PW3's home with the Appellant and went to spend at the Appellant's home with the other miners and the Appellant's wife was there.

59. The Appellant's wife also testified effective that it is not true that the Appellant spent out on 21/06/14 as he spent at his home with his colleagues and herself.
60. To the Appellant therefore, PW3 had fixed him to stop him from pursuing the issue of his lost bags of soil which contained gold and which allegedly got lost in PW3's custody.

61. Those are the two opposing versions on what led to the arrest of the Appellant. While it remains unclear how PW3 managed to get the Appellant's contacts from her testimony, the evidence of the defence tend to shed some light on the issue. There truly existed an arrangement between PW3 and the Appellant (and his other colleague miners) on the storage of the bags of soil harvested from PW3's son's land awaiting collection. The Appellant even knew the complainant as a result of the dealings he had with PW3. The Appellant used to visit the complainant's home to keep and collect the bags of soil and used to see this complainant sell the local liquor (chang'aa) to the partakers which included the local police. PW3 never disputed the fact that she knew the Appellant and that there existed the storage arrangement. Since PW3 knew the Appellant and even called him to collect the lost bags of soil, this Court therefore agrees with PW3 when she stated that:-

"I don't know the person my girl had said she slept with..."

62. The issue of the Appellant being a gold digger was even corroborated by the complainant's brother who testified as PW2. He confirmed that the Appellant was engaged in the business of digging gold and that he used to work near their home for about a week or so during which time even the complainant was also around.

63. Given the said arrangement between PW3 and the Appellant and the disagreement which ensued coupled with the threat that the Appellant was to sue as a result of the said loss, the possibility of the Appellant being framed up by PW3 cannot be said to be remote. I say so further to the fact that it was only the Appellant who was arrested and not L who was allegedly in the company of the Appellant and against whom a warrant of arrest was out; a fact PW3 knew very well but deliberately decided not to identify the said L to the police to be arrested. It can therefore be safely explained that the reason why L was not arrested, in the foregone circumstances, was that L was not concerned with the disagreement between PW3 and the Appellant herein on the lost bags of soil.

64. Taking the factual evidence as tendered and analysed hereinabove and the law on identification as fore visited side by side, it cannot be said that the alleged identification of the Appellant by the complainant, who was the only eye-witness, was free from error. I make this finding with the clarity in my mind of the proviso to **Section 124** of the Evidence Act. This Court therefore holds that the prosecution failed to legally demonstrate that the Appellant was the perpetrator of the heinous act on account of failure to positively identify him as such. The conviction cannot therefore stand and is hereby set aside.

Disposition:

65. It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.

66. The upshot is therefore that this Court has no option but to allow the appeal. The same is hereby allowed. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MIGORI this 21st day of OCTOBER, 2015

A. C. MRIMA

JUDGE