



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 25 OF 2019

KEVIN OKOTH OPIYO.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau

Senior Resident Magistrate in Rongo Magistrate's Court Criminal Case No. S. O. A.

delivered on 28/03/2019)

JUDGMENT

1. The main issue for consideration in this appeal is whether the defence contemplated under **Section 8(5) and (6)** of the **Sexual Offences Act** No. 3 of 2006 is available to the Appellant in the circumstances of this case.
2. The Appellant herein, **Kevin Okoth Opiyo**, was charged with the offence of *defilement* contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006 and in the alternative *committing an indecent act with a child* contrary to **Section 11(1)** of the **Sexual Offences Act** No. 3 of 2006. The Appellant denied both counts.
3. The particulars of the offence of defilement were that *'between 2nd June 2018 and 12th June 2018 at [particulars withheld], intentionally and unlawfully caused his penis to penetrate the vagina of PA a girl aged 12 years'*.
4. The appellant was subsequently tried, found guilty and convicted on the main count of defilement. He was sentenced.
5. The prosecution called five witnesses in support of its case. The complainant testified as **PW1** whereas the complainant's mother testified as **PW2**. **PW3** was the Assistant Chief of Koderobara Sub-Location. The investigating officer testified as **PW4**. She was **No. XXX PC (W) Elizabeth Njenga**. She was attached at Kamagambo Police Station Crime Office. **PW5** was a Clinical Officer attached at Rongo Sub-County Hospital. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except for **PW1** whom I will refer to as **'the complainant'**.
6. The prosecution witnesses testified. At the close of the prosecution's case the Appellant was placed on his defence. He gave an unsworn defence without calling any witness. The Court rendered its judgment and found the Appellant guilty of the offence of defilement. He was convicted and sentenced to 20 years' imprisonment.
7. Being dissatisfied with the conviction and sentence, the Appellant lodged an appeal in person. He filed a Petition of Appeal on 11/04/2019. He thereafter engaged the firm of Messrs. Odhiambo Kanyangi & Company Advocates to represent him. The Advocates filed a Supplementary Grounds of Appeal on 29/10/2019. Counsel challenged both the conviction and sentence.
8. The appeal was heard by way of written submissions followed by oral highlighting. **Mr. Kanyangi**, the Appellant's Counsel, duly filed written submissions while the State only relied on its oral submissions. Counsel submitted that the defence in **Section 8(5) and (6)** of the **Sexual Offences Act** was applicable in this case. He carefully took the Court through the evidence and demonstrated how the Appellant and the complainant had been friends courtesy of **PW2**. Counsel extensively cited the Court of Appeal in **Eliud Waweru Wambui vs. Republic (2019) eKLR** and the persuasive decision of **Martin Charo vs. Rep. (2016) eKLR** in support of his submissions.

9. The State opposed the appeal. **Mr. Kimanthi** for the State submitted that the charge of defilement was properly proved. He contended that all the ingredients of the offence were clearly demonstrated and further submitted that the defence had no place in the case. He pointed out that the High decision was only persuasive.

10. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okeno 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, analyze 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.

11. In line with the foregoing, this Court in determining this appeal must first 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. The Court must further interrogate the applicability of the defence in **Section 8(5) and (6)** of the **Sexual Offences Act** in this case.

12. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

13. 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. As the Appellant strenuously submitted that he ought to benefit from the defence contemplated under **Section 8(5) and (6)** of the **Sexual Offences Act**, I will hence dwell on that defence.

14. I dealt with the said defence in **Migori High Court Criminal Appeal No. 59 of 2015 Sammy Chacha Chacha vs. Republic** (unreported). I disallowed the defence. The decision was appealed against. In allowing the appeal the Court of Appeal held that the standard of proof in relying on the defence under **Section 8(5) and (6)** of the **Sexual Offences Act** is on a balance of probabilities since the burden of proof never shifts from the prosecution throughout the trial. (See **Kisumu Court of Appeal Criminal Appeal No. 107 of 2016 Sammy Chacha Chacha vs. Republic (2020) eKLR**).

15. On how the Appellant demonstrated the defence on the balance of probabilities the Court of Appeal in **Sammy Chacha Chacha** case (supra) stated as follows: -

... the appellant was more likely than not to have been deceived by the appellant's express lie about her age. Moreover, the general conduct of both SBC and her mother PW2 was such as to cause the appellant to reasonably believe, on a balance of probabilities that the appellant was over the age of 18 years.

We think that had the learned Judge recalled that in a criminal trial the burden of proof ultimately and rests with the prosecution to prove its case beyond reasonable doubts, he would have avoided the approach that appears to have placed too heavy a burden on the appellant to prove his statutory defence.

16. Turning to the case, the Appellant contended that he had agreed with PW2 (the mother of the complainant) on the marriage of the complainant to the Appellant. The complainant also stated that she agreed to be married to the Appellant. Although PW2 denied such agreement the record has it that she was not even the one who reported the matter to the Area Chief but a Children Rights Activist. I am not hence convinced that PW2 was truthful. The possibility that PW2 gave her daughter to the Appellant is sound.

17. There is no doubt the complainant was a school dropout. She dropped out in Class 4 in a year she could not remember. All along she was just at home. The Appellant as well knew that the complainant was no longer in school. The prosecution did not lead any evidence to demonstrate that the Appellant was reasonably aware that there was any impediment to his marriage to the complainant. As said by the Court of Appeal aforesaid *'the general conduct of both SBC and her mother PW2 was such as to cause the appellant to reasonably believe, on a balance of probabilities that the appellant was over the age of 18 years.'*

18. I am in agreement that this was a case where the defence contemplated under **Section 8(5) and (6)** of the **Sexual Offences Act** must be upheld.

19. For the foregone reasons I find and hold that the appellant's conviction was unsafe. Accordingly, the conviction is quashed and the sentence set aside. The appellant shall be forthwith set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February, 2020

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Odhiambo Kanyangi, Counsel for the Appellant.

Mr. Kimanthi Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

