



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

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

CRIMINAL APPEAL NO. 21 OF 2019

SMR.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

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

in Rongo Magistrate's Court Criminal Case No. 21 of 2018 delivered on 15/3/2019)

JUDGMENT

1. The Appellant herein, **SMR.**, was charged with the offence of **Defilement** contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006. He faced an alternative count of **committing an indecent act with a child**. The Appellant denied all counts.
2. The particulars of the offence of defilement were that *'on diverse dates between April 2018 and 20th July 2018 at [particulars withheld], unlawfully and intentionally caused his penis to penetrate into the vaginal of BBM a girl aged 15 years old'*.
3. The Appellant was subsequently tried, found guilty and convicted on the main charge of defilement. He was accordingly sentenced.
4. Four witnesses testified in support of the prosecution's case. **PW1** was the complainant. She was **BBM** The father of the complainant testified as **PW3**. A Clinical Officer attached to Rongo Sub-County Hospital testified as **PW2**. The investigating officer one **No. 107242 PC (W) Rosalia Chepchirchir** attached to Kamagambo Police Station testified as **PW4**. The Appellant appeared in person during the trial.
5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave an unsworn defence. He did not call any witness.
6. The trial court thereafter rendered its judgment on 15/03/2019 where the Appellant was found guilty of defilement. He was convicted and sentenced to 20 years' imprisonment.
7. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal. He contended *inter alia* that the offence was not proved.
8. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant filed the submissions and expounded on the grounds of appeal. The Appellant prayed that the appeal be allowed, convictions quashed and sentences set-aside.
9. **Miss. Tanui** Learned Prosecution Counsel relied on the record in opposing the appeal. Counsel prayed that the appeal be dismissed.
10. 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.
11. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offences 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. 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.

12. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the victim whom I will refer to as '**the complainant**'.

13. I will begin with ascertaining whether the offence of defilement was proved.

14. 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. I will consider each of them separately.

(a) On the age of the complainant:

15. The age of the complainant was properly settled by an age assessment report. The report was produced and it was not contested. Based on the evidence on record the trial court rightly settled the age of the complainant at 15 years old. The complainant was hence a minor in law.

(b) On the issue of penetration:

16. 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.*

17. 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).

18. 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.

19. Penetration was contested. I have carefully and repeatedly gone through the record. The complainant narrated the ordeal. The narration was so clear and the events freely fell from her lips. The complainant was consistent. She knew what she engaged in with the assailant were sexual activities. She also engaged in the act more than once. The complainant was candid that she had sex with a person known to her.

20. The aspect of penetration was corroborated by PW2. She examined the complainant and even treated her. The genitalia were tender, hymen was missing and there as presence of blood stains from the vagina. PW2 formed an opinion that there had been a penile penetration into the complainant's vagina.

21. Based on the evidence on record, I therefore find no difficulty in holding, which I hereby do, that penetration into the complainant's vagina by a penis was proved.

c) On whether the Appellant was the perpetrator:

22. The issue of identification was also contested in this appeal. The Appellant denied committing the offence. He narrated how he was summoned to the police station and arrested.

23. The Appellant and the complainant knew one another well. They both hailed from the same village. They had also been in a sexual relationship for several months. The Appellant described how they used to meet and indulge in intercourse. When the complainant was confronted by PW3 she readily confirmed that she was in a relationship with the Appellant. The complainant's evidence was corroborated by that of PW3 who had earlier on seen them together.

24. The trial court heard the witnesses testify. It also observed their demeanors. The court had the following to say about the complainant: -

..... Her testimony was clear and her description vivid with regard to the part of the body touched, the nature of the contact and other circumstances surrounding the situation.

25. The trial court therefore gave reasons why it believed the complainant was truthful. Since the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence then due allowance for that must be accorded by this Court. There is nothing put forth herein which successfully challenged the demeanor of the witnesses.

26. The totality of the evidence yields a safe finding that the complainant was truthful. I believe her as well. I therefore find and hold that the

complainant positively identified the Appellant as the assailant.

27. In sum I find and hold that the Appellant was properly found guilty and convicted of the offence of defilement. The appeal on conviction hereby fails.

28. I will now deal with the **sentence** rendered on the conviction of defilement. The Appellant was sentenced to 20 years' imprisonment sentence under **Section 8(3)** of the **Sexual Offences Act**. The court granted the sentence as it was aware that such an offence attracted a minimum sentence in law. The court also considered the mitigation by the Appellant. The court did not state that it rendered the sentence because it could not render a lesser one. No, the court only stated that it was aware of the law. However, mitigations were taken into account.

29. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

30. Looking at the nature of the offence and how the Appellant committed it and in consideration of the Appellant's mitigations I do not see how the sentencing court erred in arriving at the sentence of 20 years' imprisonment. The appeal on sentence is likewise dismissed.

31. The upshot is that the entire appeal is unmerited and is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 6th day of February, 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

S.M.M. the Appellant in person.

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

Evelyne Nyauke – Court Assistant