REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CRIMINAL APPEAL NO. 46 OF 2019

ERICK OKINYI SIMIYU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat Senior Resident Magistrate in Rongo Magistrate's Court Criminal Case No. 6 of 2019 delivered on 12/06/2019)

JUDGMENT

1. It is always believed that one is safe in the company of his/her family members. Indeed, that is the case to a large extent. But just like in every general rule there are exceptions, this case is a testimony of the exception. The case brings to the fore tales of horror a member underwent in the hands of her very own close family member; a cousin.

2. On 25/01/2019 the complainant in this case **M.A**. who was in Standard 7 in a primary school within Awendo Sub-County of Migori County was sent home to collect a school sweater. She lived with her grandmother. Reaching home, she met and informed her grandmother and they immediately set off to Awendo town to buy the sweater. They used a motor cycle which was ridden by a cousin to the complainant who is the appellant herein.

3. They managed to buy the sweater at Awendo town. As the grandmother had other things to attend to in Awendo town she released the complainant and the appellant. The appellant was instructed to take the complainant back home. As the two were on the way the appellant decided to pass through his home first. The home was in Uriri Sub-County. They reached the home of the appellant. The complainant even met the mother of the appellant who was her aunt; a sister to her own mother. That was around 3:00pm.

4. Shortly, the two set out to the home of the complainant. The appellant however used an alternative route. To the complainant the alternative route was not only long but also passed through a vast sugar plantation. As they passed the plantation, the appellant stopped the motor cycle and alighted. The appellant alighted as well. The appellant pushed the motor cycle into the sugar plantation. He then called the complainant to follow him, but the complainant declined. The appellant then parked the motor cycle. He went to where the complainant was and held her hand. He pulled her into the sugar plantation. Deep inside the plantation, the appellant demanded sex from the complainant. The complainant refused. The appellant held her and threw her to the ground. A struggle ensued. The complainant screamed, but the appellant held her by the neck. The appellant overpowered the complainant and undressed her. He quickly pushed his trousers to the knees and parted the complainant's legs. They had sex. The appellant then took the complainant home.

5. When the complainant arrived home, she immediately reported the ordeal to his uncle *BO*, (a witness) and a woman one Mama Eva (not a witness). The complainant was rushed to Awendo Sub-County Hospital where she was examined and treated. She was then led to Awendo Police Station where she reported the incident. The said uncle hurriedly reported the matter to a villager elder one *Dominic Odhiambo* (a witness) and they organized with members of public to arrest the appellant. They arrested the appellant and led him to the police station.

6. The appellant was also taken to Awendo Sub-County Hospital where he was also examined. *No. 105730 PC Viola Cherotick* attached to Awendo Police Station investigated the case. She recorded statements from witnesses and issued P3 Forms to both the complainant and the appellant. On return of the Forms and on receipt of treatment notes the officer charged the appellant.

7. The offence was *Defilement* contrary to **Section 8(1)(4)** of the **Sexual Offences Act** No. 3 of 2006 and with an alternative offence of *committing an indecent act with a child*. The Appellant denied both counts.

8. The particulars of the offence of defilement were that '*on 25th day of January 2019 at [particulars withheld], unlawfully and intentionally caused your penis to penetrate the vagina of M.A. a girl aged 16 years*'.

9. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

10. Five witnesses testified in support of the prosecution's case. A Clinical Officer attached to Awendo Sub-County Hospital testified as **PW1. PW2** was the complainant **M.A. PW3** was an uncle to the complainant. **PW4** was a village elder and the investigating officer testified as **PW5**. The Appellant appeared in person during the trial. 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 (PW2) whom I will refer to as '**the complainant'**.

11. At the close of the prosecution's case the trial court placed the appellant on his defence. The appellant opted to and gave a sworn defence. He called no witness. The appellant denied the offence and narrated how he was arrested.

12. Thereafter the court rendered its judgment on 12/06/2019 where the appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 15 years' imprisonment.

13. Being dissatisfied with the conviction and sentence, the appellant preferred an appeal by filing a Petition of Appeal on 26/06/2019. The appellant challenged the judgment and sentence in that the offence was not proved and the sentence was too excessive.

14. Directions were taken and the appeal was disposed of by way of written submissions. The appellant filed his submissions. He contended that he was denied legal representation contrary to **Article 50(2)(h)** of the **Constitution.** He also argued that a *voir dire* examination was not conducted on the complainant and that several witnesses did not testify. The appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

15. **Mr. Kimanthi** Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any peradventure and prayed that the appeal on conviction be dismissed.

16. 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 **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, 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.

17. 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.

18. 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. The trial court captured the evidence quite well and I reiterate the same herein and as part of this judgment by reference.

19. 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:

20. The age of the complainant was hotly contested in this appeal. The appellant contended that the age of the complainant was not settled as the complainant did not testify on her age. The response thereto is that the complainant stated in her examination-in-chief that *'I am 16 years old'*.

21. The prosecution relied on a Certificate of Birth No. 5743762 produced by PW5 in proof of the age of the complainant. The complainant was born on 12/03/2002 and as such she was 16 years old at the time of the incident. The complainant was a minor within the meaning of the law.

(b) On the issue of penetration:

22. The trial court handled the issue of penetration well. He referred to the law and binding decisions.

23. The trial court's analysis of the evidence was on point. The evidence of penetration was availed by the complainant and corroborated by PW1 who found the same whitish vaginal discharge in the vagina of the complainant and on the penis of the appellant on examination.

24. Going by the narration by the complainant coupled with the evidence of PW1 and the contents of the treatment notes, Post Rape Care Form and the P3 Form, I 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:

25. The appellant vehemently denied being the assailant and attacked the evidence of the prosecution on the main issue that potential witnesses did not testify.

26. The court dealt with the issue. It analyzed the law on corroboration relating to sexual offences under **Section 124** of the **Evidence Act**. It also referred to binding decisions.

27. On the issue of alleged potential witnesses who did not testify, **Section 143** of the **Evidence Act, Cap. 80** of the Laws of Kenya gives the prosecution the discretion to decide on the number of witnesses to avail in a trial. Unless a crucial witness is not availed and no reasonable explanation tendered, no adverse inference can be made for such a failure. (See **Bukenya & Others versus Uganda (1972) E.A. 594, Kingi versus Republic (1972) E.A. 280** and **Nguku versus Republic (1985) KLR 412).**

28. The offence was committed during day time. The complainant knew the appellant so well as her cousin. The complainant readily gave out the name of the appellant as the person who had forced sex with her to PW3 immediately she reached home. She also gave the name of the appellant to the police. (See the Court of Appeal in **Simiyu & Another vs. R. (2005) 1 KLR 192**, **R. vs. Alexander Mutuiri Rutere alias Sanda & Others (2006) eKLR, Lesarau vs. R. (1988) KLR 783**, **Morris Gikundi Kamunde vs. Republic (2015) eKLR** among others).

29. The witnesses testified before the trial court which observed their demeanors. The court considered the totality of the evidence alongside the defence and was satisfied that the appellant had been placed as the assailant. I have as well reviewed the evidence on record. There is nothing meaningful on record challenging the demeanor of the witnesses and that is why the trial court believed the witnesses. As an appellate Court I am called upon to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to my 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 I must give allowance for that.

30. The appellant also challenged the trial in that his right to fair trial under to **Article 50(2)(h)** of the **Constitution** was infringed. The appellant was charged on 28/01/2019. The Appellant had a right to apply for representation under the **Legal Aid Act No. 6** of **2016** which came into operation on 10/05/2016. He cannot therefore blame the trial court on his failure.

31. The appellant also contended that the complainant was not subjected to a *voir dire* examination. The complainant was aged 16 years old. The Court of Appeal has since the time of its predecessor the Court of Appeal for Eastern Africa held that the age for a child witness to be subjected to a *voir dire* examination should be under the age of 14 years old. (See **Kibageny arap Kolil vs. Republic (1959) EA 82** and **Malindi Criminal Appeal No. 68 of 2015 Maripett Loonkomok vs. Republic (2016) eKLR**). Therefore, there was no need of such an examination in this case.

32. Having reconsidered the evidence, I am satisfied beyond any peradventure that it is the appellant who beastly and sexually assaulted the complainant. I now find that the appellant was rightly found guilty and convicted. The appeal on conviction is dismissed.

33. On **sentence**, the appellant was to be sentenced to 15 years 'imprisonment. The High Court in **Wanjema v. Republic (1971) EA 493,** rightly so, 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.

34. I have re-evaluated the evidence and the mitigations. The appellant was a cousin to the complainant. The appellant was in a position of trust. He chose to abuse the trust. That is an aggravating factor in this matter.

35. Having been sentenced to a term of 15 years in prison and from the foregone I do not see how excessive the period is. Needless to say, the sentence was lenient in the circumstances of the case. The appeal on sentence is also disallowed.

36. From the foregone analysis, the entire appeal is unsuccessful and is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 2nd day of March, 2020.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Erick Okinyi Simiyu, 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