REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 51 OF 2018

GODFREY OJWANG OTIENDE..........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. 13 of 2017 delivered on 5/10/2018)

JUDGMENT

1. The Appellant herein, **Godfrey Ochieng Otiende,** was charged with the offence of **Defilement** contrary to **Section 8(1)(3)** 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.

2. The particulars of the offence of defilement were that '*on 14th day of September 2017 at [particulars withheld], intentionally caused your penis to penetrate the vagina of CAO a girl aged 15 years old*'.'

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

4. Six witnesses testified in support of the prosecution's case. **PW1** was the victim one **CAO** The victim was a niece to one **DAO** and **EAO** who testified as **PW2** and **PW4** respectively. The Clinical Officer attached to Rongo Sub-County Hospital testified as **PW3** whereas the arresting officer one **No. 110447 PC. Dennis Nyarayo** testified as **PW5**. The investigating officer one **No. 107242 PC (W) Rosalia Chepchirchir Maiyo** attached to Kamagambo Police Station testified as **PW6**. 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 (PW1) whom I will refer to as '**the complainant'**.

5. 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 and called his wife one **Beatrice Achieng Ojwang** (DW2) as a witness. Thereafter the court rendered its judgment on 05/10/2018 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 30 years' imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal through **Messrs. Odondi Awino & Co. Advocates** on 18/10/2018 where the Appellant challenged the judgment on the following two grounds: -

> ***(1). The learned trial magistrate erred in law and facts by treating and handling the accused in a hostile environment making it impossible for the accused to mitigate.***
>
> ***(2). The learned trial magistrate failed to appreciate that the accused is a first offender and issuing a sentence which is manifestly excessive in the circumstances.***

7. Directions were taken and the appeal was disposed of by way of written submissions. However, the Appellant instead filed his own submissions and contended that the offence was not proved, that he was detained at the police station for more than 24 hours before being arraigned in court, that the *alibi* defence was not considered and that the sentence was manifestly excessive. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

8. **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. Counsel however submitted that the sentencing section was **Section 8(4)** of the **Sexual Offences Act** and that the Appellant ought to have been sentenced to 15 years' imprisonment instead.

9. 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.

10. 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. 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.

11. 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:

12. The age of the complainant was hotly contested in this appeal. The prosecution relied on a Certificate of Birth No. 6506548 in proof of the age of the complainant. The Certificate indicated that she was born on 21/08/2002. Given that the offence was allegedly committed on 14/09/2017 then the complainant was 15 years 24 days old. The Certificate was produced as an exhibit without any objection and even in this appeal its production and contents were not challenged. I find and hold that the age of the complainant was rightly proved and the complainant was a minor within the meaning of the law.

(b) On the issue of penetration:

13. **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.***

14. 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).

15. 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.***

16. Penetration was also hotly contested. The Appellant contended that there was no evidence of penetration. The evidence of penetration was adduced by the complainant and PW3. The complainant narrated how she returned home in the morning of 14/09/2017 from school as she was unwell and slept inside their room within a plot which had several tenants including the Appellant and PW4. That, she did not lock the door from inside.

17. On waking up she saw the Appellant seated on a chair inside their house and the door locked from inside. The Appellant removed a switch blade from his pocket which looked like keys and on pressing it a blade emerged. The assailant then pulled up the complainant's skirt and removed her under wear. He then undid the zip to his trousers and got on top of the complainant as the complainant was still on the bed. The assailant then inserted his penis into the vagina of the complainant. Shortly afterwards the complainant began shouting and PW4 who was inside her room responded and ran to the door to the complainant's room and heard the complainant like choking. PW4 ran to PW2's house and informed her that there was a problem with the complainant. PW2 ran to the complainant's room and found the door locked. She banged the door three times and it opened and the Appellant came out. PW4 also saw the Appellant holding some keys before he escaped.

18. When the complainant was taken to hospital she was examined by PW3 who observed some lacerations on the *labia minora* and that the vagina was tender. There was also a whitish vaginal discharge and the hymen was missing. PW3 then filled the P3 Form which she produced as an exhibit together with the treatment notes and the laboratory results. PW3 concluded that the complainant's vagina had been penetrated by a male organ.

19. Going by the narration by the complainant coupled with the evidence of PW3 and the contents of the treatment notes 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:

20. Having believed the evidence of the complainant, suffice to say that the said evidence also touched on the identity of the assailant. The incident occurred during the day. The Appellant was a neighbour to the complainant and PW4 as they all lived in the same plot. The complainant had known the Appellant since he moved into the house 5 years earlier. The Appellant and the complainant also talked inside the house before the act. The complainant asked the Appellant why he wanted to have sex with her and yet she had a wife as the Appellant insisted that he wanted her.

21. When PW2 and PW4 came to the aid of the complainant they met the Appellant. PW4 was the first one to arrive at the door and on hearing the complainant choking she ran and called PW2. As PW2 ran to the complainant's house as PW4 went to pick her child before they all met at the complainant's house. PW2 banged the door three times and the Appellant opened and came out. PW2 asked the Appellant what he was doing inside the complainant's house and the Appellant told PW2 that she was free to do whatever she wanted. Before the Appellant left, PW4 arrived and also saw the Appellant holding what she described as keys. As PW2 and PW4 were interrogating the complainant the Appellant disappeared. Both PW2 and PW4 knew the Appellant well. The evidence of the complainant to the effect that it was the Appellant who was inside the complainant's house with the complainant was hence corroborated by the evidence of PW2 and PW4.

22. The Appellant however denied and maintained he was not at home on the alleged time as he had gone to his working place at the mines. However, when DW2 testified and on cross-examination as to where the Appellant was on the material day she stated that '***On that date he did not go to work. He and I were together all day***.' The evidence of the Appellant and DW2 was therefore at variance and that alone discredited the *alibi*. Like the trial court, I also find no merit in the defence and reject it.

23. I have carefully weighed the evidence and the law alongside the defence and I have no doubt in my mind that there were no circumstances that may have led to any doubtful identification of the Appellant by the complainant and the two witnesses, PW2 and PW4. As such, the identification of the Appellant as the aggressor was not in error. I now find and hold that the prosecution proved that it was the Appellant who sexually assaulted the complainant. The third ingredient of the offence of defilement is also answered in the affirmative.

Other issue raised by the Appellant: -

24. The Appellant also contended that he was held at the police station for more than 24 hours contrary to what is required by the **Constitution**. According to the record the Appellant was arrested on 15/09/2017. That was on a Friday. He was arraigned in court on 18/09/2017 which was the following Monday. I do not find the contention valid as the Appellant was taken to court in compliance with **Article 49(1)(f)(ii)** of the **Constitution** as the 24 hours' window from the time he was arrested ended on a Saturday, a day which is not an ordinary court day and the Appellant was arraigned before court on the following Monday.

25. I must however state that even though it was proved that the Appellant was held longer than what the **Constitution** provided and without any justification still that in itself would not have vitiated the trial unless the contrary was proved. In such cases one is entitled to the other remedies in the **Constitution** upon determination of an appropriate Petition or suit.

26. Having found all the ingredients of the offence of defilement in favor of the prosecution, this Court finds that the Appellant was properly found guilty and convicted. The appeal on conviction hereby fails.

27. On **sentence**, the complainant was 15 years 24 days old at the time the alleged offence was committed. The Appellant was to be sentenced under **Section 8(4)** of the **Sexual Offences Act** and not under **Section 8(3)** of the **Sexual Offences Act**. **Section 8(4)** provides for a minimum sentence of 15 years' imprisonment. The trial court therefore had the discretion to enhance the sentence. The sentence of 30 years' imprisonment given cannot therefore be described as unlawful, it is well within the law.

28. Most of the sentences under the **Sexual Offences Act** are very serious and it is generally desirable for a court to give reasons when enhancing the prescribed sentences. The court gave its reasons including that the Appellant was not remorseful. The Appellant denied the offence and even on conviction he had a right to challenge the conviction on a first appeal before this Court and further before the Court of Appeal and even before the Supreme Court. Requiring a convict to be remorseful in mitigations is likely to jeopardize the convict's appeal if any is preferred. Although there were other reasons given by the trial court on the enhancement, I agree with the prosecution and while remaining alive to the decision in **Wanjema v. Republic (1971) EA 493** on the principles on interference with a lawful sentence at an appellate level, that the minimum sentence under **Section 8(4)** is sufficient punishment.

29. Respectfully, the sentence of 30 years' imprisonment is hereby set-aside and substituted with 15 years' imprisonment. The appeal against sentence is thus successful.

30. Save on the issue of sentence I find no merit on the appeal against the conviction. For avoidance of doubt, the sentence shall run from the day the Appellant was sentenced before the trial court.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of May 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Godfrey Ochieng Otiende 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