



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 3 OF 2019

PAUL OTIENO OKELLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. Odenyo Magistrate

in Migori Magistrate's Criminal Case No. 7 of 2016 delivered on 20/11/2018)

JUDGMENT

1. The Appellant herein, **Paul Otieno Okello**, 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 Appellant was subsequently tried, found guilty and convicted on the alternative offence of committing an indecent act. He was accordingly sentenced.

3. Four witnesses testified in support of the prosecution's case. **PW1** was the victim one **MAO**. The Clinical Officer attached to Migori County Referral Hospital testified as **PW2** whereas the victim's grandfather and guardian one **POO** testified as **PW3**. The investigating officer one **No. 83964 PC Derrick Moshi** attached to Migori Police Station testified as **PW4**. 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**'.

4. 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 no witness. Thereafter the court rendered its judgment on 20/11/2018 where the Appellant was found guilty of the offence of committing an indecent act and was convicted. He was sentenced to 10 years' imprisonment.

5. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal on 30/01/2019 with the leave of this Court where the Appellant challenged the judgment on the following three grounds: -

(a). That I did not plead guilty to the charge herein.

(b). That the trial Court erred in both law and facts by failing to consider that the age of the complainant was in doubt.

(c). That the trial court erred in both law and facts by not observing that truly this was affixed case reasons known by the complainant.

6. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant duly complied and expounded on the grounds. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

7. **Miss. Achieng**, Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any peradventure and prayed that the appeal on conviction be dismissed.

8. 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.

9. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients 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.

10. **Section 11(1)** of the **Sexual Offences Act** states that:

11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years.

Section 2(1) of the said **Act** defines an **'indecent act'** as follows:

'Indecent act' means an unlawful intentional act which causes: -

(a) Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will.

11. Therefore, the main ingredients of the offence of committing an indecent act with a child are: -

(a) Proof that the victim is a child in law;

(b) Proof that there was contact between any body part of the accused person with the genital organ, breast or buttocks of the child victim (but that act must not be an act that caused penetration) or proof of exposure or display of any pornographic material to a child;

(c) Proof that the act(s) in (b) was/were intentional;

(d) There should be no legal justification in the act(s) complained of.

12. The Appellant strenuously contended that the **age of the complainant** was not properly settled as the Age Assessment Report did not state when the complainant was born and did not disclose the formula used to arrive at the conclusion that the complainant was a minor.

13. I have previously stated and I hereby reiterate that proof of the age of a victim in sexual offences is very crucial as that has all the bearing in sentencing. If the age of a victim is not properly settled, then a Court may find itself at a cross road in passing a lawful sentence. Ideally, age ought to be proved by way of documents including, but not limited to, a Certificate of Birth, a Birth Notification, medical documents, official religious documents, official school documents, among others. Having said so, it should not be lost that there are instances where none of the said documents may be available and in such a case a court may revert to its observation of the victim or the oral admissible evidence on record.

14. In this case, the prosecution produced an Age Assessment Report in proof of the age of the complainant. It was produced as Exhibit 3. Its production was not contested neither were the contents thereof. The Report clearly stated the method used in arriving at the age. Age assessment is a medical exercise based on settled medico-scientific basis only carried out by trained personnel. In this instant case it was carried out by one **Dr. Otieno** on 08/01/2016. I therefore find no meaningful objection to the Report and hold that the age of the complainant was properly proved and settled between 14 and 15 years old.

15. As to whether there was any contact between any body part of the Appellant with the genital organ, breast or buttocks of the complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere where the complainant alleged that the Appellant touched her genital organ, breast or buttocks. The complainant talked of the Appellant having had sex with her twice, an allegation which the trial court rejected for lack of proof and no appeal was lodged against the finding. The complainant was not led to describe how the sexual act unfolded and which part of her body was touched by which part of the body of the Appellant. With such state of evidence, I do not see how the offence of committing an indecent act with a child was proved. A trial court should not assume that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed. Every offence has the same threshold of being proved beyond any reasonable doubt.

16. I hence find that the Appellant was wrongly found guilty and convicted. The conviction is hereby quashed and the sentence of 10 years' imprisonment set-aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

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:

Paul Otieno Okello 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