



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL APPEAL NO. 47 OF 2018**

**VINCENT OCHIENG ODHIAMBO.....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. 4 of 2018 delivered on 1/10/2018)*

**JUDGMENT**

1. **Vincent Ochieng Odhiambo**, the Appellant herein, 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 9<sup>th</sup> January 2018 at [particulars withheld], intentionally caused your penis to penetrate the vagina of I.A.O. a girl aged 12 years old*'.

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

4. Eight witnesses testified in support of the prosecution's case. **PW1** was the victim one **I.A.O**. The victim's friend and also a minor one **S.A.O**. testified as **PW2**. **PW3** was one **Thomas Juma Okoto**. A *boda boda* rider one **Moses Otieno Odondi** testified as **PW4** whereas a Clinical Officer attached to Awendo Sub-County Hospital testified as **PW5**. The victim's grandmother and guardian to the victim one **MAO** testified as **PW6** and the arresting officer one **No. 211323 Cpl. Enoch Amala** testified as **PW7**. The investigating officer one **No. 105730 PC Viola Jerotich** attached to Awendo Police Station testified as **PW8**. 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 an unsworn defence without calling any witness. Thereafter the court rendered its judgment on 01/10/2018 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 20 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 11/10/2018 where the Appellant challenged the judgment on grounds that the trial court erred in not appreciating the fact the Appellant was a minor at the time of commission of the alleged offence and that there was no corroboration.

7. Directions were taken and the appeal was disposed of by way of oral submissions where **Mr. Kisera** appeared for the Appellant and argued that the evidence was riddled with several unreconciled doubts as it was not explained where the victim and her friend were for two days before they were found and that there was no evidence that it was the Appellant who had defiled the complainant, if at all she was defiled as that could have happened within the two days the complainant had left her home and spent elsewhere. Counsel also submitted that the Appellant was a minor and the court erred in not treating him as such. 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 be dismissed.

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 not contested in this appeal. The prosecution relied on an Age Assessment Report prepared by PW5 which placed the age of the complainant at 12 years old. The complainant was hence 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 hotly contested. The Appellant contended that there was no evidence of penetration as the complainant's whereabouts from 07/01/2018 to 10/01/2018 were unclear more so that the complainant spent in three different homes during that period. It is true the complainant was out of her home from the 07/01/2018 to 10/01/2018 as contended. However, the evidence of the complainant gave a narration of the events and her whereabouts during the said period. She narrated that she left her home on 07/01/2018 at 6:00pm in the company of her friend PW2 and they visited their other friend one S (not a witness) at Ranen. That, they spent the night there.

17. The next day, that is on 08/01/2018, the three visited their other friend one V (not a witness) and they spent there. On 09/01/2018 they returned to S's home where they learnt of someone who had been buried alive in a gold mine at Kanyaserega and they went there. That, they spent the whole day there until 6:00pm when the complainant asked the Appellant, who was a motor cycle rider, to take her to her Aunt's home at Rakwaro. The Appellant was then in the company of his friend one Eric (not a witness). That, four of them boarded the motor cycle being the complainant, PW2, the Appellant and Eric and they left Kanyaserega for Rakwaro. Instead, the Appellant took them to Eric's house which stood alone in the homestead of Eric's parents. The Appellant opened the door and ushered them inside and the Appellant and Eric went to prepare supper at the house of Eric's mother. The house had two chairs and two beds. That, on return, they all ate supper and instead of proceeding to Rakwaro, the Appellant took the complainant to one of the beds in the house and Eric took PW2 to the other bed.

18. The complainant then narrated what followed. That, the Appellant undressed her skirt and removed her panty. That, the Appellant also removed his trousers, his underwear and a sweater and put his penis into her vagina and thereafter they slept until 6:00 am where the Appellant took the complainant and PW2 to Rakwaro.

19. The complainant's evidence was corroborated in two ways. First by PW2 and then by PW5. PW2 confirmed the movements she had with the complainant. Like the complainant, PW2 did not state they at any time had sex with anyone save on 09/01/2018 when the Appellant had picked them to Rakwaro where along the way the complainant and PW2 ended up having sex with the Appellant and Eric. PW5 examined the complainant on 10/01/2018. He observed bruises on both lateral and posterior vaginal walls and there was foul smelling discharge. The hymen was also absent. He filled the P3 Form and the PRC Form and produced them as exhibits together with the treatment notes. PW5 concluded that the complainant's vagina had been penetrated by a male organ.

20. Going by the narration by the complainant coupled with the evidence of PW2 and PW5 and the contents of the treatment notes, the P3 Form and the Post Rape Care Form, I find no difficulty in holding, which I hereby do, that penetration into the complainant's vagina by a penis was proved.

21. Before I leave this issue I must state that even if there was evidence that the complainant had sex with other men before 09/01/2018 still

that may not have been a bar to the current charge since such previous acts, if proved, would have constituted separate offences.

**c) On whether the Appellant was the perpetrator:**

22. Having believed the evidence of the complainant, suffice to say that the said evidence also touched on the identity of the assailant. The complainant spent time with the Appellant and even slept together and it was the Appellant who took her to Rakwaro the following morning. When PW6 visited the complainant at Awendo Police Station she asked her where she been all along and the complainant stated that she had been with the Appellant. PW7 also confirmed that the complainant gave the name of the Appellant as the one she had spent the night before and had sex with. PW2 as well confirmed the identity of the Appellant and corroborated the evidence of the complainant.

23. I have carefully weighed the evidence and the law alongside the leniency sought by the Appellant in his defence. 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 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 contended that he was a minor at the time the offence was allegedly committed and as such he ought not to have been committed to a term of imprisonment. He challenged the Age Assessment Report as having not been precise on the age and insists that he was less than 18 years old. PW5 conducted the age assessment for the Appellant and concluded that the Appellant was above 18 years old. In arriving at that finding PW5 carried out an assessment on the Appellant and tabulated all steps taken to arrive at the conclusion. Age assessment is a medical process based on sound and settled medico-scientific procedures. One can only undertake it upon training. PW5 testified to be a qualified Clinician and his ability to carry out an age assessment was not impugned. Whereas the Report was not specific on the age of the Appellant, it was categorical that the Appellant was above 18 years old. The age of 16 years indicated on Page 1 of the P3 Form was given by the Police Officer who issued the Form and not by PW5. I therefore find and hold that the age of the Appellant was settled above 18 years and the contention that the Appellant was underage has no legal leg to stand on.

25. Having found all the ingredients of the offence of defilement in favor of the prosecution and that the Appellant was not a minor in law, this Court finds that the Appellant was properly found guilty and convicted. The appeal on conviction hereby fails.

26. On **sentence**, the complainant was 12 years old at the time the alleged offence was committed. The Appellant was rightly sentenced under **Section 8(3)** of the **Sexual Offences Act**. The sentence remains legal as it is the only prescribed sentence. The appeal against sentence also fails.

27. I therefore find no merit in the appeal and it is hereby dismissed.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 14<sup>th</sup> day of May 2019.**

**A. C. MRIMA**

**JUDGE**

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

**Mr. Odondi Awino** Counsel for the Appellant.

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

**Evelyne Nyauke** – Court Assistant