REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CORAM: A. C. MRIMA, J.

CRIMINAL APPEAL NO. 31 OF 2018

JOHN OMONDI ODHIAMBO *alias* NYAKWAR OWIRO.....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. 8 of 2018 delivered on 6/07/2018)

JUDGMENT

1. The Appellant herein, **John Omondi Odhiambo *alias* Nyakwar Owiro,** was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** 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 30th day of March 2018 at [particulars withheld], intentionally caused your penis to penetrate the vagina of CRO. a girl aged 9 years*'.

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

4. Seven witnesses testified in support of the prosecution's case. **PW1** was the victim one **CRO PW2** was a friend and a school mate to PW1. **BA** was a woman who rescued the victim and testified as **PW3** and the father of the victim testified as **PW4**. **PW5** was an Administration Police Officer **No. 254988** on duty at the Awendo Sub-County Offices who re-arrested the Appellant from the members of public. The Clinical Officer attached to Awendo Sub-County Hospital testified as **PW6** whereas the investigating officer one **No. 107394 PC Doris Kerubo** attached to Awendo Police Station testified as **PW7**. 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 two of his workmates as his witnesses. They were **TO (DW2)** and **NO (DW3)**. Thereafter the court rendered its judgment on 06/07/2018 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to life imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal through **Messrs. Mainga & Co. Advocates** on 19/07/2018 where the Appellant challenged the judgment and sentence on 11 grounds.

7. Directions were taken and the appeal was disposed of by way of written submissions. However, at the hearing of the appeal, the Appellant appeared in person and filed his own Supplementary Grounds of Appeal challenging the conviction and sentence. He did not file any submissions although he argued that a DNA examination was not conducted to connect him with the offence. 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.

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) <u>On the age of the complainant:</u>

12. The age of the complainant was hotly contested in this appeal. The Appellant contend that the age of the complainant is unknown. The prosecution relied on an Age Assessment Report which was produced by PW6. The assessment was based on the physical examination of the complainant and also by aid of Baptismal Card. The Report was produced as an exhibit without any objection and even in this appeal its production is not challenged. I therefore have no reasons to reject the Report. Consequently, as the Report indicates that the complainant's age as 9 years old, hereby so find and hold that the age of the complainant was rightly proved and the complainant was a minor of tender age within the meaning of the law.

(b) <u>On the issue of penetration:</u>

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 **<u>Mark Oiruri Mose vs R (2013) eKLR</u>** 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. <u>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</u>….***
>
> (emphasis added).

15. Later the Court of Appeal, then differently constituted, in the case of **<u>Erick Onyango Ondeng v. Republic (2014) eKLR</u>** 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 contend that there was no evidence of penetration. The evidence of penetration was adduced by the complainant, PW3, PW4 and PW6. The complainant narrated how she was called by the assailant while in school playing with PW2 at around 11:00am on 30/03/2018 and lured into a sugar cane plantation where she was overpowered by the assailant, pushed down, her mouth covered, threatened with a knife and drugged by use of a handkerchief and eventually sexually abused. She was abandoned there and due to the effects of the drug she only regained her consciousness the following morning. The complainant then realized that she had been injured in her private parts and had pains on her abdomen.

17. PW3 confirmed rescuing the complainant from the sugar cane plantation in the morning of 31/03/2018 where she had gone to work with her two children. She saw the complainant coming out of the sugar cane plantation and could hardly walk, she was very tired, could not talk and had blood on her buttocks. PW3 took her to the father PW4. The father inspected the complainant and found blood on her lower part of the dress.

18. When the complainant was taken to hospital she was examined and treated by the medical personnel. A laboratory high vaginal swab was also conducted and the examinations revealed that the complainant had lacerations on both the *labia minora* and *labia minora* and that the vaginal walls were lacerated as well. The hymen was perforated with tears and the presence of epithelial cells and spermatozoa in the vaginal track of the complainant were confirmed. The alleged assailant was also examined and found to have a urinary tract infection which infection was also found in the vagina of the complainant. Puss cells and epithelial cells were also found in the assailant's urethral discharge. PW6 filled and produced the P3 Form as an exhibit together with the treatment notes, Age Assessment Report and the Post Rape Care Form for the complainant as well the treatment notes and the P3 Form for the alleged assailant. PW6 concluded that the complainant's vagina had been penetrated by a male organ.

19. Before I come to the end of this discussion, I must point out the contrary to the submission by the Appellant that no DNA examination was conducted to connect him with the offence I must state, as I have previously done, that apart from the DNA examination there are many other ways of proving penetration and the failure to conduct a DNA examination is not necessarily fatal to the prosecution's case.

20. Going by the narration by the complainant coupled with the evidence of PW3, PW4 and PW6 coupled with 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) <u>On whether the Appellant was the perpetrator:</u>

21. The Appellant vehemently denied being the assailant and attacked the evidence of the prosecution on several fronts. He contends that the evidence was contradictory and not believable, that there was no corroboration, that the dock identification was useless and that the prosecution failed to link him with the commission of the offence.

22. 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. I did not come across any meaningful contradictions as alleged. If anything, any such contradictions were easily reconciled, did not create any doubt in the prosecution's case and did not occasion any injustice to the Appellant. Apart from that aspect, 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.

23. On identification, two witnesses tendered evidence thereto. They were the complainant and PW2. The complainant was then aged 9 years old and in school. She was examined by the court and found intelligent enough and knew the essence of being truthful. She narrated the entire ordeal and described the assailant in the following words: -

> ***…I know him by face. I used to see him repairing motor cycles at the centre I used to buy paraffin. He is here (points at accused person). I had seen him on several occasions. I did not meet him again after the act. I told my father the person we were with that night. I identified him at the police station. I have given the police his description……***

24. PW2 corroborated the evidence of the complainant on how the complainant was lured into the sugar cane farm and did not return that day. It was the complainant and PW2 who identified the assailant at the centre and was arrested. Both of them identified the assailant at the police station and before the trial court. Since the complainant knew the assailant well there was no need of an identification parade. (See the Court of Appeal in **<u>Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported).</u>**

25. The Appellant on his part denied the offence and through DW2 and DW3 raised an *alibi* defence and contended that he was not at the scene but working at his usual place. The Appellant's working place happened to be the same place the complainant referred to. Both DW2 and DW3 were categorical that they did not know the whereabouts of the Appellant at around 11;00am on 30/03/2018. Indeed, that was the very time the complainant and PW2 stated that the Appellant appeared and lured the complainant. The defence was definitely watered down and did not puncture the prosecution's evidence and that is why the trial court rejected it. I follow suit.

26. On the aspect of corroboration, I must wholly agree with the analysis of the trial court on the same which analysis even made reference to some of this Court's decisions and I so find that indeed there was ample corroboration, but even if there wasn't still the prosecution's case hold as the law in **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya was fully complied with.

27. Having reconsidered the evidence, I am satisfied beyond any peradventure that it is the Appellant who beastly and sexually assaulted the complainant.

28. On **sentence**, the Appellant was to be sentenced under **Section 8(2)** of the **Sexual Offences Act** to life imprisonment. Although the sentencing court relied on the mandatory sentence under **Section 8(2)** of the **Sexual Offences Act** and given that the mandatory nature of sentences has been declared unconstitutional so as to give Courts a hand to exercise discretion (See **<u>Francis Muruatetu & Another -vs- Republic 2017 eKLR</u>** and the Court of Appeal in **<u>Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR),</u>** I must however say that upon re-evaluating the evidence and by taking into account the mitigations I find that for the sake of the safety and future of the young girls on whom the Appellant pry on by use of drugs which render them unconscious for such long periods he must be permanently separated from the community at once and as such the life sentence happens to be the only suitable sentence in the unique and beastly circumstances of this case. The life sentence is hereby sustained. For avoidance of doubt, the Appellant shall spend the balance of his life on earth in prison. The appeal on sentence is also disallowed.

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

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 19th day of September 2019.**

A. C. MRIMA

<u>JUDGE</u>

<u>Judgment delivered in open Court and in the presence of:</u>

John Omondi Odhiambo *alias* Nyakwar Owiro 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