



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 11 OF 2019

PETER OCHOKI MOGUSU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau Senior Resident Magistrate in Rongo Magistrate's Court Criminal Case No. 24 of 2018 delivered on 8/02/2019

JUDGMENT

1. **Peter Ochoki Mogusu**, 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. The charge of defilement was later amended to read '**Defilement** contrary to **Section 8(1)(9)** of the **Sexual Offences Act** No. 3 of 2006'. The Appellant denied the offences as well.
2. The particulars of the amended count of defilement were that '*on 22nd September 2018 at [particulars withheld], intentionally and unlawfully caused his penis to penetrate the vagina of FAO a mentally challenged child aged 14 years.*'
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 a grandmother to and the victim's guardian one **T.O**. Two neighbours to the PW1 testified as **PW2** and **PW3** respectively. The victim was a niece to PW4. A Clinical Officer attached to Rongo Sub-County Hospital testified as **PW6**. The investigating officer one **No. 107242 PC Rosalia Chepchirchir** attached to Kamagambo Police Station 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. For clarity purposes the minor/victim did not testify.
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 did not call any witness. Thereafter the court rendered its judgment on 08/02/2019 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 timeously filing a Petition of Appeal on 22/02/2019 in challenging the judgment on conviction and sentence on 27 grounds
7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant's Counsel **Mr. Nyagesoa** extensively expounded on the grounds of appeal and referred to several decisions in support of the submissions. 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 that none of the grounds tendered are holding. Counsel prayed that the appeal be dismissed and also relied on some decisions in support of the rival position.
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. I must say that the prosecution's evidence as well as the defence were well captured in the judgment under appeal which evidence I herein incorporate by way of reference.

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 minor: -

12. The age of the minor was contested in this appeal. The Appellant contends that the Age Assessment Report produced in support of the age did not give the exact age of the complainant and as such did not settle the age properly. That, instead a Certificate of Birth was the best way out since the Report did not have any basis of arriving at the assumed age.

13. Under **Rule 4 of the Sexual Offences Act, (Rules of Court) 2014 which came into force on 11/07/2014 under Legal Notice No. 101**, a victim's age can be determined by way of a Birth Certificate, any School documents, a Baptismal Card or any other similar document. It is therefore not correct that the only way of proof of age is by a Certificate of Birth. Notwithstanding proof of age by a Birth Certificate, any School documents or a Baptismal Card the Rules further gives allowance to other ways of proving the age under the category of '**any other similar documents**'.

14. I have previously dealt with the issue of whether an Age Assessment Report is a conclusive way of proof of age. In **Lucas Masa Hura vs. Republic (2017) eKLR** which decision was upheld by the Court of Appeal and reported as **Lucas Masa Hura vs. Republic (2019) eKLR** I stated as follows: -

Whereas it can also be argued that the Age Assessment Report is an approximation, that approximation is with a sound and settled medico-scientific basis. PW6 testified on what had informed the approximation of the age of the complainant by the Medical Officer.....

15. In this case PW6 stated as follows on the Report: -

.... I used the tunners staging method with no specified information on menarche. I relied on height, weight and secondary sexual characteristics development. I assessed her age at 14 years.

16. I therefore find and hold that the age of the complainant was properly settled at 14 years' old by the Age Assessment Report and the trial court did not err in relying on it. The complainant was hence a minor within the meaning of the law.

(b) On the issue of penetration:

17. 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.

18. 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).

19. 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.

20. Penetration is hotly contested. The Appellant contends that there was no evidence of penetration and that the trial court erred in relying on the testimony of PW6 on the whitish discharge whose source was not ascertained.

21. The witnesses testified before the trial court and the court had an opportunity of observing their demeanour. Whereas an appellate Court is to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter, it must always bear in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and it should give allowance for that. The trial court evaluated the evidence of the witnesses and held as follows: -

.....As I observed them as they testified, I formed the opinion that they were credible and truthful. Their testimonies were not shaken in cross-examination.....

22. The issue of penetration was alluded to by three witnesses; PW1, PW2 and PW6. PW1 and PW2 testified that they caught the Appellant

ready-handed on the act with the minor in the sugarcane farm next to the home of PW1. That, the minor was lying down as the Appellant had raised up one of her legs, inserted his penis into the victim's vagina and was throbbing. When they raised alarm the Appellant quickly arose from the ground, picked and threw a stone to PW2 (which missed her) as he hurriedly dressed up his trousers which were at the knees and ran away towards the river. Both stated to have visibly seen the Appellant's penis which was protruding out of his trousers as he ran away as the zip was still open.

23. PW1 noticed a thick whitish fluid on the buttocks and the thighs of the minor. It was PW2 who inspected the minor's vagina and saw a whitish substance oozing therefrom.

24. PW6 testified on how she both the victim and the Appellant barely 4 hours from the alleged incident. She produced the P3 Form, the treatment notes for both the victim and the Appellant and the Post Rape Care Form (PRF) as exhibits. The said exhibits had the detailed examination conducted on the complainant and the results thereof. When PW6 physically examined the minor she observed scratch marks on the right anterior neck and that the genitalia had whitish discharge. The labia minora was lacerated, hymen was missing and there were grass strands on the orifice. A laboratory high vaginal swab examination was also carried out which revealed the presence of epithelial cells. PW6 also examined the Appellant and conducted a urinal test which revealed the presence of sperms in the urine. PW6 formed the opinion that there had been a forced penile penetration into the victim's vagina.

25. I have carefully reviewed the evidence of PW1, PW2 and PW6 and perused the exhibits on record. I must say that I am convinced that PW6 reached a true and logical conclusion that the victim's vagina had been penetrated by a penis. I therefore find no difficulty in holding, which I hereby do, that penetration was proved.

c) On whether the Appellant was the perpetrator:

26. The issue of identification was also hotly contested. The Appellant denied committing the offence. There is no doubt that the Appellant and PW1, PW2, PW3 and PW4 are neighbours. Further the incident took place during the day and PW1 and PW2 narrated how they caught the Appellant in the act with the victim.

27. PW3 was grazing his cows near the river at around midday and heard screams and shortly saw the Appellant, whom he knew well, running away from the direction of the screams. He apprehended him and noticed that the Appellant's trouser zip was open and the Appellant's penis clearly visible. Other people who had responded to the screams caught up with the Appellant and PW3 and took the Appellant to where the noise came from. PW3 found PW1, PW2, the victim among other people and learnt that the Appellant had sexually assaulted the victim. The Appellant was bound with ropes and taken to the Rakwaro AP Camp.

28. PW1's testimony that the Appellant ran towards the river when they caught up with him in the act with the victim was hence corroborated by PW3 who arrested the Appellant near the river where PW3 was grazing his cows immediately the screams were raised and the Appellant appeared running away from the direction of the screams. The Appellant's contention that he was caught on a totally-different parcel of land from where the victim was does not hold since there is clear evidence on how the Appellant ran away from the scene and was later caught by PW3 near the river. Further, PW6 confirmed the presence of sperms in the Appellant's urine on undertaking a urinalysis. That in itself is proof enough that the Appellant had engaged in a sexual act.

29. The Appellant also contends that the exact time the offence was allegedly committed was not proved. The record is clear that PW2 stated that PW1 came to her home looking for the victim at around 11:00am and she accompanied PW1 in finding the victim. PW3 stated that he was grazing his cows near the river at around midday when he apprehended the Appellant. PW4 stated that he was called at around midday and informed of the incident. According to PW5 the incident was reported to Kamagambo Police Station at around 03:30pm and the victim and the Appellant were immediately taken to hospital. The PRC Form indicates that PW6 examined the victim at around 04:00pm which was 4 hours post the incident thereby connoting that the incident occurred at around midday. Having analyzed the evidence on the chronology of events I have no doubt that there are no contradictions thereto and it is well demonstrated that the incident took place at around midday.

30. There is as well the contention that the whitish discharge found on the victim ought to have been subjected to DNA examination to confirm whether it emanated from the Appellant. I have severally stated that whereas DNA testing is one way of connecting a suspect with the commission of a crime, that cannot certainly be the only way. In this case there was other ample evidence to prove the commission of the offence notwithstanding the absence of the DNA testing.

31. I also note that PW1 and PW2 readily gave out the name of the Appellant as the person they caught up having sex with the minor in the sugarcane farm. (See the Court of Appeal in Simiyu & Another vs. R. (2005) 1 KLR 192, R. vs. Alexander Muturi Rutere alias Sanda & Others (2006) eKLR, Lesarau vs. R. (1988) KLR 783, Morris Gikundi Kamunde vs. Republic (2015) eKLR among others).

32. The foregoing must however be weighed against the defence raised by the Appellant. The Appellant briefly stated in his defence as follows: -

..... I wish to inform the court that I did not commit the offence alleged. Since I was born I have never been in court. I have never been arrested. I asked (sic) the court to let me get back home to live my normal life. That is all.

33. By placing the prosecution's evidence against the defence side by side, I find that the scales of justice tilt in favour of the prosecution. As observed by the trial court the witnesses are reliable and truthful and withstood cross examination.

34. From the foregoing analysis I have no doubt in my mind that there were no circumstances that may have led to any doubtful recognition of the Appellant by PW1 and PW2 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 victim. The third ingredient of the offence of defilement is also answered in the affirmative.

Other grounds raised by the Appellant: -

35. The Appellant further raised the issue of the defectivity of the charge on two salvos. On the first salvo the Appellant argued that he was charged under a non-existent **Section 8(1)(9)** of the **Sexual Offences Act**. It is true the said section of the law does not exist since Section 8 has only up to 8 sub-sections. The record however has it that the original charge was '**Defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006**' and the particulars did not describe the victim as mentally challenged. The amendment was necessitated by the psychiatric examination undertaken on an order of the trial court which confirmed the disability. That resulted to an amended charge with particulars that the victim was a mentally-challenged child.

36. I have carefully perused the amended charge sheet. I find that the last digit of the section under which the Appellant was charged is not clear. It may be 3 or 9. Since **Section 8** of the **Sexual Offences Act** (hereinafter referred to as '**the Act**') has no **sub-section 9** then it is highly unlikely that the investigator who preferred and drafted the charges really meant **sub-section 9**. However, even if the section as drafted is as alleged by the Appellant still the charge cannot be visited as incurably defective. I say so because under **Section 8** it is only **sub-section 1** which creates the offence of defilement. The other sub-sections deal with sentences and a defence to the charge of defilement. The Appellant understood and pleaded to the charges and fully participated in the trial. He never raised any objection to the charges and even tendered his defence accordingly. To that end I adopt the reasoning of the Court of Appeal in **Nyamai Musyoki vs. Republic (2014) eKLR** where in response to an objection that a charge of defilement was defective having been drafted as **Section 8(1)(3)** of the **Act** the Court held that: -

In this case as was rightly pointed out by the Learned Judge, the Appellant was charged under Section 8(1)(3) of the Sexual Offences Act. This was evidently a misdirection of the section creating the offence and it is apparent to us that the police intended to charge the appellant under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The prevailing question however is whether this prejudiced him in any way. It is our finding that this was a minor technical defect and it is clear from the record that all other procedures were followed to the letter and the appellant was accorded a fair hearing and he understood the charge that was facing him. His full participation in the trial process vindicated that position. If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes to the root of the charge distorting it in a way that the accused cannot understand the charge, then the Court ought to be reluctant to apply Section 382 CPC to cure the defect. In this case, we agree with the Learned Judge that the defect did not prejudice the appellant in any manner and the invocation of Section 382 CPC was proper in the circumstances.

37. Similar holdings were made by the Court of Appeal in **Thomas Aluga Ndegwa vs. Republic (2019) eKLR** and recently in **Lucas Masa Hura vs. Republic (2019) eKLR** which was an appeal against a decision I rendered way back in 2017. The situation in this case is hence curable by dint of **Section 382** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya.

38. This Court is also alive to the provisions of **Section 186** of the **Criminal Procedure Code**, (which Section of the law was not repealed by the enactment of the **Act**) which gives powers to a Court to convict and sentence even in instances where an accused person was not charged with the specific offence.

39. On the second salvo the Appellant contend that the appropriate section of the law was **Section 7** of the **Act** and not **Section 8** of the **Act** since the victim is a child with mental disability. He argues that the charge under **Section 8** of the **Act** is hence incurably defective. In response the prosecution submitted that the person contemplated under **Section 7** of the **Act** to be mentally-challenged was not a minor.

40. **Section 7** of the **Act** states as follows: -

A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.

41. A careful reading of the foregone provision reveal that only two offences are contemplated therein. They are **rape** and **indecent act**. The drafters of the **Act** intentionally left out the offence of defilement and dealt with it under **Section 8** of the **Act**. The rationale thereof could have been the prescribed sentences as **Section 7** provides a minimum sentence of 10 years' imprisonment whereas depending on the age of the victim the sentences in **Section 8** range between 15 years' to life imprisonment. Therefore, the investigator would have erred in law had he charged the Appellant under **Section 7** of the **Act**.

42. From the foregone analysis the ground on the defectivity of the charge is unsustainable and is hereby rejected.

43. Arising out of the fact that the victim did not testify the Appellant contend that the trial was not fair as the court ought to have appointed an intermediary to enable the victim tender her evidence and that he was denied an opportunity to examine the victim. It is true the victim did not testify. That decision was arrived at by the court after it ordered for a Psychiatric Report since the court could not conduct a *voir-dire* examination on the victim who was allegedly dumb and mentally-challenged.

44. It must be clearly understood that the fact that a witness is mentally-challenged does not automatically disqualify that witness from giving testimony before Court. Such is a witness in law unless the provisions of **Section 125** of the **Evidence Act, Cap. 80** of the Laws of Kenya disqualify him/her. However, before a court disqualifies such a witness from giving evidence all reasonable efforts must have been taken including the possibility of the witness testifying through an intermediary. Holding that a mentally-challenged witness cannot testify must be the last possible resort since in normal life such people have a way of communicating even if it may not be a formal one. A court must lean towards aiding parties to tender evidence before it as a way of promoting fairness and the contrary must be in the clearest of all cases. (See the Court of Appeal in **John Kinyua Nathan vs. Republic (2017) eKLR**).

45. A witness must first be declared vulnerable before the process of appointing an intermediary is initiated. When an intermediary is eventually appointed then the witness will be at liberty to tender evidence. The process of declaring a witness vulnerable may be instituted by the prosecution or by the court on its own motion during say a *voir-dire* examination or by any witness other than the one to be declared as

such. On the conditions attendant to appointing an intermediary the Court of Appeal in **John Kinyua Nathan** (supra) held that: -

.... The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.....

46. There are also instances where a witness cannot testify even with the aid of an intermediary. A case at hand is for instance a 6-months' old victim. In such a case the court will have to rely on the rest of the evidence on record. There are also instances where the victim may not testify but still a court is able to find the accused person guilty and sustain a conviction. It all depends on the unique circumstances of each case.

47. In this case the court found that the victim was unable to communicate and ordered a mental examination. The resultant Report recommended that the victim do seek further medical attention. The matter then ended there. In such a scenario the trial court ought to have interrogated the victim and made a finding as to whether she was a vulnerable person. Upon making such a finding then the court ought to have proceeded further to interrogate the possibility of an intermediary. The court however evaluated the evidence of the other independent witnesses and came up with a guilty finding on the Appellant.

48. This Court is now called upon to determine whether the failure of the victim to testify contravened the Appellant's right to a fair trial. As said each case must be considered on its own peculiar merits. PW1 and PW2 were independent eye-witnesses. They testified on how they caught the Appellant in the act with the victim. They positively recognized the assailant who was arrested just a short distance away and was returned to the scene. Even in the absence of the testimony of the victim in this case still the offence was demonstrated. This Court fully associates itself with the observation by the Court of Appeal in **John Kinyua Nathan** (supra) thus: -

.....Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice....

49. I therefore find and hold that even though the trial court erred in not making a finding as to the vulnerability of the victim, there was still ample, cogent and credible independent evidence to sustain the charge of defilement. I hence return a verdict that the failure to make a finding as to the vulnerability of the victim did not contravene the Appellant's right to a fair trial in the circumstances of this case.

50. The Appellant further contend that he did not understand the proceedings since he is a Kisii aged 68 years old and other than the Kisii language he could not understand the English/Kiswahili/Dholuo languages used during the trial. I have carefully perused the record. The Appellant took plea for the first time on 24/09/2018 where the court used English/Ekegusii languages. The Appellant denied the charges. The Court Assistant was one **Victor Mwangi**. On 27/09/2018 the charges were amended and the Appellant took plea on the amended charges. The Court Assistant was one **Judy Ohito** and the Court noted that **'Charges read out and explained to accused person in Ekegusii after which...'** The Appellant denied the charges and on that day the trial went on where PW1, PW2, PW3 and PW4 testified. On 06/12/2018 PW5 testified and the Court Assistant was one **Villa Aidi** as well as on 20/12/2018 when PW6 testified. On 17/01/2019 the Appellant testified and Villa Aidi again was the Court Assistant. On that day the court recorded that Villa Aidi Richard who was the Court Assistant was also the Ekegusii Interpreter. On 08/02/2019 when the judgment was delivered it was still Villa Aidi who was the interpreter.

51. From the record it is clear that the Appellant was accorded the services of an Ekegusii interpreter during the entire trial. I find no merit on the objection.

52. Having considered all the grounds challenging the conviction I find none to be holding. the Appellant was properly found guilty and convicted of the offence of defilement. The appeal on conviction hereby fails.

53. On **sentence**, the Appellant was sentenced to 30 years' imprisonment sentence under **Section 8(3)** of the **Sexual Offences Act**. The record is however clear that the court did not give the sentence because it was the minimum sentence in law. The court stated that it had considered the mitigation by the Appellant and all the circumstances of the case.

54. Looking at the nature of the offence, the fact that the Appellant was an elderly neighbour to the victim and hence was placed in a position of trust, the mitigations tendered, the fact that the victim was dumb and mentally-challenged and the circumstances under which the offence was committed I do not see how the sentencing court erred in arriving at the sentence of 30 years' imprisonment. The appeal on sentence likewise is disallowed.

55. The upshot is that the entire appeal is unmerited and is hereby dismissed.

Orders accordingly.

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

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Nyagesoa, 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