



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CRIMINAL APPEAL NO. 14 OF 2019**

**WAM.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. R. Odenyo Senior principal Magistrate in Migori Senior Principal Magistrate's Criminal Case No. 9 of 2018 delivered on 26/2/2019)***

**JUDGMENT**

1. The Appellant herein, **WAM**, was charged with the offence of **Defilement** under the **Sexual Offences Act** No. 3 of 2006. He also faced an alternative count of **committing an indecent act with a child**. The Appellant denied all the counts.
2. The Appellant was subsequently tried and found guilty of 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 complainant. **PW2** was a step-sister to **PW1**. The Clinical Officer attached to Uriri Sub-County Hospital testified as **PW3**. The investigating officer one **No. 112621 PC Joseph Kulama** attached to Uriri Police Station testified as **PW4**. The Appellant was unrepresented 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.
4. At the close of the prosecution's case the trial court placed the Appellant on his defence where the Appellant opted to remain silent and the court rendered its judgment on 26/02/2019. The Appellant was found guilty of the alternative count of committing an indecent act and he was convicted. He was sentenced to 10 years' imprisonment.
5. Being dissatisfied with the conviction and sentence, the Appellant timeously preferred an appeal by filing a Petition of Appeal on 07/03/2019 through **Messrs. Nyagesoa & Co. Advocates**. He challenged the judgment on 27 repetitive and winding grounds.
6. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant duly filed the submissions.
7. **Mr. Kimanthi**, Senior Principal Prosecution Counsel opposed the appeal.
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 **age of PW1** was settled by an Age Assessment Report. The contents were not challenged. PW1 was hence aged 12 years old and a minor in law.

13. As to whether there was any contact between any body part of the Appellant with the genital organ, breast or buttocks of PW1 which act however did not cause any penetration, I must revert to the record. What PW1 testified about was an act of penetration. The trial court even believed her testimony, but could not find a conviction on defilement as her evidence was not corroborated by medical evidence. Respectfully, that was a misdirection in law on the part of the trial court in view of the **proviso to Section 124 of the Evidence Act, Cap. 80** of the Laws of Kenya. Infact the trial court on analysis of the evidence found PW1 a credible witness. The court believed her evidence. The court therefore ought to have rightly convicted the Appellant of the offence of defilement. However, since that was not the case and there is no cross-appeal, I rest the matter there.

14. Be that as it may, the record does not have any evidence that there was any contact between any body part of the Appellant with the genital organ, breast or buttocks of PW1. The offence of indecent act was not proved.

15. In that case the appeal must succeed. The Appellant is however warned that he is lucky to have escaped liability in view of the foregone analysis. He is further warned to totally desist from engaging in such acts in future since he may not be that lucky next time.

16. The conviction is hereby quashed and the sentence of 10 years' imprisonment set-aside.

17. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 16<sup>th</sup> day of December, 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