REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 42 OF 2017

ERICK ODHIAMBO OWUOR.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 722 of 2016 delivered on 13/06/2017)

JUDGMENT

1. When **Erick Odhiambo Owuor**, the Appellant herein, was initially charged with the offence of defilement contrary to **Section 8(1)(4)** of the **Sexual Offences Act** No. 3 of 2006 and in the alternative committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006, he denied the charge of defilement, but admitted the charge of committing an indecent act with a child. However, he later denied both counts and a trial was ordered.

2. The particulars of the offence of defilement were that on diverse dates between 2nd December 2016 and 4th December 2016 in Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of I. A. J., a child aged 16 years.

3. The appellant was subsequently tried, found guilty and convicted on the main count of defilement and sentenced.

4. The prosecution called a total of six witnesses. **PW1** was a Clinical Officer from Awendo Sub-County Hospital. The arresting officer one **No. 234528 APC John Kisika** attached at Mariwa AP Post testified as **PW2**. The minor testified as **PW4** (hereinafter referred to as **'the complainant'**) whereas her mother, **E A J**, testified as **PW3**. **PW5** was **Dr. Sammy Ruwa Mwatela** attached at Rongo Sub-County Hospital and **No. 66286 PC Daniel Karimi** attached at Awendo Police Station was the investigating officer who testified as **PW6**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except for the complainant whom I will refer to as '**the complainant'**.

5. The prosecution's case was that the complainant left her home at *[particulars withheld]* village in the night of 02/12/2016 without the knowledge of her mother PW3. In the morning PW3 asked her other children who had spent the night with the complainant and learnt that the complainant had been called by one **Odhis** and left but had not returned. PW3 embarked on looking for her daughter for 2 days and confirmed that indeed the complainant was with Odhis, the Appellant herein, whom he knew very well. On 04/12/2016 PW3 reported the matter at the Mariwa AP Post and told the officer of the one whom she suspected to be with her daughter. PW2 knew the suspect as he was a *boda-boda* rider and used to occasionally carry him.

6. PW2 in the company of his fellow officer accompanied a son to PW3 to the home of Odhis and found the Appellant still inside his house. It was around 08:00am. PW2 knocked the door to the house of the Appellant and the Appellant opened the door while wearing a panty. When the Appellant was asked by PW2 if he knew the whereabouts of the complainant, he denied. PW2 entered inside the house and went to the bedroom. He found the complainant lying on the bed naked. The brother to the complainant who had accompanied the police confirmed that it was the complainant. The complainant and the Appellant were both arrested and taken to the Mariwa AP Post where PW3 was, before they were escorted to Awendo Police Station.

7. PW6 investigated the case. He recorded statements from witnesses and escorted the Appellant and the complainant to Awendo Sub-County Hospital where the Appellant was examined and treated. PW6 issued the complainant with a P3 Form which was filled and he charged the Appellant. PW1 produced the P3 Form for the complainant and the treatment notes and stated that the complainant had lost her hymen around 2 days ago and was satisfied that a penile penetration into the complainant's vagina had occurred. PW5 produced the Age Assessment Report which confirmed the age of the complainant to be 16 years old.

8. At the close of the prosecution's case, the trial court placed the Appellant on his defence where the Appellant opted to and gave unsworn defence and denied any involvement in the commission of any of the alleged offences. He stated that he was arrested on the road by police officers and taken to Awendo Police Station where he met PW3 whose son they had differed and that he was fixed and unfairly charged. He

closed his case without calling any witness.

9. By a judgment rendered on 13/06/2017 the trial court found the Appellant guilty and convicted him of the offence of defilement. The Appellant was then sentenced to 20 years imprisonment.

10. Being dissatisfied with the conviction and sentence, the Appellant lodged an appeal with the leave of this Court and in his Petition of Appeal filed on 18/12/2017 challenged the conviction and sentence on the following grounds of appeal: -

> ***1. THAT I pleaded not guilty to the charges***
>
> ***2. THAT the trial magistrate erred in law by failing to note that the prosecution failed to comply with the provisions of article 50 (2) (j) of the Constitution.***
>
> ***3. THAT the prosecution's evidence was shroud with contradictions.***
>
> ***4. THAT the trial magistrate erred in law by convicting and sentencing to serve 20 years imprisonment for the offence of defilement yet the age of the complainant was not ascertained beyond reasonable doubts.***
>
> ***5. THAT the trial magistrate erred in law by relying on the medical evidence adduced in court which was unsound.***
>
> 6. ***THAT the trial magistrate erred in law by failing to evaluate the evidence adduced before him.***

11. The appeal was heard by way of oral submissions where the Appellant expounded on the foregone grounds. He also prayed for a lesser sentence. The appeal was opposed, and the State urged this Court to be guided by the handwritten proceedings in view of the state of the typed proceedings.

12. The role of this Court as the first appellate Court 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, analyze 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.

13. 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.

14. 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 which I shall consider each of them.

(a) On the age of the complainant:

15. The age of the complainant was contested in this appeal. The age was settled by the Age Assessment Report produced by PW5 which assessed the complainant's age as 16 years old. The assessment was done by a Medical Officer and was produced in evidence without any objection. PW5 narrated how he arrived at the age through a settled and verified medico-technical procedure. This Court finds that the age of the complainant was properly settled at 16 years old. The complainant was hence a minor in law.

(b) On the issue of penetration:

16. **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.'***

17. 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).

18. 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."***

19. In dealing with this issue, I will revert to the record. The complainant gave sworn testimony. She narrated the events as they unfolded between herself and the Appellant. She vividly took the court through what happened from the time the Appellant picked her from her home

until they were arrested by the police. She stated that on the first night she had unprotected sex with the Appellant. She even went further to explain how the Appellant undressed her and himself and inserted his penis into her vagina. That description of the events revealed that the complainant was aware of what was happening; a sexual intercourse.

20. The complainant was also taken to Awendo Sub-County Hospital where she was examined, treated and a Post Rape Care Form filled. A P3 Form was also filled by PW1. PW1 testified that the complainant's hymen had raptured two days pre-examination and concluded that indeed the complainant had recently engaged in sex.

21. The Appellant however contested that the medical evidence did not support the charge as it referred to one **I A O** and not the complainant I A J. and that the evidence was contradictory. I have confirmed from the handwritten proceedings that PW1 stated that the patient was **I A O,** but she produced the treatment notes and a P3 Form for the complainant. She also confirmed that she was the one who had examined and treated the patient. The patient was escorted to the hospital by PW6 and it was the complainant. I have also noted that the two sets of names in issue only differ on the last name. On the totality of the evidence of PW1, PW2, PW3, PW6 and the complainant and the medical documents produced as exhibits, I find that the error on the last name of the complainant on the part of PW1 was properly reconciled and did not prejudice the Appellant in any way. In any event **Section 382** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya takes care of such an error. I am further satisfied and find that PW1 examined the complainant and filled in the documents which she produced in court.

22. Having so found, a further evaluation of the evidence and the exhibits on record confirms that there was a penile penetration into the complainant's vagina. Penetration was hence proved.

c) <u>On whether the appellant was the perpetrator:</u>

23. The Appellant vehemently denied any involvement in the alleged offence and contended that he was being framed because he had differed with a son to PW3. From the record, the evidence touching on the Appellant was mainly by the complainant. It was hence a single-witness evidence which ordinarily calls for corroboration except in sexual offences where a conviction can stand even without any corroboration (See: **Section 124** of the **Evidence Act**, Cap. 80 of the Laws of Kenya).

24. The Appellant did not deny knowing the complainant although he denied having been arrested with her. PW2 narrated how PW3 reported the disappearance of her daughter to the police and how he was accompanied by a brother to the complainant and led to the Appellant's home although PW2 knew the Appellant as well. PW3 corroborated the evidence of PW2 on the arrest of the Appellant and the complainant as she witnessed the two brought to the Mariwa AP Post where she was barely an hour after the police left with her son. The complainant also confirmed the evidence. When the Appellant asked PW2 where he was arrested, PW2 told him that he arrested him at the Appellant's home in the company of one other police officer. The matter rested there. Further, the issue of the grudge was not brought to the attention of PW6 who would have investigated it to see whether it had any nexus on the matter. Further, the Appellant did not examine PW3 on the grudge and only raised the issue at the tail end of the proceedings as he was giving his unsworn defence. The prosecution was hence not accorded an opportunity to interrogate the Appellant of the issue of the grudge. I find that the issue of the grudge was an afterthought and did not raise any doubt to the prosecution's evidence. The same is hereby rejected.

25. The complainant was arrested with the Appellant inside the Appellant's house. The complainant explained how she found her way into that house and what transpired therein. The complainant knew the Appellant and his family well including his sister who was in Standard 8 in the same school she was in and who served the complainant with some food on one evening. The offence was also committed over a period of days and all along the complainant was at the home of the Appellant.

26. The trial court observed the demeanor of the witnesses who testified. The court was convinced that they were truthful, and I must give credit to that finding. Having declined the invitation of the grudge, I find no any other contention that may sway this Court to impugn the demeanor of the witnesses. I therefore find and hold that it was the Appellant who took the complainant and stayed with her in his house and engaged in sexual intercourse until they were arrested together.

<u>On other issues raised on appeal: -</u>

27. There were two other issues which the Appellant raised. He first contended that his right under **Article 50(2)(j)** of the **Constitution** was infringed. I have perused the record and found that on 13/12/2016 the trial court made an order that the Appellant be supplied with copies of the statements on that day. Further, at the close of the prosecution's case the Appellant requested for copies of the proceedings to enable him to conduct his defence and the request was obliged. The Appellant did not raise the issue of the statements or any documents after the court made the order on its own motion on 13/12/2016. The Appellant is hence estopped by his conduct from alleging the breach of his right under **Article 50(2)(j)** of the **Constitution** and the ground fails.

28. The other issue was that there were contradictions and inconsistencies on the record. I must state that I have carefully addressed my mind on the record. The alleged contradictions, if any, were adequately explained and reconciled by the court. Indeed, they were of a minor nature and cannot be said to have adversely affected the final finding of the court. In so finding, I echo the words of the Learned Judge in **<u>Pius Nyamweya Momanyi -vs- Republic, Kisii HCRA No. 265 of 2009 (UR)</u>** when he stated thus: -

> ***"...It is trite law that minor discrepancies and contradictions should not affect a conviction."***

In any event the provisions of **Section 382** of the **Criminal Procedure Code Cap. 75 of the Laws of Kenya** safely come into play.

29. Having considered all the grounds challenging the conviction, this Court finds that the Appellant was properly found guilty and convicted of the offence of defilement.

30. On sentence, the Appellant contended that the 20-year imprisonment term is excessive, harsh and very punitive. The offence of defilement under which the Appellant was charged attracts the sentence under **Section 8(4)** of the **Sexual Offences Act**. That sentence is a minimum of 15 years imprisonment. The sentencing court upon receiving mitigations and in consideration of the facts of the case handed down the impugned sentence of 20 years imprisonment.

31. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

32. Revisiting the circumstances surrounding the commission of the offence herein and the mitigations tendered I do not see how the sentencing court can be faulted. The Appellant did not care that he was interfering with the future of the complainant who was even one year behind his sister in the same school. He conveniently took her as her sexual partner. I do not see how I can fault the exercise of discretion by the sentencing court. The appeal on the sentence is unmerited as well.

33. The upshot is that the appeal is not merited. It is hereby dismissed, and the decision of the trial court is hereby affirmed.

34. Having noted the poor state of the typed proceedings herein, the Deputy Registrar shall transmit the lower court to the trial court for retyping of the proceedings. As I come to the end of this matter I must apologize to the parties for the late delivery of this decision which was caused by this Court's engagement in the hearing and determination of election petition appeals in the month of July and the August recess which followed soon thereafter.

35. Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 4th day of October, 2018.**

A. C. MRIMA

JUDGE

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

Erick Odhiambo Owuor, the Appellant in person.

Joseph Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant