REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 34 OF 2017

GASTONE OCHOLA ODHIAMBO ..... APPELLANT

-versus-

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. Kamau, C. M. Resident Magistrate in Rongo Senior Resident Magistrate's Court Criminal Case No. 20 of 2017 delivered on 09/11/2017)

JUDGMENT

1. **Gastone Ochola Odhiambo,** the Appellant herein, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** No. 3 of 2006 and with another 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 the 21st day of July 2017 in Awendo Location in Awendo Sub-County in Migori County, intentionally and unlawfully caused your penis to penetrate the vagina of RA, a girl aged 10 years*'.

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

4. The prosecution called four witnesses in support of its case. **PW1** was a Clinical Officer attached at Awendo Sub-County Hospital within Migori County. **RA** testified as **PW2** whereas the mother to RA one **MJO** testified as **PW3. PW4** was the investigating officer was one **No. 96879 PC Maimuna Makokha** from Awendo Police Station. The Appellant appeared in person during the trial. 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 R.A. 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 sworn defence without calling any witness. Thereafter the court rendered its judgment 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 through **Messrs. Oluoch-Awino & Company Advocates** timeously preferred an appeal by filing a '*Memorandum of Appeal*' on 20/11/2017 where he challenged the entire judgment and the sentence on the following main grounds: -

> ***(1) That the Court below erred in law and /or in fact by convicting the Appellant of an offence contrary to Section 251 of the Penal Code without any material corroboration on the part of the Prosecution.***
>
> ***(2) That the Court below erred in law and / or in fact in purporting to convict the Appellant with an offence under Section 251 of the Penal Code despite the fact that the P3 form which the Prosecution produced in.***
>
> ***(3) That the Court below erred in fact and/or in law in convicting the Appellant on a plea which was not un-equivocal.***
>
> ***(4) That the Court below erred in law and /or in fact failing to appreciate adequately or at all the fact that the mitigation of the Appellant raised a defence and in failing to explore the defence raised in the mitigation, thereby arrived at a wrong decision.***
>
> ***(5) That the lower Court erred in law and/or in fact by considered irrelevant matters in convicting and sentencing the Appellant.***
>
> ***(6) That the Court below erred in law and / or fact in failing to consider adequately or at all the mitigation on the part of the Appellant and thereby arrived at a sentence which was manifestly excessive in the circumstances.***

7. It seems the '*Memorandum of Appeal'* was lifted from elsewhere since it referred to an offence contrary to **Section 251** of the **Penal Code** in grounds 1 and 2. Be that as it may, directions were taken and the appeal was disposed of by way of written submissions where the Appellant filed substantive submissions on various issues. The Appellant mainly contended that the offence was not proved as required in law. He challenged the age of the complainant, penetration, identification, constitutionality of the trial and the sentence. He prayed in the '*Memorandum of Appeal'* that the conviction be set-aside and the decision be substituted with one acquitting the Appellant or one giving a non-custodial sentence. He relied on the decided cases of **James Tinega Omwenga vs. Republic (2014) eKLR** and that of **Julius Amollo Oremo vs. Republic, Court of Appeal at Nairobi, Criminal Appeal No. 176 of 2010** (unreported) in supporting the appeal.

8. The appeal was opposed by the State through **Miss Atieno**, Learned Prosecution Counsel who prayed that the appeal be dismissed.

Analysis and Determinations:

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 written 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. On looking at those aspects in this judgment, this Court shall consider each of them. I must however confirm that the prosecution's evidence and the defence was well captured in the judgment under appeal and I hereby adopt the same as part of this decision by reference.

(a) On the age of the complainant:

12. The age of the complainant was hotly contested in this appeal. The Appellant contended that the Baptismal Card and the Age Assessment Report relied upon by the prosecution in proof of age were insufficient and that a Birth Certificate was instead to be produced.

13. The **Sexual Offences Act** promulgated some rules towards the achievement of its objectives. Those rules came to be known as ***"The Sexual Offences Act (Rules of Court) 2014*** which came into force on 11/07/2014 under Legal Notice No. 101. Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or **any other similar document**.

14. In this case a Baptismal Card was produced which is in line with the said Rules. Further, the age was assessed and a Report duly produced in evidence. In **Migori High Court Criminal Appeal No. 6 of 2016 Lucas Masa Hura vs. Republic (2017) eKLR** this Court had the following to say on an Age Assessment Report: -

> ***'35. 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 as follows: -***
>
> *...the age assessment was carried out.....She has not started menstruating, she had 28 teeth, she had 155cm, she had a fair pubic hair, her breasts had begun growing. Her age was approximately 13 years old...."*

15. Both exhibits were produced without any objection. I therefore find that the complainant was born on 07/05/2007 and she was about **10 years 2 months old** when the offences were allegedly committed. The complainant was hence a minor within the meaning of the 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. The Appellant contended that penetration was not proved since the blood found on the complainant was not proved to be human blood and that there was no DNA test to connect the blood with the Appellant. I have severally stated, which I hereby again do, that whereas a DNA test may be a way of linking the suspect with the commission of the offence, that is not the only way. There are so many other ways the prosecution can adopt to prove penetration. As to whether the fresh blood was for the complainant, PW1 had the following to say: -

'……I examined her. She was wearing a blood stained dress. It had dried blood on the front and back….

There were stains of blood present on the outer genitalia and thighs…...

Vagina was tender and examining finger revealed presence of fresh blood……...'

20. At the hearing the complainant identified the clothes she wore during the ordeal and stated that she bled and that the clothes were so soiled with her blood. It is that evidence which the trial court believed which in any event was duly corroborated despite the provisions of **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya. The evidence of the complainant coupled with that of PW1 leave no doubt that the blood which was on the complainant's clothes was of the complainant.

21. PW1 examined the complainant and found that there were some blood stains on the outer genitalia and thighs. There was also dried discharge on her thighs. The hymen was freshly broken as evidenced by the presence of fresh blood in the vagina. A high vaginal swab analysis revealed the presence of active and non-active spermatozoa, pus cells and red blood cells. PW1 estimated the age of the hymenal injury as less than 10 hours and *'concluded that there was penile penetration mainly because the vaginal examination revealed blood, broken hymen, spermatozoa and tenderness of the inside. Urinalysis revealed it.'*

22. The complainant as well described what happened to her. That, the assailant undressed her, laid her on a mattress, unzipped his trousers and inserted the male urinal organ into her female urinal organ as she lay on her back. That is a clear description of a sexual intercourse. PW3 and PW4 as well confirmed the injuries on the complainant's private parts.

23. It is the trial court which had the advantage of observing the demeanor of the witnesses and hearing them give evidence and I must give allowance for that. The trial court gave reasons for believing the complainant. There is no material placed before me challenging the demeanor of the witnesses for me to arrive at a finding that any of the witnesses was not truthful. I must therefore re-affirm the finding of the trial court that the evidence of the witnesses can be safely relied upon.

24. Going by the narration by the complainant coupled with the evidence of all the other witnesses and 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>

25. Having believed the evidence of the complainant, suffice to say that the said evidence also touched on the identity of the assailant. The complainant stated that he knew the Appellant as Okoth who used to visit their plot and that of their neighbour. When PW3 asked the complainant where she had been in the morning of the following day the complainant readily disclosed that Okoth had abducted her and took her to a house in Sare where there was only a mattress. PW3 asked the complainant which Okoth she referred to and the complainant again stated that it was the Okoth who used to visit their plot and who used to buy her and other children some sweets. PW3 readily knew that the one the complainant referred to was the Appellant.

26. The matter was reported to the police and the complainant was interrogated. She once again disclosed that she had been sexually assaulted by Okoth who lured her to a house in Sare. On 23/07/2017 the complainant identified the Appellant at the Awendo Police Station as the one who had abducted and had sex with. PW4 visited the scene and found the mattress which the complainant had mentioned about and which was blood stained. PW4's efforts to have the Scenes of Crime visit the *locus quo* were in vain.

27. The incident occurred during day time. The complainant knew the assailant well as someone she regularly dealt with, visited her home and who also used to buy her sweets. She also gave his name to the police and identified him when he was arrested by the members of public. The complainant also identified the Appellant in court as the assailant.

28. The complainant was certain on whom she was referring to and undoubtedly that it was the Appellant. PW3 also knew it was the Appellant from the description given by the complainant. PW4's visit to the scene confirmed the truthfulness of the complainant. The room was exactly how the complainant had described it. The complainant was hence not mistaken on what she talked about. Likewise, she was not mistaken on the identity of the assailant.

29. The Appellant contended that none of the members of the public who arrested him recorded statements with the police on why they had arrested him and as such it remained doubtful why he had been arrested. That is true, but regardless of the reason why the Appellant was arrested it remains a fact that the complainant identified him at the station as her assailant. Further **Section 143** of the **Evidence Act, Cap. 80** of the Laws of Kenya gives discretion to the prosecution on how many witnesses to call in proof of any fact.

30. As I take caution of the fact that the complainant was the only identifying witness and hence the need to treat her evidence with such greatest care and to satisfy myself that in all circumstances, it is safe to act on such evidence, I further stand guided by case law including the Court of Appeal cases of **<u>Wamunga vs. Republic (1989) KLR 426,</u>** **<u>Nzaro vs. Republic (1991) KAR 212,</u>** **<u>Kiarie vs. Republic (1984) KLR 739</u>** and the English case of **<u>R vs. Turnbull & Others (1973) 3 ALL ER 549</u>**, among others. As a calling I must also look at the

defense. The Appellant gave a sworn statement and mainly narrated how he was arrested.

31. I have carefully weighed the evidence and the law and I have no doubt in my mind that there were no circumstances that may have led to any doubtful recognition of the Appellant by the complainant and as such the identification of the Appellant as the aggressor was not in error. I now find 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 issues raised by the Appellant challenging the conviction:

32. As the Appellant submitted that there were contradictions and inconsistencies on the record especially the exact time the complainant went to repair her shoes, I must state that I have carefully addressed my mind on the record and noted the discrepancies. They are on time variance of around an hour or so. The contradictions were adequately explained and reconciled by the trial court which I wholly agree with. Indeed, the same 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 **R -vs- Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** 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.

33. On whether the production of the exhibits infringed the constitutional right of the Appellant to a fair trial for not calling the makers thereof, I do not think whether that it so. The prosecution endeavored and called the makers thereof and in the other instances they laid basis in law for production thereof without calling the makers. The Appellant did not raise any objection or at all. That aside, it must be known that the production of an exhibit in itself does not guarantee the probative value of the contents therein. That ground hereby fails.

34. Having found all ingredients of the offence of defilement in favor of the prosecution, this Court finds that the appellant was properly found guilty and convicted

Sentence and Disposition:

35. On **sentence**, as the complainant was a child of 10 years, the Appellant was rightly sentenced under **Section 8(2)** of the **Sexual Offences Act**. The life sentence remains legal as it is the only prescribed sentence.

36. I find no merit in the appeal. It is hereby dismissed.

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: -

M/s Oluoch-Awino & Company, Advocates for the Appellant.

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

Evelyne Nyauke – Court Assistant