REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 23 OF 2017

ISAIAH ODHIAMBO OTIENO.....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 Court Criminal Case No. 15 of 2017 delivered on 31/07/2017)

JUDGMENT

1. The Appellant herein, **Isaiah Odhiambo Otieno,** 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 in the alternative committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** No. 3 of 2006. The appellant denied both counts.

2. The particulars of the offence of defilement were that *on the 1st day of January 2017 in Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of P A O, a girl aged 11 years*.

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

4. The prosecution called five witnesses in support of its case. PW1 was a Clinical Officer attached at Dede Dispensary within Migori County. **PW2** was the father to the complainant one **J O O** and the minor testified as **PW3** (hereinafter referred to as **'the complainant'**) whereas **PW4** was the arresting officer attached at Ranen AP Post **No. 84002017 APC Gordon Nyamweya**. **PW5** was the investigating officer was one **No. 91276 Corp. Pamela Adhiambo** 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 the minor 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 timeously preferred an appeal by filing a Petition of Appeal on 14/08/2017 where he challenged the entire judgment on the following main grounds: -

1. That the learned magistrate erred in law in failing to appreciate that the charge sheet was defective by nature.

2. That the learned magistrate erred in law and in fact in failing to appreciate that the charges against me had not been proven beyond reasonable doubt.

3. That the learned magistrate erred in law and in fact by convicting the appellant on findings made out of suspicion, speculation and framed up work.

4. That the learned magistrate erred in law by failing to hold that the prosecution witness was not credible witness to convict.

5. That the learned magistrate erred in law by not holding that the evidence tendered by the state was inconsistent.

7. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant contended that his constitutional right to a fair hearing was infringed having not been given the witness statements at the trial, that the age of the complainant was not properly settled to his advantage and that the case was not proved as required in law.

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 prosecution produced an Age Assessment Report prepared by PW1 in proof of the age. That was at the instance of the trial court. PW1 stated as follows in his report: -

'Client is estimated to be 11 years old as guardian reports that she was given birth to in the year 2005 with unknown exact day and month to him.

N/B:

Thus estimated date of birth to her being:

15th June, 2005 as per medical estimation.'

13. 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...."

14. It is the duty of the officer determining the age of a person to lay a clear basis of what was considered in arriving at the approximation. Such an approximation must be with sound basis so as to give an opportunity to any one who wishes to challenge it to do so. In this case PW1 solely relied on the information given by the guardian whom he did not even disclose. Since the guardian only knew that the complainant was born in 2005 PW1 went ahead and approximated the **date of birth** as 15/06/2005 thereby estimating the age of the complainant as 11 years old. The basis adopted by PW1 is outrightly wrong. As said an officer must lay a medico-scientific basis in assessing the age and the report must contain all what was considered to arrive at such an age.

15. I must say that the age of the complainant in a defilement case determines the respective sentence hence the need for it to be settled with certainty. That becomes more serious when the age appears to be on the borderline like in this case. The Age Assessment Report therefore despite being an exhibit is of very little probative value if at all any. It could not hence form a sound basis of ascertaining the age of the complainant. Since there is evidence that the complainant was born in 2005 and in view of the lacuna on the part of the prosecution it can only be fair to both parties if it is deemed that the complainant was born 01/01/2005. Going by that analogy, the complainant was hence 12 years at the date of the alleged offence. The complainant was still 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. <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).

18. 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."**

19. The Appellant contended that penetration was not proved since the discharge found on the complainant's vagina was not tested to link him with the offence. I have severally stated, which I hereby again do, that whereas the testing of the discharge 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.

20. In this case the complainant narrated how the suspect held her hand and led her into a sugar plantation which was about 40 metres from her homestead, undressed her, and described how the male organ used for urination was inserted into her organ for urination. That, she was then given Kshs. 50/= to silence her. The money was produced in evidence. That, when PW2 called her the assailant told her not to respond as they were still in the act.

21. PW2 suddenly realized that the complainant was missing as the Appellant left his home where he was digging a well. He looked for her around and even called her in vain. Later the complainant resurfaced and narrated the ordeal she had undergone with the assailant. Since it was late, PW2 decided to take her to hospital the following day as well as to Awendo Police Station.

22. It was PW1 who attended to the complainant at Dede Dispensary on 02/01/2017. He examined her and noted that she was very anxious and in pain. The genitalia had whitish discharge and particles and the *labia majora* and *labia minora* here bruised. The hymen was broken and damaged. PW1 filled in the treatment notes and the P3 Form and opined that there had been a penile penetration into the vagina of the complainant.

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 complainant for me to arrive at a finding that the complainant was not truthful. I must therefore re-affirm the finding of the trial court that the evidence of the complainant can be safely relied upon.

24. Going by the narration by the complainant, the ordeal that occurred between herself and the assailant was a male-female genital sexual intercourse. It is that intercourse which led to the undisputable injuries on the complainant's private parts. Further, the evidence of PW1 and PW2 as well as the treatment notes and the P3 Form add credence to that fact. I therefore have no difficulty in finding, 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 the one who was digging a well at her home. PW2 confirmed the position and even stated that the Appellant had been at his home that evening and collected some money and that when he left he only realized that the complainant was also not at home.

26. The Appellant as well confirmed that he indeed went to the home of the complainant at the alleged time and checked the water level in the well he was digging. He however did not see PW2 but met the complainant who asked him for a Christmas gift. He gave her Kshs. 50/= and left. That, he was surprised to be arrested later instead of being paid his dues. I have weighed the defence against the prosecution evidence and have found it not holding. I say so since the Appellant took two positions on the issue of the money. The first position is that during cross-examination the Appellant insinuated that the complainant had borrowed Kshs. 50/= from him which the complainant vehemently denied. The second position is that the Appellant gave the complainant a gift of the money. One therefore wonders why the Appellant should take two opposite positions on the same issue. The Appellant potrayed himself as untruthful. The defence was hence an afterthought and is hereby rejected.

27. Given that there was no evidence that may have led to any doubtful recognition of the Appellant, I find that the prosecution proved that it was the Appellant who was the assailant. The third ingredient of the offence of defilement is also answered in the affirmative. For avoidance of doubt, I concur with the trial court that the identification of the Appellant as the aggressor was not in error.

<u>Other issues raised by the Appellant challenging the conviction:</u>

28. The Appellant contended that he was not given the witness statements hence his constitutional right was infringed. The record is clear that the court on its own motion ordered the prosecution to supply the witness statements to the Appellant on 23/01/2017. The Appellant never raised the issue again with the trial court. Had the Appellant informed the court that he had not been supplied with the statements despite the court order the court would have definitely acted accordingly. Raising the issue at this time is an afterthought and it is hereby rejected.

29. 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:

30. On **sentence**, as the complainant was a child of 12 years, the Appellant was to be sentenced under **Section 8(3)** of the **Sexual Offences Act**. The life sentence is hereby set aside and is substituted with a sentence of 20 years imprisonment.

31. Consequently, the appeal on conviction is dismissed but the appeal on sentence is hereby allowed.

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: -

Isaiah Odhiambo Otieno, the Appellant in person.

……..Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant