



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 1 OF 2018**

**JAMES OMONDI AYUGI.....APPELLANT**

VERSUS

**REPUBLIC .....RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau, Resident Magistrate in Rongu Senior Resident Magistrate's Court Criminal Case No.138 of 2017 delivered on 21/12/2017)***

**JUDGMENT**

1. **James Omondi Ayugi**, the Appellant herein, a relatively young man in his early 20s was charged with the offence of defilement contrary to **Section 8(1)(3)** 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 in the year 2015 and 2<sup>nd</sup> March 2017 within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of O AO, a child aged 14 years.
3. The appellant was subsequently tried and convicted on the main count of defilement and sentenced.
4. The prosecution called five witnesses in support of its case. The minor testified as **PW1** (hereinafter referred to as '**the complainant**') whereas the complainant's father one **J O A**, testified as **PW2**. **PW3** was the Assistant Chief Kaluoch Sub-Location one **Jacob Ado Oduong**. **PW4** was a Clinical Officer working at Rongu Sub-County Hospital and **PW5** was **No. 56625 PC Lanoline Kerubo** attached at Kamagambo Police Station Crime Branch Office who was the investigating officer. 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. It was the prosecution's case that the Appellant befriended the complainant in 2015 and impregnated her. She was then in school and dropped out as she eventually gave birth to a baby boy. Nothing much arose out the relationship between the Appellant and the complainant and the complainant had to return to her parents' home to raise her child. The complainant then resumed her studies at [Particulars Withheld] Primary School. It seems the Appellant continued with the affair even after the complainant delivered and returned to school. On 01/03/2017 the complainant disappeared from her parents' home and PW2 began a search after he reported the matter to the Chief, PW3, who accompanied him in the search. Their search led them into a rental house within Ndege-Oriedo township where they found the two living together with their child. They were arrested and taken to Kamagambo Police Station.
6. It was PW5 who escorted the two to Rongu Sub-County Hospital for examination and treatment by PW4 who also filled in the P3 Form and assessed their respective ages. PW5 recorded statements from witnesses and charged the Appellant.
7. At the close of the prosecution's case, the trial court placed the Appellant on his defence where the Appellant opted to and gave a sworn defence without calling any witnesses. The Appellant narrated how he met the complainant in December 2014 and befriended her until she became pregnant and gave birth. That, they lived together as a husband and wife for 2 years until when they were arrested. That, the reason for his arrest was that he had not gone to the complainant's home to officially introduce himself as the husband to the complainant and that he did not have KShs. 20,000/= which was demanded upon his arrest. He prayed that he be set free to take care of his young family. The Appellant further stated that when he met the complainant he asked her age and the complainant told him she was 18 years old and had cleared Standard 8 but did not proceed further with her education as PW2 could not raise the requisite school fees.
8. By a judgment rendered on 21/12/2017 the trial court found the Appellant guilty and convicted him of the offence of defilement. The Appellant was then sentenced to 20 years imprisonment.
9. Being dissatisfied with the conviction and sentence, the Appellant timeously lodged an appeal challenging both the conviction and sentence on the main ground that he had a holding defence in the case. At the hearing of the appeal the Appellant reiterated his position of

innocence and prayed that the appeal be allowed. The State opposed the appeal.

10. 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.

11. 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.

12. 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. Since there is no dispute that there existed a sexual relationship between the Appellant and the complainant out of which they had a child, I will hence dwell on the defence raised by the Appellant.

13. The Appellant took refuge in the defence provided under **Section 8(5) and (6)** of the **Sexual Offences Act**. I had an occasion and dealt with the said defence in **Migori High Court Criminal Appeal No. 59 of 2015 Sammy Chacha Chacha vs. Republic** (unreported) and since I have not changed my legal mind on the issue I will reiterate what I stated therein as follows: -

*'19. The other cardinal issue of consideration relates to the defence raised by the appellant. As earlier on stated, if successfully proved the same amounts to a complete defence in law and the appellant will be entitled to an automatic discharge. That is the defence provided for under Sections 8(5) and (6) of the Sexual Offences Act. The said sub-sections provides as under: -*

***"8(5) It is a defence to a charge under this section if:***

***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***

***(b)the accused reasonably believed that child was over the age of eighteen years***

***(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."* (emphasis added).**

*20. From the above provisions it can be seen that whenever an accused person opts to rely on the said defence then the evidential burden of proof shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate that: -*

***(a) That it was the child who deceived the accused person into believing that he/she was over the age of eighteen years at the time of the alleged commission of the offence;***

***(b) That the accused person reasonably believed that the child was over the age of eighteen years; and***

***(c) That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the belief on the part of the accused person was reasonable.***

*21. The accused person will first have to prove deception by the child in respect of the child's age. That deception can be by way of words or actions on the part of the child. In this case, the appellant stated that the deception was by way of words given that it was PW1 herself who told him that she was 19 years old.*

*22. The other condition relates to how the accused person handled the alleged the deception. Section 8(6) requires the accused person to further demonstrate how he/she reasonably believed the deception including the steps taken by that accused person to ascertain the age of the complainant.*

*23. In discharging that onus, it must be remembered that the actions of the accused person must be weighed against what a reasonable person would have been expected to do in such circumstances.'*

14. The Appellant stated that he met the complainant in December 2014 where the complainant told him that she was 18 years old and had completed her primary education having sat her KCPE in 2013 but could not further her studies due to her father's inability to raise school fees. She was by then planning to apply for a national identity card. They hence moved in and lived together for 2 years. The Appellant however did not formally introduce himself to the complainant's parents as the husband to the complainant, but occasionally used to call the complainant's mother.

15. From the Appellant's testimony it was not demonstrated how the Appellant ascertained that the complainant was not a minor even after the complainant told him that she was 18 years old given that the complainant had just completed her primary school studies barely a year ago. **Section 8(6)** of the **Sexual Offences Act** specifically places the onus on the Appellant to disclose the steps he took to ascertain that the complainant was not a minor.

16. All the issues raised by the Appellant taken in totality fall so far short of satisfying the conditions in **Section 8(5) and (6) of the Sexual Offences Act**. Had the Appellant approached the parents of the complainant and laid his intentions bare, high are chances that he would have been put into the right perspective on the age and whereabouts of the complainant. Whereas I note that the Appellant was by then in his late teen age and may not have known the nitty-gritties of the law, that ignorance cannot constitute a defence in a criminal case (See **Section 7 of the Penal Code, Cap. 63** of the Laws of Kenya). The Appellant cannot therefore benefit from the defence in law. He was properly convicted of the offence of defilement.

17. On sentence, the Appellant was imprisoned for 20 years. The offence of defilement under which the appellant was charged attracts the sentence under **Section 8(3) of the Sexual Offences Act**. That sentence is a minimum of 20 years imprisonment. The age of the complainant was assessed by PW4 as 14 years old. The Appellant was hence sentenced to the minimum sentence in law and as such the appeal on sentence must fail.

18. This appeal once again raises the need for the Legislature to seriously reconsider the sentences under the **Sexual Offences Act** especially for the teen age offenders of course without losing sight of the victims and the circumstances of each case. The Appellant herein committed the offence in the first instance when he was 19 years old. He is now 22 years old and shall be in prison for the next 19 years having been sentenced in December 2017. Even after successfully serving the sentence term the Appellant will have a life-long criminal record unless he successfully challenges the conviction. Our society cannot by now afford to be static, it must raise to the truism that many young people, especially between the ages of 18 years and 22 years, are languishing in prison to the detriment of the future of this country because of sexual related offences. An intervention is now a necessity. I must also say that there is need for policy guidance towards a multi-sectoral approach to this issue involving all the sector players. Further, the police must take action against parents and guardians who expressly or otherwise permit their children to engage in sexual activities within the ages of minority since the law is clear.

19. In the end, the appeal is hereby dismissed, and the decision of the trial court affirmed. Lastly, 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.

20. Orders accordingly.

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

**A. C. MRIMA**

**JUDGE**

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

**James Omondi Ayugi**, 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