REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 37 OF 2017

MARK ODHIAMBO NJOGA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. K. Kamau,

Resident Magistrate in Rongo Senior Resident Magistrate's

Criminal Case No. 79 of 2015 delivered on 07/12/2017)

JUDGMENT

Background: -

1. The Appellant herein, **Mark Odhiambo Njoga,** was charged with two main counts of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006 and **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006 respectively. He was also charged with alternative charges of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** No. 3 of 2006 on each of the main count. He denied all the charges and a trial was held.

2. The particulars of the first count of defilement were that *'On unknown date of February 2015 and 5th day of March 2015 at [particulars withheld] Academy in South Kamagambo Location within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the anus of R.O.O., a child aged 12 years'*. The particulars of the second count of defilement were that 'On unknown date of February 2015 and 5th day of March 2015 at [particulars withheld] Academy in South Kamagambo Location within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the anus of H.K., a child aged 9 years.'

3. The prosecution called a total of six witnesses. **R.O.O**. testified as **PW1** whereas **H.K**. testified as **PW2**. **B A**, the mother of PW1 and PW2 testified as **PW3**. **PW4** was a Clinical Officer from Rongo Sub-County Hospital and **PW5** was one **J A,** an Administrator at *[particulars withheld]* Academy. **PW6** was **No. 42397 PC Japhet Makokha** attached at Okumba Police Post 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.

4. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave sworn *alibi* defence without calling any witness. Thereafter the court rendered its judgment where the Appellant was found guilty of the twin counts of defilement and was convicted. He was sentenced to 30 years and life imprisonment respectively.

5. Being dissatisfied with the convictions and sentences, the Appellant timeously preferred an appeal by filing a Petition of Appeal on 11/12/2017 where he challenged the entire judgment and the sentences on the following four main grounds: -

1. That I did not plead guilty to the charge

2. That the trial court failed entirely by coming into a wrong conviction and sentence being that the ingredients of defilement were not proved to the required standard in law, how could penetrating be proved and yet the complaints herein alleged that the offence was committed on 19/02/2015 and taken to hospital on 7/3/2015.

3. That the trial court did not bother to question how could it be possible to defile 2 children from the same family? And the

first one only to report after hearing the 2nd complainant reporting to his mother.

4. That the inconsistences and contradiction evidence adduced herein could not lead to a conviction and sentence but rather a total acquittal.

6. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant filed his submissions and expounded on the foregone grounds. The appeal was opposed by the State through **Miss Atieno**, Learned Prosecution Counsel who prayed that the appeal be dismissed.

Analysis and Determinations:

7. 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.

8. 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.

9. 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:

10. The ages of PW1 and PW2 were settled by Age Assessment Reports which were produced as exhibits. The ages were assessed as 10 – 12 years and 8 – 9 years respectively. The assessments were conducted by a qualified Medical Officer one Dr. Maurice Otieno and reports were duly produced in evidence.

11. 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**.

12. In this case the Age Assessment Report can be described as one of the documents referred to as '**any other similar document'** under the said Rules. 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...."

13. Both exhibits were produced without any objection. Dr. Maurice Otieno used the Tanners method in assessing the age of the children. I therefore find that PW1 was aged between 10 and 12 years and for purposes of this discussion and in line with the Charge Sheet I will settle his age at 12 years old. I will settle the age of PW2 at 9 years old in line with the Charge Sheet. Both were hence minors within the meaning of the law.

(b) On the issue of penetration:

14. Section 2 of the **Sexual Offences Act** (hereinafter referred to as '**the Act'**) defines '*genital organs*' and '*penetration*' as: -

"genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

'penetration' means the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

15. 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).

16. 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."**

17. Both PW1 and PW2 gave unsworn testimonies. Each described their various encounters with the assailant. They explained how they were separately called and locked into the office, undressed and had the assailant's penis inserted into their anus. That, they were threatened with death if at all they disclosed what had happened to anyone. The acts were committed on various instances.

18. When PW3 reported the matter to the police, PW1 and PW2 were escorted to Rongo Sub-County Hospital where they were examined. The anal examination for PW1 revealed bruises around the anus which were about two days old. There were no visible injuries on PW2. PW4 explained that it was possible that there were no visible injuries on PW2 due to time lapse and the possibility of use of lubrication during the act. That, any such injuries would have healed and faded away. The medical records were produced as exhibits after PW4 laid such basis and took the court through them with liberty to the Appellant to raise any objection.

19. From the medical examination alongside the evidence of PW1 and PW2, the record as a whole which I have carefully reconsidered and in view of the provisions of **Section 124** of the **Evidence Act**, **Cap. 80** of the Laws of Kenya, I have no doubt that there was respective penetration on PW1 and PW2. The ingredient was hence proved.

c) On whether the appellant was the perpetrator:

20. The Appellant denied any involvement in the alleged offences. He tendered sworn defence and narrated the events as from Friday the 5th March 2015 up to the 8th March 2015 when he was arrested at the Chief's Office. He explained that he was not in school on the 5th March and that he was not a Teacher but a School Cashier. He concurred that at times he would briefly step in class for a teacher.

21. PW5 who was the School Administrator testified that the Appellant reported on duty on Friday and worked up to lunch time when he left and that some of the complaints were allegedly committed a day before. It is not in doubt that the complainants knew the Appellant so well. It is also not in dispute that PW5 was the one in-charge of the administration at the school. The complaints centered on events surrounding payment of school fees. That, PW3 would give her children some money to pay school fees and they would do so at the Appellant's office. The Appellant would then call one after the other to collect their receipts and he would eventually sodomize them.

22. It is alleged that the events occurred variously and between February and March 2015. The totality of the evidence placed the Appellant at school during the period in issue. The trial court heard the matter and observed the demeanors of all witnesses. The court believed the witnesses and this Court must give an allowance for that. There is nothing placed before me to impugn that finding by the Court. Having carefully considered the evidence on record and the defence I concur with the trial court that the defence was an afterthought and a sham. There is credible evidence that the events complained about were committed by the Appellant.

23. The Appellant submitted that there were contradictions and inconsistencies on the record but did not point out the same. I must state that I have carefully addressed my mind on the record and noted very negligible discrepancies 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.

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

Disposition:

25. As I come to the end, I must also consider the sentences**.** The Appellant was sentenced to 30-year imprisonment term on count one and to life imprisonment on the second count. The life sentence is the minimum sentence provided under **Section 8(2)** of the **Sexual Offences Act**. The sentence prescribed under **Section 8(3)** of the **Sexual Offences Act** is 20 years imprisonment. Given the position of trust the Appellant was in towards the children the court enhanced the sentenced to 30 years. I do not see how the court erred in that case. The appeal on the sentence equally fails. However, since the Appellant is serving a life imprisonment, the 30-year imprisonment is hereby held in abeyance.

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

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: -

Mark Odhiambo Njoga, the Appellant in person.

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

Everlyne Nyauke – Court Assistant