REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.2 OF 2018

BETWEEN

PHILIP OTUOMA MANYURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment and decree of the Chief Magistrate's Court,

Homa Bay in Sexual Offences No.44 of 2016 delivered

on the 01.02.2018 – HON. L. Simiyu, SRM)

JUDGMENT

1. The appellant, **PHILIP OTUOMA MANYURA**, appeared before the Senior Resident Magistrate at Homa Bay charged with defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act**, in that on the 21st December 2016 at about midday at [particulars withheld] village, Rangwe Division, Homa Bay County, he defiled M A O, a child aged 11 years. He was alternatively, charged with committing an indecent act with the same child, contrary to **Section 11 (1)** of the **Sexual Offences Act**.

2. After a full trial, the appellant was convicted on the main count and sentenced to life imprisonment. Being dissatisfied with the conviction and sentence, he preferred the present appeal on the basis of the grounds in his petition of appeal filed herein on 14th February 2018, in which he complains that medical evidence did not reveal the presence of spermatozoa yet the trial court found that there was penetration. Also, the hymen was not found to have been recently broken.

3. The appellant further complains that the trial court disregarded his defence which was strong enough to secure him an acquittal.

At the hearing of the appeal, he appeared in person and fully relied on his written submissions.

The learned prosecution counsel, **MR. OLUOCH,** appeared for the state/respondent and opposed the appeal.

4. In his oral submissions, the learned prosecution counsel stated that the minor complainant (PW2) was aged 11 years at the material time and that she was defiled by the appellant when she went to fetch water. He was known to her. He blocked her path, grabbed and took her into a maize plantation where he defiled her. He had also previously defiled her and given her a sum of Kshs.50/=.

5. The learned prosecution counsel, further stated that the complainant's grandmother found her on the material date and noticed she was walking with difficulty thereby corroborating the fact of defilement. Therefore, the appellant cannot allege that the complainant's evidence was uncorroborated.

The learned prosecution counsel contended that the trial court on convicting the appellant was alive to the provisions of **Section 124** of the **Evidence Act**. He further contended that penetration was proved and not necessarily ejaculation and urged this court to dismiss the appeal.

6. In response to the foregoing, the appellant denied having defiled the complainant on several occasions and offered her a sum of Kshs.50/=. He affirmed his reliance on his submissions on record and prayed to this court to allow his appeal.

7. This court, has given due consideration to the appeal in the light of the supporting grounds and the submissions by both the appellant and

the respondent.

8. As is required of a first appellate court, the evidence presented at the trial was herein re-considered and in doing so, regard was given to the fact that the trial court had the advantage of seeing and hearing the witnesses.

9. From the evidence, this court is satisfied that credible and sufficient evidence was adduced by the prosecution through the minor complainant **MA (PW2)**, her grandmother, **EA O (PW1)** and the Clinical Officer, **DELICE NAFULA ARMALA (PW4),** proving that the complainant was indeed defiled.

Medical evidence by the Clinical Officer confirmed penetration. It did not matter that no spermatozoa was seen at the time of medical examination. Ejaculation is no factor in establishing penetration which under **Section 2** of the **Sexual Offences Act** means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

10. The leaving or non-leaving of the hymen would also not be a factor in defilement as even the slightest of penetration would make the offence complete.

In any event, the defence raised by the appellant did not dispute the fact that indeed the complainant was sexually assaulted. The dispute centred on the identification of the offender.

11. In that regard, there was clear evidence that the complainant knew her assailant and had known him prior to the offence. She knew that he was a person from Kisii and that he lived in the homestead of one Robinson, a neighbor. Her grandmother (PW7) also knew him very well. His defence that the complainant was not known to him was disproved by the complainant and her grandmother. It was also considered by the trial court and found to be lacking in credibility.

12. The belated **"alibi"** raised by the appellant was given due consideration by the trial court and disregarded for reason that the evidence by the prosecution placed him at the scene of the offence on the material date and time. In essence, this court does not see any cogent or substantial reasons to interfere with the findings of the trial court and the resultant conviction of the appellant.

13. With regard to the sentence, the applicable provisions was **Section 8 (2)** of the **Sexual Offences Act** which provides that:-

> **"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life".**

This is a mandatory sentence for which the trial court was not at liberty to exercise discretion. However, it was incumbent upon the prosecution to prove that the complainant (PW2) was of the age of eleven (11) years or below at the material time of the offence for the sentence to hold.

14. Herein, the birth certificate tendered in evidence (**P. Exhibit 3**) by the complainant's grandmother (PW1) established that at the material time of the offence the complainant was of the age of twelve (12) years as she was born in the month of April 2004 while the offence occurred in the month of December 2016.

Therefore, the sentence of life imprisonment imposed upon the appellant by the trial court was neither proper nor lawful and is hereby set aside and substituted for a sentence of twenty (20) years imprisonment in accordance with **Section 8 (3)** of the **Sexual Offences Act**.

15. In the end result, this appeal is dismissed with regard to conviction but is allowed with regard to sentence in terms of the alteration made hereinabove.

Ordered accordingly.

J.R. KARANJAH

JUDGE

11.10.2018

[Delivered and signed this **11th** day of **October, 2018**].