



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 105 OF 2015

ALFRED OWUOR OLANGA.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. T. W. Cherere, Chief Magistrate (as she then was) in Eldoret Chief Magistrate's Court Criminal Case No. 1286 of 2014 delivered on 06/08/2015)

JUDGMENT

1. The Appellant herein, **Alfred Owuor Olanga**, 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. He also faced an alternative charge 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 05th day of March 2014 in Eldoret East District within Uasin Gishu County, intentionally and unlawfully caused your genital organ (penis) to penetrate into genital organ (vagina) of AJT aged 2½ years*'.
'.
3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement and accordingly sentenced.
4. The prosecution called seven witnesses in support of its case. **PW1** was **Esther Chepchomba Mutai**. The village elder one **Moses Kipterol Sawe** testified as **PW2**. **PW3** was the investigating officer one **No. J8489 Corp. David Mwangangi** formerly from Tarakwa Police Station. The Acting Sub-Chief of Ainapkoi Sub-Location one **Harun Kiprof Chenjor** testified as **PW4**. The arresting officer was **No. 218892 APC Corp. Richard Kiptala** of Ainapkoi AP Post who testified as **PW5**. **Dr. Jane Yatich** from MTRH who produced the P3 Form for the complainant testified as **PW6** and **PW7** was **JCT** the mother to the complainant one **AJT** 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 **AJT** whom I will refer to as '**the complainant**'.
'.
5. The case was initially heard before **Hon. A. Alego**, Principal Magistrate before he was transferred from the station. Upon compliance with **Section 200(3)** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya the matter began *de novo* and was heard before **Hon. T. W. Cherere**, Chief Magistrate, as she then was. 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 12/08/2015 where he challenged the entire judgment and the sentence on the following main grounds: -

(1) That your lordship, I pleaded not guilty on trial.

(2) That your Honour the learned magistrate erred in both law and facts in failing to consider my defence.

(3) That your Honour, the learned trial magistrate erred in both facts and law in failing to note the contradiction in the prosecution evidence between the doctor and the minor child.

(4) That your Honour, the learned trial magistrate overlooked the prosecution evidence in failing to consider the relationship between the mother of the minor and me.

(5) That your Honour, this case was planned and setup by the mother of the minor up to conviction.

7. 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, that the investigations were shoddy, that the evidence was riddled with inconsistencies and contradictions and the sentence. He prayed that the conviction be set-aside and the decision be substituted with one acquitting the Appellant.

8. The appeal was opposed by the State through **Miss Mokua**, Learned Prosecution Counsel who submitted that the offence was proved in accordance with the law and the sentence was the only legally provided in law. Counsel 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.

(a) On the age of the complainant:

12. The prosecution produced a Child Health Card in proof of the age of the complainant. The trial court rightly rejected that exhibit on account of some alterations and amendments. The court instead relied on the evidence of PW1, PW6 and PW7 in arriving at the age of the complainant. PW7 was the mother to the complainant who testified that she gave birth to the complainant on 17/04/2011. The Doctor who examined and treated the complainant gave the apparent age of the complainant as 2½ years old as well as PW1 who was the employer of both the Appellant and PW7 and lived with both of them within her compound. Although the record is silent on whether the trial court saw the complainant the combined effect of the evidence of PW1, PW6 and PW7 left no doubt that the age of the complainant was between 2½ and 3 years.

13. I therefore find that the complainant was a minor of tender years within the law.

(b) On the issue of penetration:

14. **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.’

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. The Appellant contended that penetration must be proved by medical evidence. Whereas medical evidence is desirable and corroborative a court can confirm penetration even without medical evidence by dint of **Section 124** of the **Evidence Act**, Cap. 80 of the Laws of Kenya. In this case PW1 stated that the night of 04/03/2014 had been a difficult one for the complainant. That, the complainant did not eat well and cried all night long. PW1 and PW7 noticed the complainant walking with a lot of difficulties and they both examined her all over the body only to find that her private parts were swollen and reddish with some whitish substance. They readily suspected some intrusion and PW1 asked PW7 to quickly rush the complainant to hospital as she also went to another hospital as she was not feeling well.

18. It was Dr. Imbenzi who examined the complainant and found some frictional injuries on her genitalia with some redness. He concluded that there had been some penetration on her private parts. PW6 produced the P3 Form on behalf of Dr. Imbenzi who was by then retired and could not be found.

19. The trial court 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 witnesses. 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.

20. Going by the evidence of PW1, PW6 and PW7 coupled with the contents of the P3 Form, I find no difficulty in holding, which I hereby do, that penetration was proved.

c) On whether the Appellant was the perpetrator:

21. The complainant did not testify on account of her tender age. PW7 stated that both the Appellant and herself were employed by PW1 and lived on PW1's compound and that their rooms were adjacent whereas PW1's house was about 100 metres away. Although the Appellant denied the aspect of employment several witnesses confirmed it as well as where the two lived. The testimonies of PW1 who was the employer, PW2 who was the village elder, PW3 who was the investigating officer and who visited the scene, PW4 who was the Acting Chief and PW5 who was the arresting officer further attested to the issues. To that extent I find the Appellant's denial quite wanting in truth and is hereby disregarded.

22. I have as well believed the testimony of PW7 that both the Appellant and herself went to the shopping centre leaving the complainant and her other child in her house, that the Appellant returned home earlier, that when PW7 later returned home she found the complainant asleep in the Appellant's house and the Appellant therein as well and that the complainant did not sleep well that night. PW1 corroborated the evidence of PW7 that the Appellant was the only male within her compound.

23. PW7 noticed the changes on the complainant from the time she collected her from the Appellant's house; that the complainant did not eat properly, she cried all night long, she walked with difficulties and had swollen private parts. Given that there were no immediate neighbours in the vicinity, that the Appellant was the only male within the compound and in view of the plain denial by the Appellant on where he lived coupled with the medical findings on the complainant I find that the evidence, although circumstantial, was cogent enough to link the Appellant with the commission of the offence of defilement. I say so bearing in mind the following requirements as appertains circumstantial evidence, that: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

24. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (supra)** and have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo vs. Republic (2014) eKLR** among many others.

25. The Court of Appeal in the case of **Musii Tulo (supra)** in expounding the above principles expressed itself as follows:-

“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus:

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

26. I have carefully weighed the evidence and the law and I have no doubt in my mind that there were no circumstances that could reasonably lead to a finding that the Appellant was not the aggressor. 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:

27. As the Appellant submitted that there were contradictions and inconsistencies on the record such that the evidence could not be relied upon, I must state that I have carefully addressed my mind on the record and noted some minor discrepancies. 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.

28. On whether the investigations were shoddy, I have no difficulty in finding that the prosecution availed credible witnesses in proof of the charge.

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 2½ years, the Appellant was rightly sentenced under **Section 8(2)** of the **Sexual Offences Act**. The only sentence of life imprisonment remains legal.

31. I therefore find no merit in the appeal and it is hereby dismissed.

Orders accordingly.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at ELDORET this 1st day of November, 2018.

H. A. OMONDI

JUDGE