REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 80 OF 2015

ELPHAS FEDHA NYONGESA………..APPELLANT

-versus-

REPUBLIC …... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. T. M. Olando. Resident Magistrate in Eldoret Chief Magistrate's Court Criminal Case No. 4910 of 2012 delivered on 16/06/2015)

JUDGMENT

1. **Elphas Fedha Nyongesa,** the Appellant herein, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** 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 11th day of November 2012 at around 10:00pm at [particulars withheld] village in Lugari District within Western Province, intentionally and unlawfully caused penetration with his genital organ namely penis into genital organ namely vagina of E.N. a child aged 16 years*'.

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

4. The prosecution called five witnesses in support of its case. **PW1** was the complainant one **E.N.** PW1's grandmother and guardian one **AMJ** testified as **PW2** whereas PW1's grandfather one **PA** testified as **PW3**. **PW4** was the investigating officer one **No. 69253 PC Susan Kokwee** from Lumakanda 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 PW1 whom I will refer to as '**the complainant'**.

5. The evidence of the complainant, PW2 and PW3 was taken before **Hon. C. Wattima**, Resident Magistrate before she was transferred from the station. Upon compliance with **Section 200** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya the rest of the evidence was taken before **Hon. T. M. Olando**, Resident Magistrate. 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 15 years' imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant timeously preferred an appeal by filing a Petition of Appeal on 20/11/2017 where he challenged the entire judgment and the sentence on the following main grounds: -

> ***(1) That the learned trial magistrate erred in law and fact in failing to note that the evidence tendered by the prosecution witnesses did not meet the requirement of the law while convicting me.***
>
> ***(2) That the trial magistrate erred in law and fact in failing to recognize that the prosecution didn't prove its case beyond reasonable doubt as required by law in convicting me.***
>
> ***(3) That the trial magistrate erred in law and fact in convicting me on flimsy charges of defilement whereas the evidence on records depicts the offence of defilement.***
>
> ***(4) That the trial magistrate erred in law and fact in failing to note the consequences of the uncalled prosecution witness before arriving at my conviction.***
>
> ***(5) That the learned trial magistrate erred in law and fact in falling to consider my evidence in defence before arriving at my conviction.***

(6) That the learned trial magistrate erred in law and fact in failing to note that the evidence tendered was inconsistent and contradictory before sentencing me.

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, defectivity of the charge sheet 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 legally provided minimum. 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 age of the complainant was hotly contested in this appeal. The Appellant contended that the Baptismal Card relied upon by the prosecution in proof of age was insufficient and that a Birth Certificate was instead to be produced.

13. Some rules were promulgated under the **Sexual Offences Act** towards the achievement of the objectives of the Act. 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**.

14. In this case a Baptismal Card was produced which is in line with the said Rules. It was produced without any objection. I therefore find that the complainant was born in 1996 and she was about **16 years old** when the offences were allegedly committed. The complainant was hence a minor within the law.

(b) On the issue of penetration:

15. **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.'***

16. 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).

17. 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."***

18. The Appellant contended that penetration was not proved since there was no DNA examination undertaken to connect the whitish vaginal discharge with him. I have severally stated, which I hereby again do, that whereas a DNA test 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. That is why **Section 36** of the **Sexual Offences Act** is not tailored in mandatory terms.

19. At the hearing the complainant narrated how she met the assailant and how she stayed in the assailant's house for 3 days where the two engaged in unprotective sex every night. That, as the assailant was working during the day he used to lock the complainant inside his room

from outside as he left for work until when he returned later in the evening so as to curtail any attempts by the complainant to escape. The complainant even mentioned the number of times they had sex every night with the assailant.

20. It was PW3 who upon notification rushed and caught up with the complainant and her companion and had them arrested and taken to a Police Station. The police escorted the two for medical examination at Lugari District Hospital where upon a physical and laboratory analysis it was confirmed that the complainant had engaged in a sexual act with a male counterpart. A P3 Form was filled and eventually produced in evidence by PW5 on behalf of the examining Clinical Officer one Peter Wenan who had passed on.

21. 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 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.

22. Going by the narration by the complainant coupled with the evidence of all the other witnesses and the contents of the P3 Form, I find no difficulty in holding, 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>

23. 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 she had severally saw the Appellant as she visited her Aunt at Lugari. That, at one time the Appellant asked her to be his lover and that she was to be married. Since the complainant was not performing well in school she readily agreed to befriend the Appellant and she was taken to the Appellant's house and spent three days. That, as they were going to the Appellant's home in Matete for introduction they were caught up by PW3 on the way and taken to the police. The complainant further narrated how the Appellant used to lock her inside his house as he went to work. To the complainant there was no doubt that whoever she had sexual intercourse with was the Appellant who had even promised to marry her.

24. The evidence of the complainant was corroborated by PW3 to the extent of how the complainant and the Appellant were arrested. However, the Appellant denied that he ever was with the complainant and contended that he never knew her or at all and that he was arrested at his workplace by two people who took him to Lugari Police Post where he met the complainant and PW2 for the first time. The defence was rightly considered by the trial court and dismissed as an afterthought. I likewise do not have any difficulty in arriving at the same finding. The evidence of the complainant having been duly corroborated by that of PW2 and PW3 on how the complainant disappeared from her home until her arrest outweighs the denial by the Appellant.

25. The incident occurred over several days as the complainant and the Appellant lived together and interacted so closely. The complainant therefore knew the assailant well and even readily gave his name to the police when they were both arrested together. Whereas the Appellant stated that his home was in Matete, the complainant as well stated that they were arrested as they were going to the Appellant's home in Matete to be introduced as a wife to the Appellant. The complainant also identified the Appellant in court as the assailant.

26. As I take caution of the fact that the complainant was the only identifying witness and hence the need to treat her evidence with such greatest care and to satisfy myself that in all circumstances, it is safe to act on such evidence, I further stand guided by case law including the Court of Appeal cases of **<u>Wamunga vs. Republic (1989) KLR 426,</u>** **<u>Nzaro vs. Republic (1991) KAR 212,</u>** **<u>Kiarie vs. Republic (1984) KLR 739</u>** and the English case of **<u>R vs. Turnbull & Others (1973) 3 ALL ER 549</u>**, among others. As a calling I have also looked at the defense. The Appellant gave a sworn statement and mainly narrated how he was arrested.

27. I have carefully weighed the evidence and the law and I have no doubt in my mind that there were no circumstances that may have led to any doubtful recognition of the Appellant by the complainant and as such the identification of the Appellant as the aggressor was not in error. 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.

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

28. 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 **<u>R -vs- Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)</u>** 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.

29. On whether the charge sheet was defective for listing the names of potential witnesses who never testified, I must say that a charge sheet cannot be defective on account of failure of the potential witnesses to testify. That ground hereby fails. As to the failure of the potential witnesses to testify, **Section 143** of the **Evidence Act**, Cap. 80 of the Laws of Kenya gives the prosecutor the discretion to choose the witnesses to testify. Not every witness interrogated must testify before court as long as the prosecutor has marshalled sufficient evidence to prove the case. However, if a crucial witness does not testify without any justification then an inference is made that the evidence would have been adverse to the prosecution. (See the cases of **<u>Bukenya & Others -versus- Uganda (1972) EA 549</u>** and **<u>Nguku -versus- Republic (1985) KLR 412).</u>** In this case, there was sufficient evidence adduced to support the charge and the adverse inference does not arise. Needless to say, PW5 stated that he testified on behalf of his colleague who had passed on.

30. 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:

31. On **sentence**, as the complainant was a child of 16 years, the Appellant was rightly sentenced under **Section 8(4)** of the **Sexual Offences Act**. The minimum sentence of 15 years' imprisonment remains legal.

32. I find no merit in the appeal. It is hereby dismissed.

Orders accordingly.

SIGNED BY:

A. C. MRIMA

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

H. A. OMONDI

JUDGE