REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 40 OF 2016

EZEKIEL ADWENYA MAKE.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. M.M.Wachira, Resident Magistrate in Migori Chief Magistrate's Criminal Case No. 723 of 2014 delivered on 07/09/2016)

JUDGMENT

1. The Appellant herein, **EZEKIEL ADWENYA MAKE** was charged with the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. He denied both counts.

2. The particulars of the offence of defilement were that on diverse dates during the months of July and November 2014 at [Particulars withheld] area within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of E.K. 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 four witnesses. The minor testified as **PW1** (hereinafter referred to as **'the complainant'**) whereas the minor's mother testified as **PW2**. **PW3** was the investigating officer and **PW4** was a Clinical Officer from Migori County Referral Hospital. The trial was initially conducted before ***Hon. P. Y. Kulecho***, Resident Magistrate, who was transferred from the station after placing the appellant on his defence upon the closure of the prosecution's case. The case was thereafter handled by ***Hon. M. M. Wachira***, Resident Magistrate, on compliance with **Section 200** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya. The appellant recalled all the four witnesses for further cross-examination.

5. It was the prosecution's case that the appellant operated a shop at Namba area where he met the complainant, then aged 14 years old and a pupil at [Particulars withheld] Academy. That was between the months of July and November 2014 where the appellant had sexual intercourse with the complainant on two occasions which resulted into the complainant getting pregnant. PW2 noted that the complainant oftenly vomited and upon confronting her the complainant disclosed that she had had sexual intercourse with the appellant and was pregnant. The complainant then ran away from her home and went to live with the appellant. After failing to persuade the complainant to return home for a while PW2 reported the matter to the Area Chief and both the complainant and the appellant were arrested. The two were taken to hospital for examination where it was medically confirmed that the complainant was pregnant. The appellant was then charged accordingly.

6. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant opted to and gave sworn defence where he denied any involvement in the commission of any of the alleged offences and raised the issue of a grudge with PW2 whom he alleged to have employed together with the complainant to work in his shop but later on he sacked them due to poor performances hence the charges were instead meant to settle scores. The appellant did not call any witnesses.

7. By a judgment rendered on 07/09/2016 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 20 years imprisonment.

8. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal by filing the Petition of Appeal on 19/09/2015 and challenged the conviction and sentence on nine grounds.

9. At the hearing of the appeal the appellant appeared in person and relied on his written submissions wherein he generally reiterated the grounds of appeal. The State through Learned State Counsel Miss Owenga vehemently opposed the appeal and took the Court through the record in urging that the appeal ought to be dismissed.

10. As this is 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.

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.

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. On looking at those aspects in this judgment, this Court shall consider each of them singly.

(a) On the age of the complainant:

13. There was no contestation on the age of the complainant. The prosecution produced the complainant's Certificate of Birth No. [Particulars withhed] which indicated that the complainant was born on 30/07/2000 and as such she was 14 **years old** when the offence was allegedly committed. The complainant was hence a minor within the meaning of 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.'***

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).

15. 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."

16. There is no difficulty either in resolving the issue of penetration in this case. I say so because this is a case where the complainant got pregnant out of some sexual activity. That was so stated by all the four witnesses and was medically confirmed by the Doctor who examined the complainant and filled in the P3 Form which form was produced by PW4. Further when the complainant was recalled for further cross-examination on 21/10/2015 she informed the court that she had given birth in April 2015. The fact that the complainant got pregnant and eventually gave birth proves in itself that there was indeed penile penetration into the complainant's vagina. Penetration was hence proved.

c) <u>On whether the appellant was the perpetrator:</u>

17. Although the appellant vehemently denied any involvement in the alleged offence and in his sworn defence contended that he was being framed up by the complainant's mother (PW2) whom they had differed on account of some employment, this Court equally finds no difficulty in resolving this issue as well. The complainant gave evidence before the trial court where she was recalled for further cross-examination. In both instances she was clear that it was the appellant whom she had engaged in sexually activity with that resulted into the pregnancy. When PW2 confronted the complainant on suspicion that the complainant was pregnant again the complainant confirmed that it was the appellant who was responsible. That was however not the end of the matter. The complainant then ran away from her home and went to live with the appellant. PW2 persuaded the complainant to return home in vain until she reported the matter to the Area Chief.

18. The trial court had an opportunity and noted the demeanor of the witnesses and it formed an opinion in its judgment that the complainant was truthful. I also noted from the proceedings that the complainant was very clear and candid on what happened to her. She described how the events unfolded and stated that it was the appellant who was the assailant. The complainant also readily gave the appellant's name when she was confronted by PW2. It is also worth noting that the appellant confirmed knowing both the complainant and PW2 as well.

19. From the above analysis and evidence, I am therefore at pain to believe the appellant's defence. I do hereby find that it was the appellant who was the perpetrator of the offence at hand.

20. Having also carefully analysed the evidence and the judgment, this Court finds no merit on the contention that the trial court shifted the burden of proof to the appellant. I also find no merit in the argument that some crucial witnesses did not testify. That is courtesy of **Section 143** of the **Evidence Act**, Chapter 80 of the Laws of Kenya. (Also see the cases of **<u>Bukenya & Others -versus- Uganda (1972)EA 549</u>** and **<u>Nguku -versus- Republic (1985)KLR 412).</u>**

21. On sentence I wish to point out that the appellant was sentenced to the minimum prescribed sentence under **Section 8(3)** of the Sexual Offences Act. The 20-year prison sentence remains legal.

22. As I find no reason to disturb both the conviction and sentence, the decision of the trial court is hereby affirmed and the appeal dismissed accordingly.

DELIVERED, DATED and **SIGNED** at **MIGORI** this **23rd** day of **January** 2017.

A. C. MRIMA

<u>JUDGE</u>