



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 61 OF 2015

GEORGE FRED OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. P. K. Rugut, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 419 of 2014 delivered on 15/06/2015)

JUDGMENT

1. The complainant in this matter, V.A.O. is a young girl who lived with her grandparents upon the demise of her father and the subsequent relocation of her mother. The grandparents were hence her guardians and they stayed at Mariwa village in Awendo Sub-County within Migori County. The appellant herein, **GEORGE FRED OMONDI**, was the complainant's neighbour and well known to both the complainant and the complainant's grandparents.
2. On the 25/10/2014 at around 07:00pm, the complainant was sent by her grandfather to buy some cooking oil at the local shops. She obliged. On returning home, the complainant was again sent back to the shops by her grandfather to buy a matchbox, but she never came back as expected.
3. As time passed by, the complainant's grandmother grew impatient and went to the shops to look for the complainant. She however learnt that the complainant had been to the shops twice and had not returned. That was around 08:00pm. Sensing that all was not well, the complainant's grandmother began searching for the complainant within the neighbourhood. She went into each house whose occupant was there and so continued up to around 01:00am without any success. She then returned to her home indeed so worried, tired and dejected.
4. After a short while, the complainant's grandmother heard a knock at the door and on opening she saw the complainant. She promptly asked her where she had been. The complainant told her grandmother that she had slept in the kitchen, an explanation which the grandmother flatly rejected and pressed on for a full disclosure of the complainant's whereabouts. The complainant then said that she had been under the mango tree behind the kitchen and again the grandmother rejected the response and picked a stick ready to beat her. The complainant then decided to disclose the truth amid fears since she had been threatened against any disclosure.
5. The complainant stated that as she was on her way home from the shops for the second time she met one of their neighbours whom she knew as Baba O standing under an avocado tree which was near their house. The said Baba O called her and the complainant went to where he was. Baba O then told the complainant that he wanted to give her money which was inside his house and asked the complainant to

follow him into the house which was just nearby. The complainant did so and on reaching at Baba O's house she noted that the door to the house had been locked using a padlock. However Baba O did not remove the padlock instead he opened the window and first entered inside and then pulled the complainant inside through the window as well. It therefore followed that whoever passed outside that house would readily know that the occupant(s) are away. On so saying, the complainant's grandmother recalled having not looked for the complainant in Baba O's house as the house was locked from outside.

6. The complainant stated further that as she was inside the house, she was not given the money as earlier on told instead Baba O asked her to sleep on his bed which she did. Baba O then removed his trousers and shirt and told her to remove her yellow/black dress which she also did, but not the underpant. As the complainant lay naked on the bed, Baba O removed her underpant and then lay on top of her stomach. He removed his penis and inserted it into her vagina as he threatened to strangle her if she raised alarm. As Baba O had sex with the complainant, they heard the complainant's grandmother asking the neighbours if they had seen the complainant, but she was warned not to respond and she so did not.

7. It was the complainant's further testimony that when Baba O had finished with her he let her out of the house and she went home where she knocked the door to their house and her grandmother opened it.

8. The disclosure made the complainant's grandmother seek the assistance of their neighbours. She went and woke up Baba A and Baba N and informed them of what had happened to the complainant. They then proceeded to Baba O's house where they knocked the door as they called his name out. Baba O refused to open the door but on sensing that the people were persistent and that other neighbours were gathering, he eventually opened the door. On being asked of what he had done to the complainant, he knew nothing about it and asked to be taken to the police instead. He was then led to the local Mariwa AP Post in a convoy of three motor cycles by the members of public as well as the complainant and her grandmother.

9. Baba O was re-arrested by No. 232617 APC Edward Kiptoo Cherop at the Post. He was in the company of APC Kevin Kasmir. That was around 02:00am on 26/010/2014. The complainant was then referred to the nearby Mariwa Health Centre where she was examined and treated and returned to the police post. On receiving the treatment notes, the administration police officers decided to take Baba O to Awendo Police Station using the motor cycles. As they were heading to the said police station and as the motor cycle that carried Baba O and APC Edward Kiptoo Cherop slowed down near some bumps, Baba O jumped off the motor cycle and began running away. APC Edward Kiptoo Cherop gave chase and managed to arrest him. They then walked to the station where they reached at around 10:00am and Baba O was handed over to the regular police.

10. As investigations were commenced by No. 55472 PC Reuben Guya both Baba O as well as the complainant were then led to the Awendo Sub-District Hospital where they were both examined and treated as need arose. P3 Forms for both were also filled. The real names of Baba O came out as George Fred Omondi, the appellant herein, and the police also obtained a Dedication Certificate for the complainant which indicated that the complainant was born on 03/09/2005.

11. **GEORGE FRED OMONDI** was then arraigned before court and faced the offence of defilement contrary to **Section 8(1)(2)** 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.

12. The prosecution rallied five witnesses in a bid to prove its case. The complainant testified as **PW1** whereas the complainant's grandmother testified as **PW2** and also produced the complainant's Dedication Certificate as an exhibit. **PW3** was the administration police officer who arrested the appellant at Mariwa AP Post and handed him over to the officers at Awendo Police Station. **PW4** was a Clinical Officer from Awendo District Hospital who produced all the treatment notes and the P3 Forms and confirmed that indeed the complainant had been defiled. The investigating officer testified as **PW5**.

13. At the close of the prosecution's case, the trial court placed the appellant on his defence and the appellant opted for and gave unsworn testimony where he denied any involvement in the commission of

any of the alleged offences and briefly stated that as he was asleep he was woken up by many people who were armed and took him to the police even without telling him what he had done. The appellant did not call any witnesses. The State then filed its written submissions.

14. By a judgment rendered on 15/06/2015 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to life imprisonment.

15. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal with the leave of this Court. He filed the Petition of Appeal on 31/07/2015 where he raised the following four grounds:

1. THAT I pleaded not guilty to the charge in question

2. THAT the trial magistrate erred in both law and facts by shifting the burden of proof in the circumstances to the accused.

3. THAT the trial magistrate erred in both law and facts by meeting out a sentence which was excessive in the circumstances.

4. THAT the trial magistrate erred in both law and facts by failing to consider the mitigating circumstances and other options while sentencing the appellant.

16. At the hearing of the appeal the appellant appeared in person and filed supplementary grounds of appeal as well as written submissions. The two supplementary grounds challenged the age of the complainant and that the appellant was not accorded a fair hearing. The appellant relied on the written submissions wherein he expounded on the grounds of appeal and further challenged the record that many of the questions he asked the complainant were not recorded. The State opposed the appeal and relied on the record in urging this Court to dismiss the appeal. This judgment is therefore the outcome of the appeal.

17. 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.

18. 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.

19. 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:

20. From the record no Certificate of Birth or an Age Assessment Report were produced in proof of the age of the complainant. The prosecution relied on the **Dedication Certificate** from the Full Gospel Churches of Kenya Nduga Local Church Assembly which was produced as exhibit 3 as well as the evidence of PW2. The document referred to the complainant. The said exhibit states that the complainant was born on 03/09/2005 and that places her age at 9 years 11 months old at the time of the commission of the alleged offence.

21. But was **exhibit 3** admissible evidence in so far as determining the age of the complainant is concerned more so in the absence of a Certificate of Birth or Age Assessment Report? 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**.

22. In this case I have no hesitation in finding that the **Dedication Certificate** produced as exhibit 3 falls under the category of '**any other similar document**' under Rule 4 aforesaid and that the same is in proof of the complainant's age. If one is still in doubt, there is the evidence contained in the **P3 Form** at **page 3** where the age of the complainant was approximated as 9 years by the Medical Officer who filled in the same.

23. I therefore find that the complainant was born on 03/09/2005 and as such she was about **9 years 11 months old** when the offence was allegedly committed on 25/10/2014. The complainant was hence a minor of tender years within the meaning of the law.

(b) On the issue of penetration:

24. **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).

25. 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.”

26. This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

27. This Court has on several occasions reiterated the fundamental importance of the ingredient of penetration in sexual offences. It remains that the ingredient of penetration is so crucial in such cases such that without its proof no such offences are disclosed.

28. In dealing with this issue I will revert to the record, When the complainant gave her sworn testimony after a *voir dire* examination she stated as follows:

“...I recall on 25/10/14 I had been sent.....

.....he then asked me to sleep on his bed. I slept on his bed.....He removed his trousers and shirt. I removed my dress. He then did bad manners on me. He lay on top of me, he slept on my stomach. I had my pant, the accused person removed it. He then removed his penis and inserted it where I urinate from....told me if I raised alarm he would strangle me,.....”

During cross-examination by the appellant, the complainant stated that:

“..My stomach and my private parts were aching. I sat on the motor cycle on my way to Awendo

but I was in so much pain....."

29. PW2 who had the guardianship over the complainant interrogated her on her return to the house and stated as follows on cross-examination:

"...The child told me you were not inserting your penis directly and each time she cried you would withdraw it and put it back.....the child narrated the ordeal to me"

30. The complainant was first taken to the Mariwa Health Centre and then to Awendo Sub-District Hospital where she was examined and treated. PW4 also examined the complainant and filed in the P3 Forms. From the medical evidence on record and the testimony of PW4, on examination of the complainant's vagina it was confirmed that the complainant's hymen was broken and both the labia the *labia majora* and *labia minora* were reddened and painful on touch. There was also the presence of the epithelial cells although no sperm cells were seen. PW4 confirmed that the complainant had been defiled. The findings by PW4 therefore corroborated the evidence of the complainant and PW2.

31. On an evaluation of the evidence of the complainant, PW2 and PW4 as well as the contents of the P3 Forms and all the other medical notes on record, this Court is satisfied that there was penile penetration into the complainant's vagina. Penetration was hence proved.

c) On whether the appellant was the perpetrator:

32. The appellant vehemently denied any involvement in the alleged offence. It is not in dispute that the complainant and PW2 knew the appellant well as their neighbour. Although the appellant denied knowing the complainant, the complainant stated that she knew the appellant as their neighbour and was known as Baba O and even went ahead and identified him in court. PW2 also confirmed that the appellant was known as Baba O.

33. I have carefully gone through the proceedings as well as the judgment. I have no doubt but to concur with the trial court 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 readily gave the appellant's name to PW2 and even described where the appellant's house was, what it was made of and what was inside the house. It is also in evidence that when the complainant and the appellant entered into the appellant's house the appellant lit the tin lamp which he later on put off. The complainant also narrated the ordeal to PW2. From the record it is also not far-fetched that the appellant and the complainant spent quite some considerable time together since the complainant left her home at around 07:30 pm and returned past midnight and there is no indication that the complainant was at any other place apart from being with the appellant.

34. I have taken into account the caution in dealing with identification of suspects especially at night. To that end I have been guided by the cases of **Wamunga Vs Republic (1989) KLR 426**, **Nzaro vs Republic (1991) KAR 212**, **Kiarie vs Republic (1984) KLR 739**, **R -vs- Turnbull & Others (1973) 3 ALL ER 549** among many others.

35. Further the Court of Appeal in the case of **Simiyu & Another vs. Republic (2005) 1 KLR 192** re-emphasized that there can be no better way of recognizing someone you know than by giving the name.

36. From the totality of the evidence and the law, I am not in agreement with the appellant that he knew nothing about the charges he faced. I am indeed satisfied that the recognition of the appellant as the assailant by the complainant was free from error.

37. This Court is also not in agreement with the appellant that the trial court shifted the burden of proof. I have read the judgment and I find that the argument lacks merit. On an equal footing, I do not find the contentions that the appellant was not granted a fair hearing and that the record did not capture the true proceedings especially only when the complainant's was cross-examined as merited.

38. On sentence and mitigations, I wish to point out that the appellant was sentenced to the only prescribed sentence under **Section 8(2)** of the Sexual Offences Act. The life sentence hence remains legal.

39. The upshot is that the appeal is unmerited and is hereby dismissed.

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

A. C. MRIMA

JUDGE