



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 39 OF 2016

SAITON OTIENO OKUMU.....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. 413 of 2014 delivered on 31/08/2016)

JUDGMENT

1. The Appellant herein, **SAITON OTIENO OKUMU** 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 the 14th day of September 2014 at [particulars withheld]village in Migori County within the Republic of Kenya, intentionally caused his penis to penetrate the vagina of W. A. O. 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 six witnesses. The minor testified as **PW1** (hereinafter referred to as '**the complainant**') whereas **CA**, the minor's Aunt and a sister-in-law to the complainant's father testified as **PW2**. **PW3** was one **POO** who was also an Aunt to the complainant and a sister-in-law to the complainant's father. The complainant's father one **WOO** testified as **PW4** whereas **Simon Otieno Ochieng** one of **PW3**'s workers testified as **PW5** and **PW6** was a Clinical Officer from Awendo Sub-County Hospital. 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 otherwise stated.
5. It was the prosecution's case that on 14/09/2014 **PW3** was unwell. **PW3** then called **PW4** and requested him to allow the complainant to go to her home and assist her in some chores. **PW4** readily agreed and dispatched the complainant. The complainant safely arrived at **PW3**'s home which was situated at Angaga area at around 07:00pm and found **PW3** truly unwell. The complainant then undertook various chores as she was directed by **PW3**. The complainant also met one of the **PW3**'s male workers at home whom **PW3** asked him to assist the complainant in showing her around.
6. At one point **PW3** asked the complainant to prepare the evening *ugali* meal for the family and told the

male worker to fetch firewood for her. PW3 remained inside her house throughout due to the illness. As the complainant had put the water in the fire in the kitchen which was outside the main house wherein PW3 was, the worker instead of getting the firewood as directed by PW3 asked the complainant to accompany him so that she could also know where the firewood was usually kept. The two proceeded to the rear of the kitchen house. There was a chicken house which was about 10 metres from the kitchen. As the two were then behind the kitchen, the worker, who held a panga in his right hand, in a surprise turn of events showed the panga to the complainant and dared to cut her if she raised alarm. The worker then hurriedly undressed the complainant by removing her underpant and he also undressed by removing his trousers. The worker then inserted his penis into the place which the complainant uses for urination. Blood immediately oozed out and ran down the complainant's thighs.

7. The worker then took the complainant to the veranda which connected the kitchen and the chicken pen. The complainant then slowly moved to the main house where PW3 was and laid on a sofa set. The main house was well lit with fluorescent lamps but the light in the kitchen was off. The complainant still noted that blood was continuously oozing out but she did not raise the matter with PW3 instead she told PW3 that she was unwell. PW3 gave her a jacket to put on as she felt cold.

8. As the complainant was sleeping on the sofa set in the main house the worker then appeared and on seeing the complainant he told her to sleep in one of the rooms and that he would take her to hospital the following morning. Before the complainant retired to bed the worker in a bid to conceal what he had done to the complainant treated the complainant so well. He gave her a cup of water which she drunk and even washed her private parts with water which he had put in a black basin. He also asked the complainant to instead sit near the fire so that she would feel warm. He further wiped the blood which was on the sofa set as well as on the floor and pleaded with the complainant not to disclose what had happened. The complainant however did not take supper that day but went to bed early. She however remained awake the whole night for fear of such repeated attacks.

9. The complainant woke up very early the following morning and visited the toilet. She noted that blood was still flowing and informed PW3 about the blood. PW3 however thought that the complainant was in her menses. PW3 confirmed to have seen some blood in the toilet when she later on visited. The complainant then looked sick and PW3 asked her why wondering how come that the one who had gone to assist her also fell sick. The complainant felt so tired and her legs were weak. Dressed in her school uniform the complainant however managed to leave PW3's place and proceeded back home.

10. On arrival at her home the complainant went to PW2's house. PW2 readily realized that all was not well with the complainant as she noticed that she was bleeding. On enquiry the complainant lied that she had fallen down but upon insistence she disclosed her ordeal in the hands of the PW3's worker. PW2 rushed and informed PW4 and both returned to see the complainant lying on the grass outside PW2's house. PW4 called for an ambulance which took the complainant to Awendo Sub-District Hospital where the complainant was admitted for 3 days.

11. When PW4 had taken the complainant to the hospital he proceeded to PW3's home to enquire on what had actually happened. PW3 was so shocked and revealed her strange experiences with the complainant the night before. The PW3's worker, who used to share a house with his fellow co-worker PW5, had however left PW3's home very early that morning and never returned to work. PW4 then reported the matter to the Awendo Police Station. PW4 produced the complainant's Certificate of Birth in evidence. PW4 was present when the PW3's worker was arrested in the night of 11/10/2014 at Kanyamkago.

12. PW3's worker was subsequently arraigned and charged in court. He was positively identified by the complainant, PW3 and PW5 as the PW3's worker which the complainant had encountered on 14/09/2014.

13. PW6 produced a P3 Form which had been filled by his colleague as an exhibit and confirmed that the complainant had truly been badly defiled.

14. 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 and denied any involvement in the commission of any of the

alleged offences. To him the alleged offences were false and were meant to force him settle a civil matter. He stated that he had visited his sister at Angaga area and took his phone for charging in a home of a certain lady. When he returned for his phone after 2 days later the woman instead alleged that the appellant had stolen her Kshs. 10,000/=. Two weeks later the appellant was arrested by the police and was placed in custody and was forced to instead repay the said woman Kshs. 15,000/= but told them that he had no money. He only became aware of the current offences 2 days thereafter.

15. By a judgment rendered on 31/08/2016 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 20 years imprisonment.

16. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal by filing the Petition of Appeal on 13/09/2016 and challenged the conviction and sentence on four grounds.

17. At the hearing of the appeal the appellant appeared in person and filed six more supplementary grounds of appeal which he expounded in his written submissions. For clarity purposes I will reproduce the supplementary grounds of appeal:

1.THAT the trial court erred in law and facts by convicting the appellant on a case which the appellant was denied the statements that the prosecution was to relied upon.

2.THAT the trial court erred in law and facts by convicting on illegal and defective proceedings which was not taken in a lawful way.

3.THAT the trial court erred in law when convicted the appellant on the proceeding that Section 211 (1) of Criminal Procedure Code was not complied with.

4.THAT the trial court erred in law and in facts by not appreciating my defense which was material fact, highlighting the cause of allegation.

5.THAT the trial court also erred in law by convicting the appellant on a charge which was not explained clearly to the appellant.

6.THAT the appellant was convicted on non -investigated case.”

18. The State through Learned State Counsel Mr. Okaka vehemently opposed the appeal and took the Court through the record in urging that the appeal ought to be dismissed.

19. 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.

20. 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 with all the decisions referred to therein.

21. 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:

22. There was no contestation on the age of the complainant. The prosecution produced the complainant's Certificate of Birth which indicated that the complainant was born on 28/09/1999 and as such she was only two weeks to her fifteenth birthday; that is she was **14 years 11 months 2 weeks 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:

23. **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).

24. 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."

25. 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:

"....he had a panga.....he told me if I screamed, he would cut me with the panga.....he then removed my pant, and he then took his penis and inserted it in me. He undressed me.....he removed his trousers and inserted his penis where I normally urinate from he then did bad manners to me, I saw blood coming from my private parts where I urinate flowing to my thighs,...."

26. PW2 who lived with the complainant in the same homestead interrogated her on her return to the home on seeing that she was bleeding from her private parts. That led to the disclosure on what had actually happened. PW3 also confirmed that she noted that the complainant had a sudden change claiming it on a headache and that in the morning of 15/09/2014 the complainant told her that she was bleeding from her private parts and that her lower abdomen was painful. PW3 however thought that the complainant was in her menses. PW3 indeed saw blood in the toilet after the complainant had visited.

27. The complainant was then taken to the Awendo Sub-County Hospital where she was admitted for 3 days. She was also examined and treated. A Dr. Omire Godfrey examined the complainant and filled in the P3 Form which was produced in evidence by PW6. I have carefully perused the P3 Form which indicates that upon examination of the complainant's private parts it was revealed that the hymen had been ruptured. There were also multiple longitudinal lacerations in the vaginal wall which were still actively bleeding. It was confirmed that there had been a penile penetration into the complainant's vagina.

28. From the medical evidence on record and on an evaluation of the evidence of the complainant, PW2, PW3, PW4 and PW6 as well as the contents of the P3 Form, 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:

29. Although the appellant vehemently denied any involvement in the alleged offence and in his sworn

defence contended that he was being framed up for failing to pay Kshs. 15,000/= he had been said to have stolen, 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 examination-in-chief. In both instances she was clear that it was the appellant who had forced her into a sexual act. Although the complainant had only seen the appellant that day for the first time, it was confirmed beyond any doubt that the appellant was indeed a co-worker with PW5 at the PW3's home and that the appellant had been at work on 14/09/2014 until the morning of 15/09/2014 when he disappeared. This Court therefore rejects the appellant's contention that he did not know PW3 and PW5.

30. The complainant also spent some time with the appellant. It was the appellant who assisted her in the chores albeit briefly before the attack, After the incident the complainant had yet another opportunity to see the appellant who attended to her so closely. This time round it was inside the main house where there was bright light from a fluorescent tube. The appellant gave her some water to drink. He also took and washed the complainant. He talked to her severally from issuing threats to pleading with her not to disclose what had happened. The complainant also witnessed the appellant endeavoring to conceal the sexual act by cleaning the blood from the sofa set, from the floor and also from the seat which the complainant had used near the fire. Further the complainant remained clear although that it was one of the PW3's workers who had sex with her. The complainant also ruled out the possibility of PW5 being the culprit by being very categorical that PW5 only came to PW3's home after the appellant had already forcefully had sex with her. The complainant also firmly reiterated in court on several instances that it was the appellant who was the assailant and identified him as well before court.

31. This Court is aware of the caution it is legally obliged to take in cases of identification of suspects especially in difficult situations like night times. (See 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 others). Taking such caution into account and in view of the evidence and the circumstances of this particular case on one hand and the appellant's defence on the other hand, I am fully convinced that the complainant was the one who was at the PW3's home on the material day with the complainant and that the complainant had ample time to identify the appellant and that the appellant's identification, even without the aid of an identification parade, was free from error,

32. The above finding is further anchored in the fact that the trial court also had an opportunity and noted the demeanor of the witnesses and 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 trial court relied on **Section 124 of the Evidence Act**, Chapter 80 of the Laws of Kenya as well as the Court of Appeal decision of **Mohammed vs. R** in fortifying its findings.

On the other grounds raised by the appellant:

33. On the contention that the appellant was not provided with the witness statements, I find the appellant not to be truthful. I say so because the record does not support the appellant's allegation. The trial court, as so required in law, directed that the appellant be provided with the witness statements. That was at the plea stage on 17/10/2014. On 20/01/2015 when the case had been set for hearing the appellant informed the court that he was not ready to proceed as he had not been provided with the statements. The case was adjourned and the prosecution was called upon to act accordingly. The appellant then did not raise the issue of the statements again when the case subsequently came up for hearing. That therefore means the matter was properly resolved and the appellant had no complaint. The appellant cannot hence be heard to mischievously and erroneously raise the issue at this point in time. That ground fails.

34. As to whether the proceedings were defective as the trial court used abbreviations at the plea stage, this Court partly agrees and partly disagrees with the appellant. Whereas it is correctly pointed out that it is not proper for a court to use abbreviations in its proceedings, it is to be noted that the charges were read out to the appellant and the appellant denied them and the trial court rightly entered pleas of not guilty in respect to both counts and the matter proceeded for full hearing. The single use of the abbreviations **CRO & E** although wrong is therefore curable under **Section 382 of the Criminal Procedure Code** Chapter 75

of the Laws of Kenya since the appellant did not suffer any miscarriage of justice.

35. The record is also clear that when the appellant was placed on his defence, the trial court complied with **Section 211(2)** of the **Criminal Procedure Code** and the appellant opted to be sworn without calling any witnesses. I agree with the appellant that the trial court only referred to **Section 211(2)** of the **Criminal Procedure Code** and not **Section 211(1)** of the **Criminal Procedure Code**. However a look at the wording of **Section 211(2)** of the **Criminal Procedure Code** shows that the same is a continuation from **Section 211(1)**. I say so because **Section 211(1)** deals with the options available to an accused person who has been found to have a case to answer whereas **Section 211(2)** deals with compelling of the witnesses which the accused person would have otherwise wished them to attend court. In other words it is not reasonably logical to comply with **Section 211(2)** without satisfying the requirements of **Section 211(1)**. The foregone holding is clearly confirmed by the record which indicates that after the court complied with **Section 211(2)** the appellant opted to be sworn. In any event, that irregularity is again curable under **Section 382** of the **Criminal Procedure Code** Chapter 75 of the Laws of Kenya since the appellant did not suffer any miscarriage of justice. The contention that the irregularity renders the conviction incurably defective is therefore misplaced and is for rejection.

36. The appellant also argued that the case was not investigated at all as the investigating officer did not testify in court. I wish to state from the outset that investigating a case is completely different from the investigating officer attending court to testify. An investigator may diligently carry out the duties required but, for many reasons, may not tender the testimony before court. In this case I find no merit in the argument that since the investigator did not testify then the case was not proved. The evidence tendered before the court was enough to find a conviction even without the evidence of the investigator. Infact the investigator's evidence in this case would have not aided the case any further in view of the evidence of the witnesses then rendered. That is why **Section 143** of the **Evidence Act**, Chapter 80 of the Laws of Kenya gives the prosecutor the discretion to chose the witnesses to testify. (Also see the cases of **Bukenya & Others -versus- Uganda (1972)EA 549** and **Nguku -versus- Republic (1985)KLR 412**).

37. On sentence, as the complainant was aged 14 years old, 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.

39. Since there is 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 24th day of January 2017.

A. C. MRIMA

JUDGE