



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 59 OF 2016

LAWRENCE TOBIAS ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C.K. Kamau, Resident Magistrate in Rongo Senior Resident Magistrate's Court Criminal Case No. 410 of 2016 delivered on 16/11/2016)

JUDGMENT

1. The Appellant herein, **LAWRENCE TOBIAS ODHIAMBO**, was charged with 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.
2. The particulars of the offence of defilement were that on 23rd day of June 2016 within Migori County within the Republic of Kenya, intentionally caused his penis to penetrate the female genitalia of I. A. O. a child aged 5 years old.
3. The appellant was subsequently tried and convicted on the main count of defilement and sentenced.
4. The prosecution called seven witnesses. The minor testified as **PW3** (hereinafter referred to as '**the complainant**') whereas **MAO**, the minor's mother testified as **PW1**. **JOO**, the minor's father testified as **PW2**. He was then an Inspector of Police attached to Nyatike Police Station. **PW5** was a Clinical Officer from Rongo Sub-County Hospital. **PW4** was **No. 96067173 AP Corp. Paul Korir** from Rakwaro AP Post and **PW7** was **No. 218442 AP S/Sgt. James Bereti** from Rakwaro AP Post and the investigating officer one **No. 101970 PC Dora Mado** from Kamagambo Police Station testified as **PW6**. 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 PW1 and PW2 had employed the appellant on 22/06/2016 as their shamba boy. On 23/06/2016 at around 02:00pm PW1 left the complainant at their home playing with her younger sister under a tree as she went to the complainant's school. PW1 also left behind their new employee, the appellant, in their home. PW2 was then at work. As soon as PW1 left home aforesaid the appellant approached the complainant and her sister and gave them sweets and told them to go and sleep, but they declined. The appellant then got hold of the hand of the complainant and forcefully pulled her into one of the houses within the homestead as he locked the complainant's sister in another house. The appellant then took the complainant and placed her on the bed which was in the house. He removed the complainant's underpants as he also removed his pair of trousers. The appellant then treated the complainant to another sweet. The appellant went ahead and touched the complainant's genitalia and then slowly inserted his penis into her vagina and had sexual intercourse with her. As the act was painful to the complainant, she cried and asked the appellant to leave her alone but he would not. As the act went on PW2, who had just arrived at home with PW1, called out the complainant's name from outside the house and he immediately entered into the house. PW2 got the complainant and the appellant naked on the bed inside the house. The appellant got out of the bed and was trying to dress up while his penis was fully erected. PW2 arrested their day's old employee, the appellant and he told the complainant to go to her mother, PW1.
6. PW2 called PW7 who came to his homestead with PW4 and re-arrested the appellant and took him to Kamagambo Police Station. As PW2 was organizing for the re-arrest of the appellant, PW1 hurried with the complainant to Kamagambo Police Station where they were later on escorted to Rongo District Hospital for examination and treatment. PW5 attended to the complainant at the hospital around four hours after the act and confirmed that her hymen had just been ruptured and that she had indeed been defiled. On completion of the investigations PW6 preferred the charges against the appellant.
7. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant opted to remain silent.
8. By a judgment rendered on 16/11/2016 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to life imprisonment.

9. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal by filing the Petition of Appeal on 01/12/2016 and challenged the conviction and sentence on mainly three grounds.

10. At the hearing of the appeal the appellant appeared in person and relied on his hand written submissions which he expounded the grounds of appeal. For ease of clarity I will reproduce the grounds of appeal as follows:

1. That the trial court erred in law by failing to arrive at finding that this was a planted case by the accused's employee to dismiss the accused person from his employment.

2. That the trial court erred in law by failing to consider the importance of comprehensive medical evidence that could shade light thereto.

3. That the trial court erred in law when relied on non-authentic medical report to prove penetration.”

11. The State through Learned State Counsel Miss Owenga vehemently opposed the appeal and relied on the evidence on record.

12. 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.

13. 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.

14. 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:

15. The age of the complainant was settled by the Certificate of Birth No. 896192 which was produced as an exhibit. It indicated that the complainant was born on 26/07/2010 and as such the complainant was aged around 5 years old at the date of the alleged act. The complainant was hence a child of tender years within the meaning of the law.

(b) On the issue of penetration:

16. **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).

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. In dealing with this issue I will revert to the record. When the complainant gave her unsworn testimony she stated exactly what the appellant did to her from the time the appellant gave her a sweet as she was playing with her sister under a tree until when PW2 rescued her. She clearly stated that, while in the house, the appellant undressed her, touched her genitalia and while also undressed, inserted his penis into her vagina and they had sex.

19. The complainant was then taken to the Rongo District Hospital where she was examined and treated. PW5 examined the complainant and filled in the P3 Form together with a Post Rape Care Form which she produced in evidence. I have carefully perused the P3 Form and the Post Rape Care Form which indicate that upon examination of the complainant's private parts it was revealed that the hymen had been recently ruptured and that there were visible tender vaginal tears on the *labia minora*. Some motile sperm cells were also seen. It was confirmed that there had been a penile penetration into the complainant's vagina.

20. From the medical evidence on record and on an evaluation of the evidence of the complainant, PW1, PW2 and PW5 as well as the

contents of the P3 Form and the Post Rape Care 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:

21. The appellant denied any involvement in the alleged offence and opted to remain silent when he was placed on his defence.

22. I have re-evaluated the prosecution's evidence with care and caution. Having noted that the trial court which had an opportunity and to hear and see the demeanor of the witnesses formed an opinion in its judgment that the complainant was consistent and truthful, I have no reason to depart from that finding. Indeed that finding is clearly supported by the evidence. 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 whom she had sex with.

23. I therefore find that there is adequate evidence in proof that the appellant was the one who had sex with the complainant. He was therefore rightly found guilty of defilement as charged and convicted.

24. Since the life sentence handed down to the appellant is the only sentence provided in law and given that 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 14th day of March 2017.

A. C. MRIMA

JUDGE