



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 01 OF 2017

MOHAMMED SALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. Z.J. Nyakundi, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 273 of 2013 delivered on 14/04/2014)

JUDGMENT

1. The Appellant herein, **MOHAMMED SALIM** was charged with the offence of defilement contrary to **Section 8(1)(4)** 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 night of 6th and 7th July 2013 at [particulars withheld] Area within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of G.D.A. a child aged 16 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 **C A O**, the minor's mother testified as **PW2**. **PW3** was a Clinical Officer from Rongo District Hospital and the investigating officer one **No. 77327 Corp. Hellen Nyaga** testified as **PW4**. 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. The prosecution's case was fairly straight-forward. The complainant, then a Form Four student at St. [particulars withheld], had returned home for a mid-term break in early July 2013. On 03/07/2013 when the complainant had returned to their home from Kisii town with PW2, she asked PW2 for permission to go to Rongo Shopping Centre and return later. The complainant was so allowed and indeed she was given some money. She proceeded to Rongo town where she met the appellant whom she had met the previous day and they had agreed to again meet on that day. The two who had been lovers since 2009 then proceeded to the appellant's home on the way to Homa Bay where the complainant was locked inside a house by the appellant until she agreed to marry him on 07/07/2013. The complainant remained in the appellant's home from the 03/07/2013 up to 07/07/2013 since the appellant used to lock the complainant inside the room every morning he left his home until his return later in the evening. During that period the appellant's siblings also used to ask the complainant to agree to be married by the appellant so that she could secure her freedom. Although the appellant and the complainant did not share a room they nevertheless engaged in a sexual intercourse in the night of 06/07/2013 when they slept together. The complainant stated that she had however engaged in such sexual acts with the appellant since she was in Standard 7, that was in 2009.
6. PW2 was very concerned that the complainant did not return home and tried to reach her by phone but the same was always offline. On 07/07/2013 the complainant sent an SMS to PW2 that she was so sorry for not returning home for a couple of days. PW2 asked her by a return SMS to go back home and attempted to call her, but the complainant's phone was again immediately offline. PW2 kept on praying for her daughter's safe return until the evening of 07/07/2013 when the complainant returned home.
7. Shortly after the return of the complainant, a neighbour to PW2 one Baba Faith (not a witness) came into PW2's house and informed PW2 that the appellant wanted to see her. By that time the appellant used to stay in the servant quarters whereas PW2 and her family used to stay in the main house. PW2 then knew the appellant too well given that around 4 years back the appellant had abducted the complainant and took her to some island bordering Uganda before her rescue. PW2 then locked the door of the house where the appellant was in from outside and called the police. The appellant was later on arrested and escorted to Kamagambo Police Station.
8. PW2 and the complainant went to the police station the following morning where the complainant was interrogated by the police and later

on taken to Rongo District Hospital for tests and treatment. Upon examination of the complainant's private parts by PW3 it was revealed that the complainant had lost her virginity although it was not recently. There was no evidence of any sperms or any recently infected sexually transmitted diseases or pregnancy. The treatment notes and the P3 Form were produced as exhibits. The appellant was later on charged accordingly.

9. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant opted to and gave a sworn defence and denied any involvement in the commission of any of the alleged offences. He contended that he had given Kshs. 45,000/= to PW2 in 2010 when the appellant was aged 19 years old being his then earnings from selling sand. The reason why the appellant gave the money to PW2 was that PW2 was a neighbour to the appellant's grandmother who used to stay with the appellant and that the money was for safe custody since the appellant had intended to pursue a certain course thereafter. The appellant was arrested as he had gone to ask for the said money and the charges were planted on him.

10. By a judgment rendered on 14/04/2014 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 15 years imprisonment.

11. Being dissatisfied with the conviction and sentence, the appellant prayed for leave to appeal out of time vide Migori High Court Misc. Criminal Application No. 11 of 2016 which leave was granted on 16/01/2017. The appellant then lodged the Petition of Appeal on 19/01/2017 and challenged the conviction and sentence on mainly four grounds namely: -

1. That I pleaded not guilty to the offence

2. That the trial magistrate erred in law and facts to convict me on the basis of defilement whereas there was no supportive evidence from the medical evidence as there was no penetration and no spermatozoa were found in the vaginal.

3. That the trial magistrate erroneously convicted me by claiming that the victim knew me whereas no such evidence was adduced in court hence the findings were insufficient in law.

4. That my defence was erroneously rejected without giving cogent reasons whereas this matter was instigated by PW2 due to debt hence liaised with the police to fabricate this charge against me to suit their whims.

12. At the hearing of the appeal the appellant appeared in person and filed written submissions where he in effect challenged the complainant's behaviors that portrayed her as an adult who could leave her home to the appellant's home for sexual pleasure and wondered why she was not impregnated since 2009.

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

14. 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.

15. 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.

16. 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:

17. The age of the complainant was settled by the Certificate of Birth No. [particulars withheld] which indicated that she was born on 12/05/1997. That being so the complainant was then aged 16 years old when the alleged sexual act took place. The complainant was hence a minor within the meaning of the law.

(b) On the issue of penetration:

18. **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).

19. 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."

20. In dealing with this issue I will revert to the record. When the complainant gave her sworn testimony she stated that she had been in a relationship with the appellant since 2009 when the appellant used to stay with his grandmother in the neighbourhood. Since then the two had engaged in sexual intercourse on several instances. She also took the court through what had transpired from the time the complainant left her home on 03/07/2013 until her return on 07/07/2013 all that during all that period she was in the sole custody of the appellant. She as well confirmed that she had severally engaged in sex with the appellant at the appellant's home in the night of 06/07/2013.

21. The complainant was then taken to the Rongo District Hospital where she was examined and treated. PW3 examined the complainant and filled in the P3 Form which she produced in evidence together with the treatment chits. I have carefully perused the P3 Form and the treatment chits which indicates that upon examination of the complainant's private parts it was revealed that the hymen had been ruptured albeit not recently. Although there was no evidence of any sexually transmitted diseases, sperm cells or pregnancy nevertheless to PW3 the complainant had previously engaged in acts of sexual intercourse that led to the rupture of the hymen.

22. From the medical evidence on record and on an evaluation of the evidence of the complainant and PW3 as well as the contents of the P3 Form and from the legal guidance by the various decisions referred to above, 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:

23. Although the appellant vehemently denied any involvement in the alleged offence and in his sworn defence raised an issue of having been framed up to conceal the demand of his KShs. 45,000/= which he had given to PW2, it ought to be noted that the issue was not earlier on raised during the prosecution's case or a basis thereof laid. I will nevertheless weigh the prosecution's evidence in light of that defence.

24. As elsewhere above stated, the complainant took the court through what happened from when she left her home until when she returned. She was all along at the discretion of the appellant. Although the appellant denied ever knowing the complainant he however admitted that he used to live with his grandmother near PW2's home and that he had some dealings with PW2. That aspect of the appellant living with his grandmother was in consonance with the evidence of the complainant. It was again the appellant who was arrested at the homestead of PW2 where he used to live in the servant quarters. The arrest was prompted by the appellant himself who had asked one person to inform PW2 that the appellant wanted to see her. That was immediately the complainant returned home. The complainant confirmed that it was the same appellant whom she had been living with at his home on the way to Homa Bay who was arrested at their homestead.

25. On the issue of the appellant being framed up by PW2 as to conceal his debt, I have considered the casual way that very important issue was handled. Without not seen as shifting the burden of proof, this Court notes that the appellant never examined PW2 or any other witness on the issue at all. The first time that all important issue came up was during the defence hearing. The prosecution was therefore not accorded an opportunity to challenge such serious allegations which if well proved could possibly result to a different decision altogether. That is why this Court respectfully regards that aspect of the defence as an afterthought. The same was therefore rightly rejected by the trial court.

26. This is a case where the only evidence touching on the appellant was by the complainant save the evidence of the arrest by PW2. In such a case my attention has been drawn to the provisions of **Section 124** of the **Evidence Act**, Chapter 80 of the Laws of Kenya which states that:

" 124. Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

27. I have intently looked at the judgment by the trial court. The court observed the demeanors of all the witnesses as they testified. I did not find any adverse notes by the trial court on any of the witnesses in the proceedings as well as in the judgment. The court believed the witnesses and stated that their evidence was candid and truthful. I have also carefully perused the proceedings and cannot fault the trial court on that finding. The complainant was very forthright and consistent on what, where and how it all happened. I therefore find that the trial court complied with the provisions of **Section 124** of the Evidence Act and as required in law.

28. On reaching at the foregoing finding, this Court has warned itself of the dangers of relying on the evidence of a single witness which is uncorroborated. Had the provisions of **Section 124** of the Evidence Act not been complied with I would have as well not relied on the evidence of the complainant. However having satisfied myself otherwise I find that the reliance on the evidence of the complainant was within the law.

29. On placing the prosecution's evidence on one hand and the defence evidence on the other hand, I find that the defence evidence does not cast any reasonable doubt on the prosecution's evidence. Further there is no evidence that the complainant was engaged in any other sexual activity with any other person between the 03/07/2013 and 07/07/2013. I hence find that it was the appellant who was with the complainant for all those days and who had sex with her in the night of 6th and 7th July 2013.

30. There is an issue which the appellant also attempted to bring up in his submissions which is worth a mention. I would say that the appellant wanted to rely on the defence in **Section 8(5)** of the **Sexual Offences Act** that the complainant made him believe that she was an adult. Again such a serious issue cannot be brought up at the submissions stage and on appeal. If the appellant had wanted to mount such a defence the law is very clear on what he ought to have proved in order to properly rely on the said defence. I have not seen any such basis and as such that the submission fails. I wish to however further make an observation that an appellant runs the risk of appearing as inconsistent if on one hand he denies committing any sexual act with a complainant and on the other hand takes the position that he/she was made to believe that the complainant was not a minor when he engaged in the sexual act with her/him. An accused person has to make up his/her mind from inception on the line of the defence he/she intends to take and take full advantage of the law on that defence.

31. Having said so I find that there is adequate evidence in proof that the appellant was guilty of defilement as charged and convicted of.

32. On sentence, as the complainant was aged 16 years old, the appellant was sentenced to the minimum prescribed sentence under **Section 8(4)** of the Sexual Offences Act. The 15-year prison sentence remains legal.

33. 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 14th day of March 2017.

A. C. MRIMA

JUDGE