



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MIGORI**  
**CRIMINAL APPEAL NO. 62 OF 2016**

**J.M.N.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal arising from the conviction and sentence by Hon. P. N. Maina,*

*Principal Magistrate in Kehancha Principal Magistrate's Criminal*

*Case No. 421 of 2016 delivered on 15/12/2016)*

**JUDGMENT**

1. It is usually presumed that one's home is one of the safest places to be. That was not the case in this matter when **J.M.N.**, the appellant herein, was charged with committing a series of sexual acts with his niece whom they were staying in the same homestead between 2015 and 2016. The charge was however defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006 and in the alternative committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. The appellant denied both counts.

2. The particulars of the offence of defilement were that on diverse dates between 2015 and 2016 at [particulars **withheld**] within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of C. M. a child aged 10 years.

3. The appellant was subsequently tried and convicted on the main count of defilement and sentenced.

4. A total of five prosecution witnesses were called. The minor testified as **PW1** (hereinafter referred to as '**the complainant**') whereas the complainant's Deputy head teacher (**A B**) and head teacher (**M A A**) at [particulars **withheld**] School testified as **PW2** and **PW3** respectively. **PW4** was a Clinical Officer from Isebania Sub-County Hospital whereas **PW5** was the investigating officer one **No. 77518 PC Jackson Mutinda**. 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. There was a special announcement at the burial ceremony of a pupil where **PW2** had attended. The pupil who had died was from one of the **PW2**'s neighbouring schools and **PW2** had gone to represent her school at the burial. That was on 19/05/2016. The announcement called for all members of a certain clan to attend a very crucial meeting on the following day where a serious matter was going to be discussed. **PW2** just curiously asked one of the villagers seated next to her about the agenda of the meeting and what

she heard really shocked her; the meeting was to discuss about a girl from PW2's school who was allegedly defiled by her uncle for a long period. The girl was said to be one C.M. who was in class 2. PW2 then recalled PW3 having mentioned to her about such a rumor that had been going on during a previous fundraising meeting where money was being collected to assist in the funeral expenses for the deceased pupil. PW3 followed up the matter but did not get any leads as to take a concrete action. PW2 then purposed to attend that meeting and also so informed PW3.

6. Coincidentally, some students were sent home in the morning of 20/05/2016 to collect some money for activity fees. After a while, one of the students returned to the school crying and PW2 saw her. She called her so as to find out what the issue was. She began interrogating her. The student's name was C.M. and she was in class 2 (the complainant herein). PW2 was shocked as she recalled what she had heard at the funeral the previous day and that the little girl was the victim. What made the girl cry was what she had encountered at her home. On asking her father about the money for the activity fees, her father had told her to go and ask the girl's uncle whom the father referred to as 'the girl's husband'. That response made the girl cry and return to school to seek the assistance of her teachers.

7. PW2 spent time with the minor and gathered that the girl's uncle had actually been defiling her for quite a long time and that one day the girl's father had caught the girl and the uncle engaging in a sexual activity but the father did nothing. The complainant also revealed that her said uncle had been sexually assaulting her and other little girls by luring them into his house with sweets, maandazi and at times some little money. According to the girl, her said uncle's name was one **J. M. N. alias Major**. PW2 then called PW3 and updated her accordingly. PW2 then left for the meeting and PW3 was to join her later on at the meeting. PW2 left the complainant in the hands of PW3. PW3 also took time with the complainant who again reiterated what she had told PW2.

8. The meeting, as scheduled, was on 20/05/2016 at 02:00pm and it was well attended. When the meeting was called to order, the said **J. M. N. alias M** (the appellant) was called to the front of the crowd and the meeting was briefed on the purpose of that day's gathering. When the said appellant was then asked to respond to the matter, he, to PW2's utter shock and surprise, confirmed and even said that he had indeed slept with the girl for over 20 times. He begged for forgiveness and even knelt down. The youths who had attended the meeting were so furious that they wanted to attack the appellant, but were restrained. The elders then delivered their verdict. The appellant was to be punished by the clan for the 'wrongdoing' by *inter alia* being chastised in public and the complainant was to be immediately removed from PW2's school and some rituals were to be conducted in accordance with that clan's traditions. All that was to be done on that day. The elders then asked some members to go and look for the complainant and avail her before the meeting. That was when PW2 intervened and objected to the verdict. She introduced herself and asked the members to let the matter be dealt with in accordance with the law. As the meeting was discussing the matter raised by PW2, PW2 immediately called PW3 and updated her of the decision. PW3 hurriedly rushed the complainant to a rescue center and went to the meeting. As PW3 arrived at the meeting she also saw the appellant on his knees pleading for forgiveness. PW3 then echoed what PW2 had said. The proceedings of the meeting were allegedly video-recorded.

9. Some Administration police officers were called from the Komomwamo AP Post who arrested the appellant and escorted him to Isebania Police Station. PW2 and PW3 then took the complainant to Isebania Police Station that evening. The complainant was taken to hospital on 21/05/2016 where on examination of her private parts it was revealed that her hymen was broken, although not recently, the *labias* were bruised and the cervix was lacerated. PW4 concluded that the complainant had been defiled for a long period. He filled in the P3 Form which he produced it in court as an exhibit together with the treatment notes, an age assessment report and the laboratory results. PW5 proceeded and recorded statements from the witnesses who testified in court and based on the evidence PW5 gathered he preferred the charges against the appellant.

10. 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 stated that he was being framed as he had opposed the position taken by the family that the complainant should go and work in order to raise money for her school fees. He confirmed that he

was indeed an uncle to the complainant. He prayed that the charges be accordingly dropped and called no witnesses.

11. By a judgment rendered on 15/12/2016 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to life imprisonment.

12. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal timeously by filing the Petition of Appeal on 22/12/2016 wherein he challenged the conviction and sentence on the following grounds of appeal: -

*a. That I pleaded not guilty to the charge herein.*

*b. That the trial court erred in both law and facts by failing to consider that the ingredients of the case herein were not proved to required standard.*

*c. That the trial court erred in both law and facts by not observing that the key witnesses did not record statements and testify in court.*

*d. That the trial court erred in both law and facts by coming up into a harsh and excessive sentence on defective charge.*

13. The appeal was heard by way of written submissions where the appellant expounded on the grounds. It was hotly contended that crucial witnesses including the complainant's father, the one who recorded the proceedings, the doctor who assessed the complainant's age and the other children who were as well allegedly defiled were not called to testify. It was also contended that there were contradictions between the testimonies of PW2 and PW3 and that the court erred in relying on the evidence of a single witness. The State through Learned State Counsel Miss Owenga opposed the appeal and prayed that the same be dismissed.

14. The role of this Court as the first appellate Court 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.

**(a) On the age of the complainant:**

17. The age of the complainant was settled by an age assessment report that was produced by PW4. The report had been prepared by PW4's colleagues at Kehancha District Hospital. The production of that report by PW4 was not objected to by the appellant. I have looked at the report and the same has a scientific and medical basis as to how the assessment was done and the age arrived at. From that evidence, the age of the complainant as at the alleged time of commission of the heinous act was rightly settled at 10 years old. The complainant was hence a minor of tender years 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.’***

19. 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).

20. 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.”***

21. In dealing with this issue I will revert to the record. In a sworn testimony, the complainant gave an elaborate and clear account of what transpired between herself and the appellant for that period in issue. She vividly took the court through what had been happening to her inside the appellant’s house whenever the appellant called her inside. She even revealed that at one time her father caught the appellant and herself ready-handed in a sexual activity inside the appellant’s house but to her surprise her father did nothing.

22. Although the acts complained of spanned over a long period, the complainant reiterated what happened in some instances as follows:

***“... I recall one day the accused call me to fetch him water.....he later picked me up. He lifted me and placed me on a table. He then pulled down my skirt. He then used his penis to penetrate my vagina. He later released me and told me not to tell anyone. I however went and told my grandmother. That was the second time he had done that to me.....***

***.....I felt pain whenever the accused did bad things to me. I did not bleed though.....***

***.....On another day the accused sent me to buy him a match box at the shop. On taking the matchbox to him, he held me and placed me on his bed. He then had sex with me. My father then came in and found him on top of me on is bed. Father went back home.....”***

23. What the complainant described above can only fit instances of sexual intercourse between herself and the appellant.

24. When the complainant was taken to the Isebania Sub-County Hospital she was examined and treated. PW4 examined the complainant and filled in the P3 Form and the treatment notes which she produced them in evidence together with the other documents. On examination of the complainant's private parts it was revealed that her hymen was broken, although not recently, the *labias* were bruised and the cervix was lacerated. It was therefore confirmed that the complainant had severally engaged in sexual activities.

25. From the above analysis and on an evaluation of the evidence of the complainant and PW4, this Court is satisfied that there was a penile penetration into the complainant's vagina. Penetration was hence proved.

**c) On whether the appellant was the perpetrator:**

26. The appellant vehemently denied any involvement in the alleged offence and contended that he was

framed up on account of his position that the complainant was not to go and work in order to raise money for her school fees. From the record, the evidence touching on the appellant was truly by a single witness; the complainant.

27. The appellant so expressly admitted that the complainant was his niece; a daughter to his brother, that they lived in the same homestead, that he would normally send her, that the complainant freely used to go into his house to eat and go to school and that there was no way the complainant would mistaken the appellant. The appellant as well admitted that there was a clan meeting that was called to discuss a case on insult and that as he was at the meeting he was wrongly accused of the issue before court.

28. The trial court was then burdened to weigh between the evidence of the complainant on one hand and that of the appellant on the other hand as to whether it was the appellant who was the assailant. As earlier on said, I have perused the judgment of the trial court. The trial court dealt with the above issue in some good length. It referred to the enabling **Section 124** of the **Evidence Act**, Chapter 80 of the Laws of Kenya in laying a basis on the evidence of the single witness. The court went ahead, and rightly so, and warned itself on how to treat such evidence. It also made reference to binding decisions on that aspect as well and on coupling all that with the demeanor of the complainant and the appellant (as well as the other witnesses) the trial court found for the complainant.

29. I have revisited the evidence of all the witnesses on this issue and I cannot but agree with the trial court that it was the appellant who used to severally engage the complainant in sexual encounters. The complainant's evidence is readily believable as opposed to that of the appellant and his defence. The complainant turned out to be a candid, straight-forward and truthful witness worth believing her testimony. She was so consistent and she was not even shaken on cross-examination. She was a reliable witness in the case. I am indeed persuaded that the appellant's defence did not cast any reasonable doubt on the prosecution's evidence to warrant any interference. The appellant was hence so properly placed as the perpetrator.

30. This Court therefore finds that the appellant was the one who severally had sex with the complainant and as alleged by the prosecution.

31. As to the witnesses who did not testify before the trial court, the court handled that aspect so well. It rightly made reference to **Section 143** of the Evidence Act which gives room to the prosecution to call any number of witnesses it so wishes in proof of any fact. However, if the prosecution fails to call very crucial witnesses in a trial without any justification, then the inference that had the witnesses been called their evidence was likely to have been adverse to the prosecution is usually made. (**See: Bukenya & Others -versus- Uganda (1972)EA 549 and Nguku -versus- Republic (1985)KLR 412**). In this case the witnesses who testified were able to establish the ingredients of the offence notwithstanding that other potential witnesses did not testify.

32. I will also point out that once the trial court was satisfied that the main charge of defilement had been proved then there was no need of belaboring on the alternative count of committing an indecent act with a child. In establishing whether both the main charge and the alternative once were established, the trial court took the risk of possibly finding that both were offences were proved and that would pose a challenge even in sentencing. The settled practice is that once the main charge is proved then the matter ends there and the alternative charge is usually not for any legal consideration. That however did not render the judgment defective in any manner whatsoever.

33. On sentence, as the complainant was aged 10 years old, the appellant was sentenced to the only prescribed sentence under **Section 8(2)** of the Sexual Offences Act. The life sentence remains legal.

34. As I come to the end of this judgment, I wish to unreservedly thank and highly appreciate the efforts taken by the Head teacher of [particulars *withheld*] School **Mrs. M A A** and her Deputy, **Mrs. A B** in firmly standing against the traditions of a community that were contrary to the rights of the girl child and advocating that it should only be the law that should take its course in the circumstances of this case. It is my sincere hope that such enormous efforts will not remain unnoticed by the relevant offices. I therefore

direct that the Deputy Registrar of this Court to serve copies of this judgment upon the County Secretary of the County Government of Migori and the Migori County Director of Education (or the equivalent) who represents the national government within the County.

35. The upshot is that the decision of the trial court is hereby affirmed and the appeal is accordingly dismissed.

**DELIVERED, DATED and SIGNED at MIGORI this 10<sup>th</sup> day of April 2017.**

**A. C. MRIMA**

**JUDGE**