



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. 22 OF 2016**

**M O O.....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 Criminal Case No. 160 of 2015 delivered on 22/02/2016)***

**JUDGMENT**

1. When **M O O**, the Appellant herein, was charged with the offence of defilement contrary to **Section 8(1)(3)** 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, he denied both counts.
2. The particulars of the offence of defilement were that on the 16<sup>th</sup> day of May 2015 at [Particulars withheld] village, [Particulars withheld] sub-location Township within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of **E 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 a total of six witnesses. The minor testified as **PW1** (hereinafter referred to as '**the complainant**') whereas **D O O** and **S O**, who were both brothers to the complainant testified as **PW2** and **PW3** respectively. **PW4** was the investigating officer one **No. 96599 Insp. Radhia Ali**. **PW5** was a Clinical Officer from Rongo Sub-County Hospital whereas **PW6** was the arresting officer **No. 96067163 AP Corp. Paul Korir**. 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 that in the morning of 18/05/2015 the complainant, then a Class 8 pupil at [Particulars withheld] Academy at Kitere, met the appellant, who was her cousin, as she was on her way to school. The complainant was in the company of her brother **PW3**. The appellant asked the complainant if the complainant mother's cell phone which had been reportedly lost had been found. The complainant answered in the negative. The appellant then informed her that he had found the cell phone and asked the complainant to collect it from his house when she returns home from school that evening. The complainant returned home at around 06:30pm but did not go to collect the cell phone as asked to. As she was at their home **PW3** then reminded the complainant that the appellant had asked her to go to his home and collect the cell phone. As it was approaching darkness, the complainant rushed to the appellant's house in the company of **PW3**. When they reached the appellant's house, they found the appellant who asked the complainant to enter inside the house but she refused. The appellant then got hold of her and pulled her inside the house. **PW3** rushed back home and reported the matter to his mother and **PW2**. The

appellant then told her that he would only give the cell phone if she spent the night there. The complainant protested and threatened to accordingly report the appellant to her mother. As the complainant wanted to leave the house, the appellant restrained her. He instead got hold of her and started fondling her. He then took her into his bedroom, undressed her and so he did and had sexual intercourse with her.

6. That encounter was not without a struggle. The complainant was determined not to give in. She protested and asked the appellant to give her the cell phone as she wanted to go back to their home. The appellant instead insisted that he must sleep with her first and went ahead to remove a panga and placed it on the table. That altercation was however overheard by PW2 who was by then outside the appellant's house having been informed by PW3. PW2 recognized her sister's voice as well. He was keen to know what was happening. He went and peeped through an opening on a window and with the aid of the light from a lantern lamp which was inside the house, PW2 managed to see the appellant holding the complainant by her hand. PW2 immediately rushed to, and reported what was the happening to her sister to the village elder. The elder asked PW2 to rush to the nearby AP Post and report the matter. PW2 did so and with the aid of PW6 and his fellow officers, the complainant was rescued but after the door, which the appellant had refused to open, was forced open. The cellphone which was allegedly lost and which belonged to the complainant's mother was also recovered in the appellant's house and it was handed over to the owner later on.

7. The appellant and the complainant were then escorted to the Kamagambo Police Station where they spent the night thereat and in the morning of the following day both were taken to the Rongo Sub-County Hospital for examination and possible treatment. PW5 examined both of them. Whereas she found nothing abnormal with the appellant, she however found that the complainant's hymen was missing and that the vagina was tender. A high vaginal swab revealed no presence of spermatozoa but epithelial cells were present. PW5 explained that it was not possible to get any evidence of spermatozoa at the time of examination as the human sperm would ordinarily survive for 3 hours at most after ejaculation. According to PW5 the complainant had engaged in a sexual act before the examination but that was not her maiden sexual intercourse. PW5 filled in the Post Rape Care Form as well as the P3 Form which she produced them alongside the treatment notes as exhibits.

8. Upon concluding the investigations PW4 preferred the charges before court. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant opted to and gave unsworn defence and denied any involvement in the commission of any of the alleged offences. He stated that one J K had threatened to teach him a lesson arising out of a boundary dispute two days before he was arrested over the allegations in this matter. He further explained how he was arrested as he was on his way back home from a funeral. He prayed that the charges be accordingly dropped and called no witnesses.

9. By a judgment rendered on 22/02/2016 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 20 years' imprisonment.

10. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal out of time, but with the leave of this Court, and filed the Petition of Appeal on 28/04/2015 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 shifting the burden of proof to I the appellant herein.***

***c. That the trial court erred in both law and facts by failing to consider my defense and mitigation."***

11. The appeal was heard by way of written submissions where the appellant expounded on the grounds. The State through Learned State Counsel Miss Owenga opposed the appeal and prayed that the same be

dismissed.

12. 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.

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

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.

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

15. The age of the complainant was settled by the complainant's Certificate of Birth No. [Particulars withheld] which showed that the complainant was born on 27/07/2001. From that evidence, the age of the complainant as at the alleged time of commission of the heinous act was 14 years old less two months (that is 13 years 9 months and 21 days). The complainant was hence a minor 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.'***

17. 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).

18. 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."***

19. In dealing with this issue I will revert to the record. The complainant gave sworn testimony. She was in Class 8 and narrated the events as they unfolded between herself and the appellant. She vividly took the court through what happened inside the appellant's house. She was denied access to leave; she was held; fondled; pulled into the bedroom, undressed, laid on a bed, inserted with a penile organ in her vagina and they engaged in a sexual intercourse until the man ejaculated. That description of the events reveals that the complainant was well aware of what was happening; a sexual intercourse.

20. When the complainant was taken to the Rongo Sub-County Hospital she was examined and treated.

PW5 examined the complainant and filled in the P3 Form and the Post Rape Care Form which she produced them in evidence together with the other treatment notes. On examination of the complainant's private parts it was revealed that the hymen was missing and that the vagina was tender. Although the complainant had earlier on engaged in previous sexual intercourse, it was confirmed that there had been a recent penile penetration into the complainant's vagina.

21. From the above analysis and on an evaluation of the evidence of the complainant and PW5, 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:**

22. The appellant vehemently denied any involvement in the alleged offence and contended that he was framed up on account of a boundary dispute. From the record, the evidence touching on the appellant was by four witnesses: the complainant, PW2, PW3 and PW6.

23. The complainant, PW2 and PW3 stated that they knew the appellant so well as their cousin. That was not denied. The complainant and PW3 engaged the appellant in the morning as they were on their way to school. The appellant specifically asked the complainant to go and collect the cell phone from his place once she was back from school that evening. When the complainant did not turn up as so expected to collect their mother's cell phone, PW3 reminded the complainant to do so. PW3 accompanied the complainant to the appellant's house and witnessed the appellant pull the complainant into his house. PW3 then rushed back home and reported the matter to PW2 and his mother. When PW2 went to the appellant's house, he truly confirmed what PW3 had told him. The complainant and the appellant were inside the house and the appellant was holding the complainant. Whereas the complainant was struggling to get off and return home, the appellant made it clear that he was determined to sleep with her. PW2 overheard all that and rushed to the village elder and the police. When PW2 returned to the appellant's house with PW6 alongside other police officers and forcefully gained access inside the appellant's house as the appellant had declined to open the door, the complainant and the appellant were found inside that house half naked and they were arrested.

24. I have carefully revisited the evidence of the complainant, PW2, PW3 and PW6 and how the trial court analysed the same. I am well aware that the trial court had an opportunity to observe the demeanor of the witnesses. I am equally and in agreement with the prosecution's version of the events as they unfolded as opposed to the defence put forth by the appellant. I am indeed persuaded that the appellant was arrested by PW6 and led to Kamagambo Police Station where he was received by PW4 and not as per the appellant's version.

25. Having re-evaluated the evidence on record and the defence put forth I am not persuaded that sufficient reasons have been furnished to warrant this Court differ with the trial court's finding. Needless to say 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.

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

27. On sentence, as the complainant was aged almost 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.

28. This Court now finds that none of the grounds of appeal put forth and supported by the written submissions is successful. 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**