



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 7 OF 2016

JAMES ONYANGO OMBATI.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment on conviction and sentence by Hon. Z. J. Nyakundi Principal Magistrate in Rongo Principal Magistrate's Court Criminal Case No. 99 of 2012 delivered on 30/11/2012)

JUDGMENT

1. This appeal hinges on the defence to the offence of defilement provided in **Sections 8(5) and (6)** of the Sexual Offences Act No. 3 of 2006 relating to instances where an accused person reasonably believed that the victim was of age and not a minor.
2. The Appellant herein, **JAMES ONYANGO OMBATI**, was charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between 20th day of February 2012 and 27th day of February 2012 at [Particulars Withheld] township in Migori County, intentionally caused his penis to penetrate the vagina of M. A. O. a child aged 15 years.
3. The prosecution called five witnesses in proving its case. The minor testified as **PW1** (hereinafter referred to as '**the complainant**') whereas her uncle (a brother to the complainant's father) testified as **PW2**. **PW3** was an administration police officer who was the arresting officer stationed at the [Particulars Withheld] Chief's Camp. **PW5** was a Clinical Officer from Awendo Sub-County Hospital and **PW4** was the investigating officer **No. 89149 PC Richard Kagiri** attached at Awendo Police Station.
4. Briefly, the prosecution's case is that the appellant herein took the complainant then aged 15 years old and a Standard Six pupil at [Particulars Withheld] Primary School and lived with her as his wife for a while at his house in [Particulars Withheld] township. The two engaged in sexual activities until when the complainant was rescued by the concerted efforts of her parents and the police.
5. The complainant reiterated that she lived with the appellant as his wife as PW2 confirmed that the complainant had disappeared from her home. It took his efforts in conjunction with the local administration and the police to trace and eventually find the complainant whom they found living with the appellant.
6. The appellant and the complainant were arrested by PW3 and taken to Awendo Police Station. They were later escorted by PW4 to Awendo Sub-County Hospital for examination. On examining the complainant, PW5 found that her hymen was missing and there was the presence of a whitish vaginal

discharge. A high vaginal swab laboratory analysis revealed the presence of epithelial cells. PW5 confirmed that the complainant had engaged in penetrative sex. He also examined the appellant but did not find anything suggesting that the appellant had recently engaged in any sexual act. PW5 filled in P3 Forms for the complainant and the appellant which he produced in court together with the treatment notes for the complainant.

7. When the appellant was placed on his defence he gave an unsworn testimony where he indeed confirmed that he had lived with the complainant as his wife but did not know that the complainant was a student or underage. He did not call any witnesses.

8. By a judgment rendered on 30/11/2012, the appellant was found guilty of defiling the complainant, was convicted and sentenced to 20 years' imprisonment.

9. The appellant then visibly aggrieved by the said conviction and sentence preferred an appeal to this Court. With the leave of the Court, the appellant filed a Petition of Appeal wherein he challenged the conviction and sentence. The appellant also filed written submissions to his appeal where he expounded on his defence and urged this Court to allow the appeal. He also asked this Court to find that the prosecution had failed to settle the age of the complainant. The appeal was opposed.

10. As an appellate Court of first instance, the role of this 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.

11. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement were proved and as so required in law; beyond any reasonable doubt and in light of the appellant's defence.

12. 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.

13. I have revisited and re-evaluated the evidence with care and patience. On the age of the complainant, the **Certificate of Sacrament's Received** from the Catholic Church at Ulanda in Sare – Awendo confirmed that the complainant was born on 13/11/1996 and took her first sacrament on 23/11/2011. The production of the Certificate was not objected to and neither were its contents challenged. I find the same to be a proper document in proof of the age of the complainant by dint of **Rule 4 of The Sexual Offences Act (Rules of Court) 2014** which came into force on 11/07/2014 under Legal Notice No. 101. Under the said **Rule 4 thereof**, the age of a victim may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or **any other similar document**. In this case I have no hesitation in finding that the **Certificate of Sacrament's Received** produced as exhibit 2 falls under the category of '**any other similar document**' and that the same is in proof of the age of the complainant. The complainant was hence about **15 years and 4 months old** at the date of the alleged offence.

14. This Court is equally satisfied that the evidence on record confirms that indeed there was penetration of the complainant's sexual organ by a penile organ. That was so confirmed by the evidence of the complainant as well as PW5. The complainant stated that she had sexual intercourse with the appellant seven times before they were arrested by the police. When PW5 examined the complainant, he found that the hymen was missing and there was the presence of epithelial cells. The treatment notes and the P3 Form produced as exhibits attest to that fact.

15. As to whether it was the appellant who was the author of the complainant's misfortune, the record still speaks for itself. The appellant took the Complainant and lived with her as his wife. The appellant so confirmed in his defence. The issue is hence settled in the affirmative.

16. I will now consider the defence raised by the appellant. I will reiterate verbatim what the appellant stated when he had been placed on his defence. He stated as follows: -

'I come from Ndhiwa, am a Juakali. I met the complainant where I was working, she was also working, I did not know if she was going to school. We met there we were working for 1 year. One day I called her to come and stay with me she came, she used to help me because my wife is deceased suddenly I was arrested so I knew her, I did not know if she was schooling she came and she was in my house, I could not throw her out. That is all'

17. What the appellant stated was an attempt to benefit from the defence contemplated under **Sections 8(5) and (6) of the Sexual Offences Act**. If such a defence is successfully proved, then the appellant is entitled to an automatic release. **Sections 8(5) and (6) of the Sexual Offences Act** provides as under: -

"8(5) It is a defence to a charge under this section if: - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that child was over the age of eighteen years

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant." (emphasis added).

18. As I stated in **Migori High Court Criminal Appeal No. 59 of 2015 Sammy Chacha Chacha v. Republic** (unreported), whenever an accused person opts to rely on the said defence then the **evidential burden of proof** shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate that: -

(a) That it was the child who deceived the accused person into believing that he/she was over the age of eighteen years at the time of the alleged commission of the offence;

(b) That the accused person reasonably believed that the child was over the age of eighteen years; and

(c) That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the belief on the part of the accused person was reasonable.

19. The accused person will first have to prove deception by the child in respect of the child's age. That deception can be by way of words or actions on the part of the child. In this case, the appellant seems to suggest that the deception was by way of the complainant's actions; **she was not in school and she worked with the appellant for a whole year.**

20. The other condition relates to how the accused person handled alleged the deception. **Section 8(5)(b)** requires the accused person to further demonstrate how he/she reasonably believed the deception including the steps taken by that accused person to ascertain the age of the complainant.

21. In discharging that onus, it must be remembered that the actions of the accused person must be weighed against what a reasonable person would have been expected to do in such circumstances.

22. In this case the appellant believed that the complainant was not a minor as she engaged in some gainful employment just like the appellant. That was for a whole year. Indeed, it is very reasonable for one to conclude as such in those circumstances. **But how was that aspect handled in the context of the entire trial?** The appellant had been provided with the witness statements well in advanced and had an opportunity to prepare for the hearing of his case. He knew in advance what evidence those witnesses were to tender before the trial court. However, when the complainant, PW2 and PW4 testified, none was examined on the line of the contemplated defence. The evidence of the complainant and PW2 that the

complainant was then a student who had just been sent to relay a message to her grandparents on the day she disappeared from her home went uncontroverted. The only time the defence was raised was when the appellant, then the accused person, was placed on his defence. The prosecution witnesses were therefore not tested on that defence. With such a state of affairs, this Court can only find that the appellant fell short of taking advantage of the defence in law. The conviction therefore stands.

23. On conviction, the appellant was sentenced to 20 years' imprisonment. Given that I have found that the complainant was indeed 4 months past the 15 year-mark provided in **Section 8(3)** of the **Sexual Offences Act**, the appellant was to instead benefit from the provisions of **Section 8(4)** of the **Sexual Offences Act**, He was to be sentenced to a minimum of 15 years' imprisonment. I therefore substitute the sentence of 20 years' imprisonment with that of **15 years imprisonment** since the appellant had benefitted from the minimum sentence under **Section 8(3)** of the **Sexual Offences Act**.

24. The appeal has therefore partly succeeded on the aspect of sentence.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 6th day of June 2017.

A. C. MRIMA

JUDGE