



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 19 OF 2016

ROBERT ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. P. K. Rugut, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 435 of 2015 delivered on 29/03/2016)

JUDGMENT

1. When **ROBERT ODHIAMBO**, the Appellant herein, was charged with the offence of 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, he denied both counts.
2. The particulars of the offence of defilement were that on the 1st day of October 2016 **particulars withheld** in Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of I. A. a child aged 10 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 her mother, **P.A**, testified as **PW5**. **PW2** and **PW4** were administration police officers who were also the arresting officers from Dede AP Post. **PW3** was a Clinical Officer from Rongo Sub-County Hospital. **PW6** was **No. 96879 PC Maimuna Makokha** attached at Awendo Police Station. It is on record that the appellant is the husband of **PW5** but not the biological father of the complainant since **PW5** had the complainant long before she married the appellant. The appellant is therefore a step-father to the complainant. 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 night of 01/10/2015 at around 04:00am, the complainant who slept in the same house with her parents (**PW5** and the appellant) went to relieve herself outside their house leaving her parents inside. She had a running stomach. As the complainant walked back into the house she met the appellant standing outside their house. The appellant then held her hand and took her into the sugar cane plantation where he undressed her and had sex with her. Both returned to the house and on being asked by **PW5** whom she was with in the sugarcane plantation, the complainant revealed that it was the appellant.

6. In the morning, PW5 took the complainant to Dede Health Centre where she was examined, treated and a Post Rape Care Form filled. It was revealed that the complainant had engaged in a sexual intercourse. The matter was then reported to Dede AP Post where statements were recorded. PW2 and PW4 then arrested the appellant in the night of 02/10/2015 and escorted him to Awendo Police Station on the following day. The complainant also revealed to PW5 that the appellant had severally had sexual intercourse with her especially in her absence. PW6 referred the complainant and PW5 to Awendo Sub-County Hospital where the complainant was re-examined and a P3 Form filled. PW6 preferred the charges upon completing investigations.

7. 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 explained how he was arrested. He prayed that the charges be accordingly dropped and called no witnesses.

8. By a judgment rendered on 29/03/2016 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 timeously lodged an appeal and in his Petition of Appeal filed on 08/04/2016 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.**

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

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.

11. 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.

12. 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

13. 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:

14. The age of the complainant is one of the two main grounds relied upon by the appellant. It is contended that the same was not settled as no evidence was tendered in proof thereof. The trial court rightly found that the age of the complainant was settled by the P3 Form that was produced by PW3. The P3 Form indicated at page 3 that the approximate age of the complainant was 10 years old. The same was

produced in evidence without any objection from the appellant and its contents were not either not challenged. The court also saw the complainant testify and observed that she was a child of tender years.

15. I therefore find no error on the part of the trial court in relying on the P3 Form to ascertain the age of the complainant. From that evidence, the age of the complainant as at the alleged time of commission of the heinous act was 10 years old hence a minor of tender years in 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 narrated the events as they unfolded between herself and the appellant. She vividly took the court through what happened in the sugar plantation. She was led by the appellant thereto, laid on the ground, undressed, her mouth covered and 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 aware of what was happening; a sexual intercourse.

20. The complainant was taken to Dede Health Centre and was examined, treated and Post Rape Care Form filled. She was later referred to Rongo Sub-County Hospital where she was re-examined and treated and a P3 Form filled by PW3. On both examinations on the complainant's private parts it was revealed that the hymen was missing, there were tears on the labia minora and the vagina was inflated. There was also a whitish vaginal discharge with foul smell and although there was no presence of any sperm cells on undertaking a laboratory high vaginal swab, the presence of epithelial cells was confirmed. PW5 explained that human sperms usually change into epithelial cells after 24 hours of ejaculation. 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 PW3 and the exhibits on record, 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. From the record, the evidence touching on the appellant was by the complainant and PW5.

23. There is no doubt that the complainant knew the appellant so well as her father and they lived together. The complainant stated that she had a running stomach that night and had to go out to help herself in the sugarcane plantation. That was confirmed by PW5. She also stated that when she was so out

of the house the appellant got hold of her hand and led her to the plantation. PW5 also confirmed that the appellant left the house after the complainant went to help herself and that the appellant did not return until when the complainant returned. The complainant also revealed that she had been with the appellant in the sugar cane plantation when she was asked by PW5 on return to the house.

24. It was the evidence of the complainant that there was ample moonlight and she saw the one who held her hand, led her to the plantation and had sex with her as the appellant. She also stated that she recognized the appellant's voice so well and that the appellant talked to her while in the plantation as he warned her not to tell anyone of what had happened. The complainant described how the ordeal went on. Her mouth was even covered to restrain her from raising alarm. She had a penile penetration into her vagina by none other than someone she knew very as her father; the appellant.

25. I have carefully revisited the evidence of the complainant and PW5 and how the trial court analysed the same. I understand the trial court had an opportunity to observe the demeanor of the witnesses and it so stated in the judgment. I am equally and in agreement with the prosecution's version of the events as they unfolded. I find no reason to differ from the finding of the trial court on this aspect.

26. Having re-evaluated the evidence on record and the defence put forth I am not persuaded that defence cast any reasonable doubt on the prosecution's evidence to warrant any interference. The appellant was hence so properly placed as the perpetrator.

27. This Court therefore finds that the appellant was properly found guilty and convicted of the offence of defilement.

28. 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.

29. 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 6th day of June 2017.

A. C. MRIMA

JUDGE