REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 8 OF 2017

IRENE ATIENO OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by

Hon. C. M. Kamau, Resident Magistrate in Rongo Senior

Resident Magistrate's CriminalCase No. 625 of 2016

delivered on 02/03/2017)

JUDGMENT

1. This is a rare appeal in that it is by an adult woman who was convicted and sentenced for defiling a young boy. It is alleged that on the 7th day of October 2016 at Rongo within Migori County in the Republic of Kenya, the Appellant intentionally caused the penis of M.O.O. a child aged 17 years to penetrate her vagina. The Appellant herein, **IRENE ATIENO OCHIENG** was charged with the offence of defilement contrary to **Section 8(1)(4)** of the **Sexual Offences Act** No. 3 of 2006. She 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. She denied both counts.

2. The prosecution called five witnesses. The minor testified as **PW1** (hereinafter referred to as **'the complainant'**) whereas **P.A.I**, the minor's mother testified as **PW2**. **PW3** was the complainant's grandmother one **M.N.O** aged 73 years old. The Clinical Officer from Rongo District Hospital testified as **PW4** and the investigating officer one **No. 756625 PC Lanoline Kerubo** attached at Kamagambo Police Station testified as **PW5**. 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 for the complainant.

3. It is the prosecution's case that PW2 learnt that her son, the complainant, then aged 17 years old and who had just dropped out of Downtown Academy where he was in Standard Six sometimes in April/May 2016 was engaged in a sexual relationship with the appellant, a woman with several children. That the complainant, PW2 and the Appellant all fellowshipped in the same church. PW2 reported the matter to their spiritual leader one **Pastor Richaed Ochieng** (not a witness) and a meeting was convened. The meeting was attended by the Pastor, the Church elders, the complainant, PW2, PW3 and the Appellant. It was at the Church. That the matter was extensively discussed and the Appellant was vehemently warned against engaging in sex with the complainant who was still a child in law regardless of the circumstances. That the appellant apologized and vowed to terminate the relationship as she alleged not to have been aware that the complainant was still a child. The complainant also undertook not to further engage the Appellant sexually.

4. The matter was deemed to have come to an end. But was not the case. It seems that the Appellant continued with the relationship with the complainant to a point where the complainant moved out of their home and began staying with the Appellant. That was in October 2016. Before that PW2 had caught the Appellant with the complainant on 10/07/2016 and again warned the Appellant accordingly. By then the complainant had developed a tendency of not spending at home at times. PW2 and PW3 also had a discussion with the complainant and once again warned him accordingly. When the complainant eventually moved out of their home aforesaid PW2 reported the matter to the Children's Officer who in turn reported the matter to the police at Kamagambo Police Station. The police arranged with their Administration Police counterparts and the appellant and the complainant were arrested from inside the house of the Appellant on 07/10/2016. They were escorted to the Kamagambo Police Station.

5. The two were eventually taken to Rongo Sub-County Hospital where they were examined and P3 Forms filled by PW4 on 11/10/2016 who later produced them in court. On completion of investigations PW5 preferred the charges against the Appellant. PW2 produced a Certificate of Birth No. [particulars withheld] for the complainant confirming that the complainant was born on 04/04/1999.

6. At the close of the prosecution's case, the trial court placed the Appellant on her defence where the Appellant opted to and gave an unsworn defence and denied any involvement in the commission of any of the alleged offences. She contended that she did not understand the charges before court as she only knew the complainant as a *boda-boda* (motor cycle) rider and her customer to whom she used to sell porridge to. She called no witnesses.

7. By a judgment rendered on 02/03/2017 the trial court found the appellant guilty and convicted her of the offence of defilement. The appellant was then sentenced to 15 years imprisonment.

8. Being dissatisfied with the conviction and sentence, the appellant through the firm of **Messrs. S.M. Kagwe & Company Advocates** filed a Petition of Appeal on 15/03/2017 and challenged the conviction and sentence on nine grounds namely: -

i) The trial magistrate misdirected himself when evaluating the evidence on record before occasioning a miscarriage of justice.

ii) The trial magistrate failed on consider the evidence adduced by the appellant in her evidence by merely dismissing it without considering and giving its due effect.

iii) The trial magistrate erred in law and fact by finding the appellant guilty of the offence charged as the evidence on record never supported the charge.

iv) The trial magistrate erred in law and fact by finding the appellant guilty of the offence charged when no proper identification parade was carried out.

v) The trial magistrate in law and fact by sentencing the appellant without considering the circumstances surrounding the case.

vi) The trial magistrate never considered evidence as a whole in his judgment.

vii) The trial magistrate judgment was bad in law and irregularly delivered from the word go.

viii) The learned trial magistrate erred in law and fact by not complying with the provisions of the criminal procedure code which required him identify and set out the issues of the case.

ix) Any other grounds that may be adduced at the hearing of this appeal.

9. At the hearing of the appeal the appellant appeared in person as she indicated her inability to pay the Advocates fees and costs and argued the appeal orally. The Appellant in essence admitted engaging in sexual adventures with the complainant but denied that the complainant was a minor. To her, the complainant was a school dropout and a *boda-boda* rider whom she had become acquainted to as the complainant used to carry her and in turn the Appellant used to sell porridge to the complainant. It was the complainant who seduced her severally until she agreed. Further, the complainant was a man enough. He discharged all the responsibilities of a head of house including sexually satisfying the Appellant among other roles. She also indicated that the complainant told her that he had been chased away from his home by PW2 and had nowhere to go to and as such agreed to accommodate him and promptly informed PW2. On asking the complainant why he had decided to move into her house, the complainant told the Appellant that he was a grown-up and wanted peace in his life. The Appellant also stated that she had lived with the complainant for five months as grown-ups and did not bother to ascertain his age. She prayed that the appeal be allowed.

10. The State through Learned State Counsel Miss Owenga vehemently opposed the appeal and relied on the evidence on record. Counsel further argued that this case ought to serve as a warning to older women who use young boys as sex pets.

11. 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.

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 oral 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 singly.

(a) On the age of the complainant:

14. The age of the complainant was settled by the Certificate of Birth No. [particulars withheld] confirming that the complainant was born on

04/04/1999. That being so the complainant was then aged around **17 years** and **6 months old** when the alleged sexual act took place. The complainant was hence a minor within the meaning of the law.

(b) <u>On the issue of penetration:</u>

15. 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 **<u>Mark Oiruri Mose vs R (2013)eKLR</u>** 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. <u>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</u>….'** (emphasis added).

16. Later the Court of Appeal, then differently constituted, in the case of **<u>Erick Onyango Ondeng v. Republic (2014) eKLR</u>** 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."**

17. In dealing with this issue I will revert to the record. When the complainant testified he took the court through how the relationship with the Appellant began. He is the one who approached and seduced the Appellant. That they engaged in sexual acts severally thereafter but he was careful enough to use a condom every time he had sex with the Appellant in her house. The complainant clearly described how he used to put on the condom and how he used to have sex with the Appellant. That fact was not denied by the Appellant who even stated that the complainant was a man enough who used to sexually satisfy her.

18. That being the position penetration was proved.

c) <u>On whether the appellant was the perpetrator:</u>

19. Again, the Appellant does not deny having engaged in sex with the complainant on several instances. What she seems to raise is the defence contemplated in **Section 8(5)** and **(6)** of the **Sexual Offences Act.** If properly proved that is a complete defence in law. The said sub-sections provide as follows: -

> **"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 <u>reasonably believed</u> 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).

20. From the above provisions, it can be seen that 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.**

21. 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 admits that she attended a meeting convened by their Church Pastor where she was warned over the relationship with the complainant since the complainant was still a young child. The Appellant therefore knew that despite of how the complainant appeared in terms of physical appearance and complexion and his ability to discharge any and/or all the roles of a man worth of a head of a house the complainant was still but just a minor. Therefore, if there had been any prior deception by the complainant on the Appellant that the complainant was an adult that deception ended on the day of the meeting.

22. As I come to the end of this analysis I must point out that the Appellant did not raise the defence she raised on appeal during the hearing

before the trial court. The law is very clear. Unless the Appellant sought leave and was allowed to adduce additional evidence on appeal, the line of argument she adopted on appeal is purely for rejection. I however heard the Appellant who was then unrepresented as to ascertain if at all there was any basis for such a defence. An accused person who wishes to take advantage of the defence in **Section 8(5)** and **(6)** of the **Sexual Offences Act** must lay such a basis during the trial. When such a serious defence is raised later, more so on appeal, that denies the prosecution the opportunity to interrogate the same by way of cross-examining the accused person and the other witnesses and that visits an injustice to the victim.

23. Further an Appellant who raises such a defence for the first time on appeal, or an accused person who raises it for the first time when placed on defence, runs the risk of the defence being treated as an afterthought and the defence may not be of much assistance to such a party.

24. Consequently, the Appellant would thereafter not be reasonably expected to hide under the allegation that she did not know that the complainant was a minor. That being so, the defence is not available to the Appellant. I find that the Appellant was rightly found guilty of defilement and convicted.

25. On sentence, as the complainant was aged 17 years and 6 months 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.

26. 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 27th day of July 2017.

A. C. MRIMA

JUDGE