Case Number:	Criminal Appeal 86 of 2019
Date Delivered:	17 Dec 2020
Case Class:	Criminal
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	Rose Edwina Atieno Ougo
Citation:	Peter Nyakundi Omariba v Republic [2020] eKLR
Advocates:	Mr. Otieno Senior State Counsel Office of the DPP
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. D. Mac'Andere - RM
County:	Kisii
Docket Number:	-
History Docket Number:	Criminal Case 36 of 2019
Case Outcome:	Appeal partly allowed.
History County:	Kisii
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

CRIMINAL APPEAL NUMBER 86 OF 2019

PETER NYAKUNDI OMARIBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and sentence of Hon. D. Mac'Andere (R.M)

dated 11th October 2019 in Kisii Criminal Case No. 36 of 2019)

JUDGMENT

1. The appellant was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1)** as read with **section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**. He was found guilty of the offence of intentionally and unlawfully causing his penis to penetrate the vagina of MNS a child aged 8 years on 16th March 2019 in Transmara West District within Narok County.

2. From the petition of appeal dated 22nd October 2019 and the appellant's written submissions dated 13th July 2020, this is an appeal against the trial court's finding on sentence and proof of the minor's age. The appellant contends that there was no clear evidence on the age of the minor apart and there was likelihood that she was over 12 years at the material time, which would have attracted a different sentence. Mr. Otieno for the State opposed the appeal. He submitted that there was sufficient evidence that the appellant had defiled a child aged 8 years.

3. This being a first appeal, this court has a duty to re-evaluate all the evidence given at trial and come to its own independent conclusion being aware that it never saw nor heard the witnesses testify and therefore make due allowance for that.(See ***Okeno v R [1972] EA 32*** **and** ***Kariuki Karanja v R [1986] KLR 190***)

4. After *voir dire* examination, the minor, M.N.S. (PW1) testified that on 16th March 2019, she was going to the river when the accused asked her to go to the toilet with him. The appellant pulled her inside the toilet and removed his "thing" which he placed in her "chuchu". The minor told the court that she had felt pain. She also testified that it was the second time the appellant was doing it. She stated that she had been taken to Marani hospital on that day. She added that she knew the appellant as he would come to their place and stated that she was 8 years old and was in class 3.

5. RNB (PW2) testified that he was going to the posho mill when he saw the minor and the appellant standing near a school. On his way back from the posho mill, he found the appellant defiling the minor. He went to look for her father. He reported the matter to community policing members as he could not find the minor's father.

6. The minor's father, SN (PW3) recalled that on the material day he came home from the shamba and found the minor crying. She did not tell him what had happened when he questioned her. He testified that it was PW2 who told him that the appellant had defiled the minor. He reported to the chief, who organized for the arrest of the appellant and went to the police the following day. He stated that the minor was his last born and that she was in class three and was approximately 8 years old.

7. PC Mildred Sikolia (PW4) from Rioma police station testified that a report was booked against the appellant on 17th March 2019 for allegedly defiling the minor. She testified that the minor had been taken for an age assessment which indicated that she was

below 18 years. She produced the age assessment report as Pexh. 3.

8. The clinical officer, Samwel Machuki (PW5), testified on behalf of Dr. Nyangau who was on transfer. He stated that the minor was brought to the facility with a history of having been defiled by a person known to her. On examination, it was found that there were no lacerations in the vagina but there were debris of broken hymen. There was a white foul smelling discharge on the external genitalia and vaginal walls. They conducted a HIV test which turned negative. The test for venereal diseases also turned negative. PW5 testified that the impression of the diagnosis was defilement. The minor was put on antibiotics and post exposure prophylaxis treatment.

9. On being found with a case to answer, the appellant testified that on 16th March 2019 he came from work and slept at home with his parents. A youth then came and arrested him because he had differed with the minor's father. He was taken to the chief and accused of defiling his daughter.

10. The appellant was found guilty of committing an offence contrary to **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act. The provisions stipulate:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

11. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant. The appellant does not dispute his identification as the minor's assailant or the element of penetration. The eye witness account of PW2 established the identity of the appellant beyond peradventure. His evidence corroborated that of PW1 who named the appellant as her assailant. PW1 gave a vivid account of her assault by the appellant. Her evidence that she was defiled was confirmed by the medical evidence of PW5.

12. The appeal relates to the trial court's finding that the minor was aged 8 years. The appellant argues that there is a possibility that the minor was older. He brought it to the court's attention that the age assessment report had not specified how old the minor was. It simply indicated that the minor was below 18 years. He also urged that the claim that the minor was in class 3 was not supported by any evidence and that there was a blanket assumption that the minor was aged 8 years yet the birth certificate had not been produced.

13. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. Dire consequences flow from proof of the offence of defilement. (See ***Hadson Ali Mwachongo* vs *Republic* Criminal Appeal No. 65 of 2015** ***[2016] eKLR*** & ***Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009[2010]eKLR)***

14. It is apparent that the age assessment report produced by PW4 only states that PW1 was below 18 years at the time in question. The report did not specify how old the minor was. The appellant is opposed to the evidence on record for the reason that no proof was produced to confirm that the minor was a Class 3 pupil. He also argued that there was no Certificate of Birth to ascertain her age.

15. In the case of ***Mwalango Chichoro MwanjembeV. Republic, Mombasa Criminal Appeal No. 24 of 2015 [2016]eKLR***the Court of Appeal held as follows:

"The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R,Cr. Appeal No.19 of 2014 and Omar Uche v R,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

16. The decision of the Court of Appeal in **Evans Wamalwa Simiyu vs R *Criminal Appeal No. 118 of 2013 [2016] eKLR*** is also instructive on this issue. In that case the Court held:

"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

17. As emphasized in the above authorities, there is no requirement that age can only be proved by way of a Certificate of Birth, other evidence such as medical proof, the testimony of the victim's parents or guardian and observation can establish the age of a victim. The minor in this case gave sworn testimony before the trial court. Her evidence was clear and unshaken in cross examination. She testified that she was 8 years old and her evidence was affirmed by the testimony of her father. The clinical officer, PW5, produced a P3 form which indicates at Section C that the minor's estimated age at the time was 8 years. In my view the letter dated 9th April 2019 from Kisii Teaching Referral Hospital and referred to as an age assessment report by PW4 does not contradict the age set out in the P3 form since it confirmed that PW1 was a minor. The inevitable conclusion from a wholesome analysis of the evidence is that there was ample evidence to prove that the minor's age at the material time was 8 years. I accordingly uphold the appellant's conviction.

18. Turning to the issue of sentence, the appellant argues that the sentence of life imprisonment was harsh, excessive and without due regard to the circumstances pertaining to the offence. There is a myriad of Court of Appeal decisions which hold that the provisions of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Some of those cases include ***Dismas Wafula Kilwake v Republic Criminal Appeal No. 129 of 2014 [2018] eKLR, Christopher Ochieng v R KSM Criminal Appeal No. 202 of [2018] eKLR 2011, Jared Koita Injiri v R KSM Criminal Appeal No. 93 of 2014 [2019]eKLR*** and***d Evans Wanjala Wanyonyi v Republic Criminal Appeal No. 312 of 2018 [2019] eKLR.*** The Court in ***Christopher Ochieng (supra)*** reduced a sentence of life imprisonment to 30 years for the defilement of an 8 year old girl. In ***Jared Koita Injiri (supra)*** the Court revised an imprisonment of life downwards to 30 years for the defilement of a girl aged 9 years.

19. Although the trial court indicated that it had considered the appellant's mitigation, it seemed constrained by the mandatory minimum sentence provided in **Section 8 (2)** of the **Sexual Offences Act**. The aggravating factors in this case include the fact that the appellant was known to the minor he defiled and expected to protect. The fact that the minor was a child of tender years is also an aggravating factor. There is a need for society to eradicate such ghastly acts against children. I have weighed this against the fact that the appellant was a first offender. Taking all these into account and also bearing in mind the decisions of the Court of Appeal on comparative cases, I set aside the sentence of life imprisonment and substitute thereof with a sentence of 30 years' imprisonment to run from the date of the trial court's judgment.

Dated, Signed and Delivered at KISII this 17th day of December 2020.

R.E. OUGO

JUDGE

In the presence of:

Appellant In person

Mr. Otieno Senior State Counsel Office of the DPP

MS. Rael Court Assistant