



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. E006 OF 2020

BENARD ODWESO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.22 of 2019 of the

Principal Magistrate's Court at Oyugis by Hon. C.A Okore–Senior Resident Magistrate)

JUDGMENT

1. Benard Odweso, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on diverse dates between 1st day of May, 2018 and 6th day of May 2019 at Wangchieng location, Rachuonyo East Sub-County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of L.A, a child aged 14 years.

3. The appellant was sentenced to serve 15 years imprisonment. He has appealed against both conviction and sentence.

4. He raised the following grounds of appeal:

- a) That the trial court failed to observe that the nothing linked him to the alleged offence.
- b) That the trial court failed to observe that the sentence imposed was against the evidence adduced.
- c) That the trial court failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.
- d) That the trial court failed to appreciate that the prosecution case was full of contradictions hence unsafe to base a conviction upon.

5. The appeal was opposed by the state through Mr. Ochengo, learned counsel.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

7. For the prosecution to establish the offence of defilement, the following ingredients must be proved beyond any reasonable doubts:

- a) Whether there was penetration;
- b) Evidence must show that the accused is the perpetrator; and
- c) The age of the victim must be below eighteen years.

In **Fappyton Mutuku Nguvi vs. Republic [2012] eKLR** Joel Nguji J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

8. LA (PW1) testified that the appellant was her boyfriend for one year before the incident that led to his arrest and trial. For that period they had had sexual intercourse severally. The last liaison was on 6th May, 2019.

9. The evidence of Lyne Mayinga (PW5) was that when LA was examined, her genitalia was normal except that she was pregnant, but she did not discern the age of pregnancy. This evidence was prove of penetration.

10. According to the birth certificate that was produced, it gave the date of birth of the complainant as 29th December, 2009. This would mean that at the time of the alleged offence the complainant was ten years. According to the evidence of PC Joseph Katoi (PW4) the age she gave and her stature roused suspicion in his mind and took her for age assessment. The age assessment gave her age as 14 years. The document in respect of the age assessment of the complainant is overwritten where 14 appears and is not countersigned. This report is therefore of no value.

11. The birth certificate in respect of the complainant was obtained on 28th May, 2019 after the appellant was charged in court. The information in such a document is supplied by the parent. One is therefore tempted to believe that it was deliberately tailored for this case. When the mother of the complainant testified there was no attempt to reconcile the information on the document and her evidence that the complainant is 14 years and not 10 years as indicated in the document. The court of Appeal in the case of of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates makes it unsafe to accept his evidence.

It was unsafe to rely on the evidence of the age of the complainant.

12. Other than the complainant, who connected the appellant with the defilement, the other witnesses relied on what she said. The proviso to section 124 of the Evidence Act states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

13. In the instant case I am not persuaded to believe that the complainant is a truthful witness. She lied about her age in court and the evidence of her mother that she would lie that she was attending evening classes only to later learn she was visiting a boyfriend.

14. In such a case, the prosecution ought to have waited until after the birth of the child she was expecting to take a DNA test. I find that there was no sufficient evidence to link the appellant with the penetration of the complainant's genitalia.

15. The upshot of the foregoing is that the conviction was not safe. The same is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at Homa Bay this 31st Day of March, 2022

KIARIE WAWERU KIARIE

JUDGE