REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 26 OF 2016

DANIEL ATIA ORWENG'……..….APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(From the original conviction and sentence in Criminal case No. 300 of 2012 of the Principal Magistrate's Court at Ndhiwa by Hon. B.O. Omwansa –Ag. Principal Magistrate)

JUDGMENT

1. Daniel Atia Orweng' the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) (3) *[sic]* of the Sexual Offences Act No.3 of 2006. This was after he pleaded guilty.

2. The particulars of the offence were that on the 19th day of December, 2012 at Ratang'a sub location in Ndhiwa District of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of TAB., a child aged 12 years.

3. The appellant was sentenced to 25 years imprisonment. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised grounds of appeal as follows:

a) That the trial court failed to consider that the age of victim was not proved beyond reasonable doubt.

b) That the trial court erred in law and facts by not considering that the prosecution's evidence was full of contradictions and inconsistent hence unreliable witnesses whose evidence ought not to have been relied upon.

c) That the trial magistrate decision to award me 25 years imprisonment is harsh and excessive hence violates my right to a fair trial under article 50(2)(p) of the constitution.

d) That the trial magistrate failed to give my defence statement due consideration despite the fact that the same was not challenged by the prosecution case.

5. The appeal was conceded by the state, through Ochengo Justus who submitted that the facts that were read were capable of being interpreted variously.

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. Section 8 (1) (3) of the Sexual Offences Act does not exist. The charge to that extent was erroneously drafted. It ought to have read:

…contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act …

8. This error is curable under section 382 of the Criminal Procedure Code and could not have caused any prejudice to the appellant.

9. When the plea was taken on 24th December, 2012 the appellant pleaded guilty to the charge. When the prosecutor read the facts, he partly informed the court that:

He forcibly removed the underwear of the complainant. He put her on the ground and started to chew the unripen fruits. He warned her of dire consequences if she was to make any noise or report the same after the act.

10. The facts as read did not support the offence the appellant had pleaded to. It is trite law that where the particulars of the offence are at variance with the charge, the accused is entitled to an acquittal. This was held in the case of **John Brown Shilenje vs. R. High Court (NBI) Criminal Appeal No 181 of 1981** (unreported). I therefore find that the conviction of the appellant was not supported by the facts read. There was no relation between defilement and the unripe fruits whichever they were.

11. The upshot of the foregoing is that the conviction cannot stand. The same is quashed and the sentence set aside. The appellant is set free unless if otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE