



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. E 042 OF 2021

ELISHA OKUMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No. 27 of 2021 of the

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

JUDGMENT

1. Elisha Okumu, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on the 4th day of July, 2019 at Kojwach sub location in Rachuonyo East sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of LEA, a child aged 3 years and 3 months.
3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence.
4. The appellant was represented by Oluoch Ammon & Company Advocates. He raised the following grounds of appeal:
 - a) That the learned magistrate erred in law in not appreciating the fact that since the complainant testified through an intermediary, the provision to section 124 of the Evidence Act was not applicable.
 - b) The learned trial magistrate erred in law in assuming that PW2 was the victim of the crime whose evidence did not need corroboration.
 - c) The learned trial magistrate erred in law in assuming that PW2 was the victim of the crime whose evidence did not need corroboration.
 - d) The learned magistrate erred in law in discharging PW1, 2 & 3 before further cross-examination without giving the defence an opportunity to be heard on their non-availability on the 24th February, 2021 thereby contravening the provisions of Article 25(c) of the Constitution.
 - e) The learned trial magistrate erred in law in ignoring material contradictions in the Prosecution's case to the detriment of the appellant.
5. The appeal was conceded by the state through Mr. Ochengo, learned counsel. He contended that there was mistrial for the defence was denied a chance to have some witnesses recalled.
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. Article 25 (c) of the Constitution provides:

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(c) the right to a fair trial;

8. On 20th November, 2019 (erroneously indicated as 20th November 2020) the defence counsel applied for the recalling of PW1, PW2 & PW3. The application was allowed. When the matter came for hearing on 24th February, 2020 the advocate for the accused was absent on grounds of bereavement. On this date the court was however not informed whether the recalled witnesses were present or not. The court record indicate that the appellant and his advocate did not show up in court until 26th October, 2020.

9. On 26th October, 2020 the recalled witnesses were not available in court. The prosecution indicated that they were trying to locate them. The matter was adjourned to 30th November, 2020. The matter was adjourned but the recalled witnesses were not in court. The prosecution were granted the last adjournment to call the witnesses.

10. On the 24th February, 2021 the prosecution availed PW1, PW2 & PW3. The advocate of the accused was not in court and did not ask a colleague to hold his brief and communicate his reasons for absence to the court. The court therefore discharged the witnesses.

11. When the matter came up for further hearing on 3rd March, 2021 the advocate for the accused was present but did not offer any explanation for his absence on 24th February, 2021 nor make an application for the court to review its order of discharging the witnesses.

12. The appellant cannot be allowed to claim that his constitutional was breached. The court offered him the chance by availing the witnesses who had been recalled. The appeal cannot turn on this ground.

13. 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 Ngui vs. Republic [2012] eKLR** Joel Ngugi 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.

14. AAO (PW3) produced a copy of Certificate Birth of the complainant which indicates her date of birth as 5th April, 2016. This therefore means that at the time of the complained of offence she was 3years and 3 months old. Her age was proved.

15. Though the prosecution applied to have the complainant testify through an intermediary, she did not do so. AAO (PW3) gave her evidence and not that of the complainant.

16. The complainant was too young to testify even through an intermediary. Such a child need not testify. There are equally other cases for example in bestiality cases where the "victim" is not called and courts rely on the evidence on record.

17. AAO (PW3) testified that when she checked the complainant, she saw whitish substance on her thighs, genitalia and legs. Her underpants were wet. The finding of the clinical officer (PW5) confirmed this assertion except that no spermatozoa were seen after taking a high vaginal swab.

18. Kibet Serem (PW5) is the clinical officer who examined the complainant on 4th July, 2019. He found that labia minora was slightly bruised, hymen was intact and the child had whitish substance on her thighs. He therefore concluded that there was partial penetration. I therefore find that the complainant was defiled.

19. According to the complainant's sister aged 5 years, (PW2) it was the appellant who defiled the complainant. She found him in the act and when she told him she was going to report, he stood up from the complainant and hitched up his pair of trousers.

20. The appellant in his defence pleaded an alibi. When an accused has pleaded an alibi, the onus is on the prosecution to prove that the alibi is not true. In the case of **Kiarie vs. Republic [1984] KLR** the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

This burden does not leave the prosecution even when it is raised for the first time during defence. In the case of **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal rendered itself as follows on the issue of alibi:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

21. The appellant contended that on the material day he was at Mikai. He denied to have known the complainant as well as her father. However, during cross examination changed and conceded that he knew PW1, the complainant's father. He changed his defence during cross examination and contended that PW1 cut him on the head when he refused to take an offer of a job and claimed he defiled his children.

22. I am satisfied that PW2 told the truth and that the alibi defence of the appellant was displaced by the evidence on record.

23. After the analysis of the evidence on record, I find that the conviction of the appellant was safe.

24. Section 8 (2) of the Sexual Offences Act provides:

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.

The sentence meted out was therefore legal.

25. The upshot of the foregoing is that the appeal lacks merit and the same is dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF MARCH, 2022

KIARIE WAWERU KIARIE

JUDGE