



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. E007 OF 2021

SO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.54 of 2019 of the

Principal Magistrate's Court at Mbita by Hon. Japheth C. Bii –Senior Resident Magistrate)

JUDGMENT

1.SO the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) (3) [sic] of the Sexual Offences Act No.3 of 2006.

2.The particulars of the offence were that on the 2nd day of November, 2019 at Malongo in Suba Sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of JA., a child aged 15 years.

3.The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.

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

- a) That the sentence of 20 years imprisonment by the trial magistrate is harsh, excessive and violated Article 50(2) (p) of the Constitution.
- b) That the trial magistrate erred in law and fact by relying on birth notification card of the complainant without birth certificate as a conclusive proof of her age thus the age was not proved beyond reasonable doubt.
- c) That the trial magistrate erred in law and fact by relying on the birth notification card which was altered a proof of forgery and uttering false document which is contrary to section 353 of the Penal Code.
- d) That the evidence contained in prosecution exhibit PMFI (Birth notification card) was obtained in a manner that is detrimental to the administration of justice hence this court should invoke the provisions of Article 50(4) of the constitution and revoke it.
- e) That the trial magistrate erred in law and fact by basing the conviction on a defective charge in that the complainant was above the age of 18 years as at the time of the alleged incident.
- f) That the trial magistrate erred in law and fact by relying on medical evidence that was not sufficient enough to prove penetration as one of the ingredients of defilement.
- g) That that trial magistrate erred in law and fact by relying on prosecution's evidence that was marred with contradictions and inconsistencies.
- h) That the trial magistrate erred in law and facts by not considering the period spent in remand custody while passing the sentence of 20 years.
- i) That the trial magistrate erred in law and facts by not finding out that the complainant was forced and coerced to give evidence

against the appellant by her mother and the police officers who arrested him.

5. The appeal was opposed by the state, through Ochengo Justus, 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. 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 ...

Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the Criminal Procedure Code.

8. Section 8(1) of the Sexual Offences Act defines defilement in the following terms:

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

An offence of defilement therefore, is established against an accused person when the prosecution has proved the following ingredients:

- a) That there was penetration of the complainant's genitalia;
- b) That the accused was the perpetrator; and
- c) The age of the complainant was below eighteen years.

This was emphasised in **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** when 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.

These are the ingredients that the prosecution must prove against an accused person.

9. The appellant challenged the evidence in the birth notification. This is a document that was issued by the District Civil Registrar on notification of birth pending issuance of a birth certificate. At the trial, he never challenged this document. Section 38 of the Evidence Act provides:

An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible.

This notification is therefore admissible. The contention by the appellant that evidence during cross examination revealed that the complainant was above the age of 18 years is misleading. The age of the complainant was therefore proved.

10. JA (PW1) narrated to the court how the appellant defiled her. She freely testified that she had had sexual intercourse prior to the complained of incident. When she was examined on 3rd November, 2019 by Alphonse Akech (PW2) a clinical officer, he found that she had a tear on the posterior vagina. This was prove of penetration by force. The element of penetration was proved.

11. Fredrick Hassan Oduor (PW3) met with the complainant who was crying. She reported that her uncle had defiled her. The appellant is her uncle. The proviso to section 124 of the Evidence Act provides:

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.

I have no reasons to doubt the complainant's contention that it was the appellant who defiled her.

12. Section 8 (3) of the Sexual Offences Act provides:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

The appellant was sentenced to serve the prescribed sentence.

13.The upshot of the foregoing analysis of the evidence on record, the appeal lacks merit and is accordingly dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF MARCH, 2022

KIARIE WAWERU KIARIE

JUDGE