



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 11 OF 2019

DUNCAN OCHIENG GUNDUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in S.O.A case No.22 of 2018 of the Principal Magistrate's Court at Mbita by Hon. Japheth C. Bii-Senior Resident Magistrate)

JUDGMENT

1. Duncan Ochieng Gundu, 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 21st day of August, 2018 in Mbita Sub County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of CA, a child aged 11 years.
3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised seven grounds of appeal as follows:
 - a) That the trial magistrate convicted him on a defective charge.
 - b) That the age of the complainant was not specifically ascertained as the medical report stated that the complainant was an adolescent to warrant a life imprisonment.
 - c) That the trial court did not consider that the evidence on record was not corroborated.
 - d) That the trial court erred both in law and fact in convicting the appellant without appreciating that crucial witness who was alleged to have seen me committing the alleged act was not one of the prosecution witnesses thereby rendering the evidence tendered unsafe to warrant a conviction.
 - e) That the appellant was not medically tested to confirm he committed the said act.
 - f) That the trial court did not consider the defense of the appellant.
 - g) That the sentence meted was very harsh in the circumstances.
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. 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 victim must be below eighteen years.

This position was echoed in the case of **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.

8. The appellant contended that the charge was defective. My perusal of the charge does reveal any defect.

9. FA(PW1) is the complainant's mother. She testified that the complainant was born on 30th December, 2007. But had not been issued with a birth certificate. The medical evidence was vague for it only stated that the child was below 18 years. CA testified she was 10 years. This coupled with the evidence of her mother meant that at the time of the offence complained of she was 10 years and 8 months. The age of the complainant was therefore established.

10. The complainant and her mother gave contradictory evidence. According to the complainant, she screamed while being defiled and when a neighbour whom she did not know intervened, the appellant opened the door and she went home. However, her mother said that the girl went missing and she found her in the home of NA on the following day. The Court of Appeal in the case 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 that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

11. Their evidence being unreliable required the evidence of NA to reconcile it. NAWas not called as a witness and no explanation was tendered. The Court of Appeal in the case of **Bukenya vs. Uganda [1972] EA 549**, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

12. 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.

In the instant case without the evidence of NA, it would not be safe to conclude that the complainant is telling the truth.

13. 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.

14. From the foregoing analysis of evidence on record is that the conviction was unsafe. The same is quashed and the sentence thereof set aside. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 29TH DAY OF MARCH, 2022

KIARIE WAWERU KIARIE

JUDGE