REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 16 OF 2020

PAUL OUKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.20 of 2019 of the

Principal Magistrate's Court at Ndhiwa by Hon. M.A Ochieng –Principal Magistrate)

JUDGMENT

1. Paul Ouko 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 15th day of June, 2019 at South Kabuoch location in Ndhiwa Sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of B.A., a child aged 13 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 five grounds of appeal as follows:

a) That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to serve 20 years imprisonment based on a defective charge sheet.

b) That the trial magistrate erred in law and fact by awarding me an excessive and harsh sentence which is a mandatory sentence provided under section 8((3) of the SOA hence unconstitutional.

c) That the trial magistrate erred in law and facts by relying on prosecution evidence that was rife with contradictions and inconsistencies.

d) That the trial magistrate erred in law and facts by not considering that there existed a grudge between the complainant's parents and the appellant.

e) That the trial magistrate erred in law and facts by not considering appellant's defense.

5. The appeal was opposed by the state, through Ochengo Justus who submitted that all the ingredients of the offence were proved.

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. 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.

9. 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.

10. Though the appellant contended that he was framed up due to an existing grudge with the complainant's parents he never confronted Evans Ochola Ndire (PW2) the complainant's father with these facts. This ground of appeal is therefore baseless.

11. The age of the complainant was proved by the production of a baptismal card.

12. The evidence of the complainant was the appellant took her to a house where her father and other people found her at about midnight. She had left her home to go and fetch firewood. This is what her father (PW2) testified to.

13. Jared Ware (PW3) testified that he received the appellant from some members of public at about 2a.m.

14. I therefore make a finding that the complainant was found in the house with the appellant as testified.

15. The complainant testified at one stage that the appellant tried to penetrate her genital but was unable to. At another, she said that he only rubbed his penis on her vagina. 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.**

The complainant has portrayed herself as such a witness. She cannot be relied upon to be telling the truth.

16. When Benard Otieno (PW5) a clinical officer examined the complainant on 17th June, 2019 he found vaginal inner walls painful and bruised. The hymen was ruptured. He therefore concluded that there was penetration. Though the complainant was shifty in her evidence, I have no reason to doubt this witness. From the evidence I find that the complainant was shifty in her evidence for she was a willing participant. She however had no capacity to give consent..

17. 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.**

18. The appellant was sentenced to serve the prescribed sentence.

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 29th Day of March, 2022

KIARIE WAWERU KIARIE

JUDGE