



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CRIMINAL APPEAL NO. 10 OF 2019

STEPHEN OMONDI ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.29 of 2018 of the Senior Principal Magistrate's Court at Mbita by Hon. Jacinta A. Owiti-Senior Principal Magistrate)

JUDGMENT

1. Stephen Omondi Odhiambo, 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 diverse dates between 14th day of September, 2018 and 6th Day of October, 2018 at Mulongo Beach Mfangano North location in Mbita Sub County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of PAI a child aged 11 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 trial court failed to consider that the case was poorly investigated.
 - b. That the trial court failed to consider that the evidence of penetration was not proved beyond reasonable doubt.
 - c. That the trial court failed to observe that essential witnesses in support of their case.
 - d. That the trial court failed to consider that the prosecution case was full of contradictions.
 - e. That the trial court erred in both law and fact by convicting and sentencing me while acting on wrong principles.
5. The appeal was opposed by the state through Mr. Ochengo, learned counsel who contended the offence was proved beyond any reasonable doubt.
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. PAI (PW1) testified that while she was sleeping in one room of their house, the appellant gained access and defiled her on two occasions i.e. on 7th September, 2018 and another occasion before he was arrested on 6th October, 2018. She did not tell the trial court how she knew that it was the appellant who went and defiled her. This was at night and in her evidence she testified that the appellant did not tell her anything but only felt somebody lying next to her.

9. On the day the appellant was arrested, she testified that he attempted to break the door. Again she did not testify how she knew it was the appellant.

10. BA(PW2) the complainant's mother testified that on 5th October, 2018 she met the appellant and asked him why he was defiling PAI (PW1). He denied the allegation. She did not testify on how she identified the person who had gained access to her daughter's room since it was at night.

11. Coupled with the evidence of BA(PW2) that it was reported to her that the complainant was sleeping around with men at the beach, I find that evidence of the identity of the perpetrator of defilement was not proved.

12. 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 illegal.

13. 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