



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 23 OF 2017

HESBONE OKEYO OBONYO *alias* JANABI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.43 of 2012

of the Senior Principal Magistrate's Court at Oyugis

by Hon. G.M On'gondo –Ag Chief Magistrate)

JUDGMENT

1. Hesbone Okeyo Obonyo alias Janabi, the appellant herein, was convicted for 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 5th day of December, 2012 at [Particulars Withheld] sub location, Rachuonyo South district within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of MAA a child aged 10 years.
3. The appellant was sentenced to serve life imprisonment. He has appealed against both conviction and sentence.
4. He raised three grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law and in fact by compelling him to proceed with the case thirty minutes of service with statements.
 - b) That the learned trial magistrate erred in law and in fact by convicting him on insufficient evidence.
 - c) That the learned trial magistrate erred in law and in fact imposing a harsh sentence in the circumstances of the case.
5. The appeal was opposed by the state through Mr. Oluoch, 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. On 11th June, 2013 the record of the court just before proceedings commenced is as follows:

Pros- I am ready for hearing now. Accused has statements.

Accused- I got the pros. Witness statement [sic].Court clerk made copies for me. I am ready for hearing.

This contradicts his allegation that he was not given adequate time to prepare. He in fact indicated to the court that he was ready. He cannot turn around and claim that he was compelled to proceed with the hearing when he was not ready.

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 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.

These are the ingredients I will endeavour to find if the prosecution proved against the appellant.

9. In her testimony, the complainant said she was 12 years when she testified. Her mother (PW5) and Dr. Peter Ogola (PW3) said she was 10 years at the time of the incident. Dr. Ogola is the one who filled her P3 form. The medical documents which were produced gave her age as follows:

X-ray request form from Matata Hospital gave her age as 10 years, Discharge summary from the same hospital gave her age as 12 years and General Out patient Record from Rachuonyo South District Hospital gave her age as 10 years.

In view of these contradictions, an age assessment would have been required.

10. Section 8 (2) of the Sexual Offences Act states:

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.

11. In view of this irreconcilable contradictions, the appellant ought to have been charged under section 8(3) of 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.

12. MAA (PW1) was sent to the home of the appellant by her brother to purchase some vegetables. She found the appellant who asked her to enter into his house for the balance. This when he shut the door, cautioned her against crying, pulled her into the bedroom. He undressed then undressed her before he defiled her.

13. After the ordeal her brother went for her. On reaching home, she reported to her mother. She was taken to hospital where she was admitted.

14. FO (PW2) is the complainant's brother. He said after his sister had overstayed in the home of the appellant, he went to check on her. He found her and the appellant in the house. The appellant told her not to get worried. When she got unwell on the following day she said the appellant had defiled her.

15. DR. Peter Ogola (PW3) examined the complainant on 27th December, 2012 and observed that she had bruising on the external genitalia and the hymen which was intact had a small tear. This was evidence of penetration.

16. There was sufficient evidence that it was the appellant who defiled the complainant herein. The conviction was safe except that it ought to have under section 8(3) of of the Sexual Offences Act. I therefore quash the conviction under section 8(2) of of the Sexual Offences Act and set aside the life sentence. I substitute the conviction with one under section 8(3) of of the Sexual Offences Act and sentence him to serve twenty (20) years imprisonment effective from 4th August, 2014. To that extent only does his appeal succeed.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF JUNE, 2021

KIARIE WAWERU KIARIE

JUDGE