REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 8 OF 2019

KENNEDY OMONDI AJWANG.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in S.O.A case No. 25 of 2017 of the Senior Principal Magistrate's Court at Mbita by Hon. Japheth Bii–Senior Resident Magistrate)

JUDGMENT

1. Kennedy Omondi Ajwang, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) (2) *[sic]* of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on the 19th day of December, 2017 at [Particulars Withheld] in Suba sub County of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of PAO, a child aged 9 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 fourteen grounds of appeal which I have summarized as follows:

a) That the learned trial magistrate erred in law and fact by not according him a fair trial.

b) That the learned trial magistrate erred in law and fact by violating the right to non-discrimination.

c) That the learned trial magistrate erred in law and fact by convicting where penetration was not proved.

d) That the learned trial magistrate erred in law and fact by disregarding his defence.

5. The appeal was opposed by the state.

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) (2) 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 (2) 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. When the plea was taken, interpretation was in Dholuo language. This is the language the appellant said he understood. Before hearing commenced the prosecutor informed the court that the appellant had been supplied with statements. The appellant confirmed the same and said he was ready for the hearing. The only issue I have noted is that there was some delay due to non-attendance of his advocate. When the case came up subsequently, the lawyer of the appellant did not attend and he asked the court to expedite the hearing. I therefore find that the appellant was granted a fair hearing as envisaged under Article 50 of the Constitution of Kenya.

9. The appellant complained that he was discriminated against. He however did not point any instance of discrimination and when I perused the record, I did not come across any such instance. This ground has no basis.

10. 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.

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.

11. The medical evidence (PW3) and treatment notes indicate that at the time, the complainant was 9 years old. Francis Odhiambo Otieno (PW3) a clinical officer who examined the complainant said she was 9 years old. VAO (PW2) gave her daughter's (PW1) age as nine years. In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** Joel Ngugi J. said:

> ... **that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.**

Though no birth certificate was produced, the issue of age was proved through other means.

12. FAO (PW1) testified that on 19th December, 2017 the appellant called her to his house. He called her to his house and ordered her to remove her panty. He however removed the same for her and proceeded to defile her after warning her not to scream. Her sister went and found them in the act and attracted members of public.

13. The girl's mother, (PW2) gave a different version. She said after the appellant had called the complainant, she followed shortly and found the appellant defiling the complainant.

14. The evidence by these two is contradictory in some material aspect. Since the complainant testified that the appellant defiled her in his house, there is no evidence as to how PW2 gained access. She never talked of entering into the house of the appellant. 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 makes it unsafe to accept his evidence.**

These two witnesses could not be relied upon and one is left wondering as to why their evidence is contradictory. These contradictions were never resolved. This could have been resolved by calling one or two of the alleged members of public who responded.

15. Francis Odhiambo Otieno (PW3) examined the complainant on 19th December, 2017 and found bruises on the labia minora and minimal bleeding. He was of the opinion that there was penetration. I therefore find that penetration was proved.

16. The failure by the prosecution to call other witnesses in view of the contradictory evidence of PW1 and PW2, I found that it was not proved to the required standards that the appellant was the culprit. He ought to have been given the benefit of doubts.

17. I therefore quash the conviction and set aside the sentence by the learned trial magistrate. The appellant is set at liberty unless if otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE