



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 18 OF 2020

JOSEPH ODERO KAHEDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case

No. 266 of 2011 of the Senior Resident Magistrate's Court at

Ndhiwa by Hon. B.O Omwansa–Senior Resident Magistrate)

JUDGMENT

1. Joseph Odero Kahedo, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) (4) [sic] of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on the 1st day of November, 2011 at [particulars withheld] District of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of L.A. a child aged 15 years.

3. The appellant was sentenced to serve 18 years imprisonment. He has appealed against both conviction and sentence.

4. The appellant was represented by the firm of Odero, Osiero & Company Advocates. He raised six grounds of appeal which I have summarized as follows:

- a) That the learned trial magistrate erred in law and fact by convicting the appellant on insufficient evidence.
- b) That the learned trial magistrate erred in law and fact by convicting the appellant without corroboration of the evidence of the complainant.
- c) That the learned trial magistrate erred in law and fact by disregarding the defence of the appellant.

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) (4) 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 (4) 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.

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.

10. The complainant in her evidence testified that she was 15 years old. Her age was never an issue.

11. According to the complainant, the appellant who was the school's head teacher summoned her to his office where he defiled her. This was after he had taught a combination of standard six, seven and eight pupils. In her (PW1's) evidence, she said that after the defilement, she went straight home and reported to her father. She was taken for medical examination by her uncle.

12. BO (PW4) and JOO (PW5) who were pupils in class six with the complainant testified that indeed the appellant summoned the complainant into his office. When she returned, she went away.

13. The evidence of JN (PW2) is that the complainant's father who is his brother summoned him to his home. When he went there, the complainant said that the appellant had defiled her. He took the complainant to hospital for her father was suffering from malaria.

14. The medical evidence was adduced by Stephen Kerario (PW8) who testified that he concluded that the complainant had been defiled. The examination was on 1st November, 2011. His findings were as follows:

- a) Bruises on the genitalia and vaginal walls were red;
- b) Numerous epithelial cells.

He explained that epithelial cells occur after a sexual intercourse.

15. This witness examined the appellant on the same day and found similar epithelial cells to the ones found in the complainant's genitalia. He therefore concluded that the two had had sexual congress.

16. Section 124 of the Evidence Act provides:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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. [Emphasis added]

17. The appellant contended that there was no corroboration of the complainant's evidence. The proviso to section 124 of the evidence Act exempts sexual offences from such a requirement. However, the complainant's classmates, PW4 & PW5 as well the medical evidence offered corroboration.

18. The defence of the appellant was displaced by the evidence on record and the learned trial magistrate cannot be faulted for dismissing it.

19. Section 8 (4) of the Sexual Offences Act provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

20. The appellant was erroneously charged under subsection (4) instead of under subsection (3) of section 8. This is because the complainant was 15 years old. The minimum sentence under subsection (4) is fifteen years. I will therefore not disturb the sentence meted out by the trial magistrate.

21. From the foregoing, the appeal is dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF JUNE, 2021

KIARIE WAWERU KIARIE

JUDGE