



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 18 OF 2019

ISAAC ODHIAMBO ABUORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.21 of 2017 of the Principal Magistrate's Court at Oyugis by Hon. J.S Wesonga–Senior Resident Magistrate)

JUDGMENT

1. Isaac Odhiambo Abuoro, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on the night of 31st day of August, 2017 in Rachuonyo South Sub-County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of DAO a child aged 12 years.
3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was represented by the firm of Odumbe, Okello & Company Advocates. He raised nine grounds of appeal which can be summarised as follows:
 - a) That the learned trial magistrate erred in law and in fact by failing to warn herself of the danger of relying on the evidence of a single identifying witness.
 - b) That the learned trial magistrate erred in law and in fact by failing to appreciate that penetration was not proved.
 - c) That the learned trial magistrate erred in law and in fact by relying on insufficient evidence.
 - d) That the learned trial magistrate erred in law and in fact by meting out a harsh and cruel sentence.
5. The appeal was opposed by the state through Mr. Ochengo, learned counsel on the following grounds:
 - a) That the age of the complainant was proved.
 - b) That the offence occurred in broad daylight and that the appellant was found in the act.
 - c) That the medical evidence confirmed that the complainant was defiled.
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. It is trite law that a fact can be proved by the evidence of a single witness. In the case of **Abdullah Bin Wendo vs. Rex 20 EACA 166**, the Judges of Appeal, however, emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

Subject to certain well-known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification

especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.

8. NO (PW3) is the complainant's uncle. He testified that when he told his sister that he was going to bathe in the river, she asked him to check on the complainant who had taken unduly long before returning from the river where she had been sent to fetch some water.

9. On arrival at the river, he did not see his niece and therefore called her out loudly as he looked around for her. He saw some bushes shaking. When he moved nearer, he saw the appellant come out of the bush running. He chased him and caught up with him. He took him to the bush where he had emerged.

10. He asked the complainant what the matter was. Due to her mental condition she was unable to explain but kept crying pointing at the appellant. The assistant chief who responded to the alarm asked that the appellant be released until after it was confirmed that the complainant was defiled.

11. This is the witness that the appellant contended that the learned trial magistrate ought to have warned herself before relying on his evidence.

12. The circumstances under which this witness implicated the appellant did not require such a warning. All the court needed was to satisfy itself that he was credible. I find no evidence to the contrary.

13. 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.

14. The complainant did not testify. She is a girl living with severe mental retardation. Dr. Peter Ogolla (PW5) testified that though 12 years at the time of examination, she had mental capability of a 2-3 year old. She therefore did not testify.

15. Her age was established by the production of her baptismal card. She was 12 years old.

16. Willis Omondi (PW4) testified that when the complainant was examined, she had visible injury on the outer genitalia and her hymen was broken. His colleague Silas Mado (PW7) who examined the minor at the first instance on 31st August 2017 testified that her hymen was freshly breached. Though it was contended that the evidence of these two clinical officers was contradictory, I do not find any material contradiction. Both arrived at the conclusion that the complainant had been defiled. There is nothing to doubt about their evidence.

17. The appellant was implicated to the offence by circumstantial evidence. What is circumstantial evidence? In the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** Osiemo Judge explained what circumstantial evidence is, as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

18. In order for any court to make inference of guilt from circumstantial evidence, such evidence must satisfy the conditions prescribed by the Court of Appeal in the case of **Republic vs. Kipkering Arap Koskei & another 16 EACA 135**, which held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

19. In the instant case, the evidence on record point to no other conclusion other than that the appellant was the one who defiled the complainant.

Section 8 (3) of the Sexual Offences Act states:

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.

The appellant was sentenced to serve the prescribed sentence for the offence.

20. I therefore find that there is no merit in the appeal. The same is dismissed.

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

KIARIE WAWERU KIARIE

JUDGE