



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 22 OF 2020

GEOFFREY OTIENO BOR.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in S.O.A case No.40 of 2018 of the Senior Principal Magistrate's Court at Mbita by Hon. Japheth Bii-Senior Resident Magistrate)

JUDGMENT

1. Geoffrey Otieno Bor, 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 26th day of November, 2018 at [particulars withheld], Mbita Sub-County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of RA. a child aged 15 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 Quinter Adoyo & Company Advocates. He raised ten grounds of appeal which can be summarised as follows:
 - a) That the learned trial magistrate erred in law and in fact by convicting him on inconsistency evidence.
 - 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 failing to appreciate the issue of time.
 - d) That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.
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. 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.

8. PA (PW2) is the complainant's mother. Her evidence is that she sent her daughter RA (PW1) to their home to get a sweater for her at about 6 p.m. When she delayed to return, she sent her husband to look for her, but did not find her. At about 10 p.m., the appellant who was with them at the funeral was sent to get tools for digging the grave. This is when he allegedly chased one D away who was in company of RA. He took RA to his house and defiled her.

9. The version of the girl's father (PW3) is that when he went to look for their daughter RA, he did not find her. He went back to the funeral where the appellant was present. They later received information that that the girl was at the appellant's home.

10. In her evidence, RA, said that the appellant found her in company of D whom he hit and chased away then took her to his house where he defiled her. Her father went and found her there.

11. There are important issues that arose from the evidence of these three witnesses and which were not satisfactorily addressed.

- a) There was no attempt by the prosecution to explain where RA. was from 6 p.m. to 10 p.m.
- b) Since both parents of RA admit that the appellant was at the funeral until when he was sent to fetch digging implements, evidence was required to prove that he had time and opportunity to commit the alleged offence. This was not forthcoming.
- c) The evidence of RA was contradictory to that of her father. Whereas RA, testified that her father found her in the appellant's house, he never testified anything to that effect.

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.

It was unsafe to rely on the prosecution evidence that raised doubts that were not resolved.

12. Other than the contention by RA. that the appellant penetrated her genitalia, the medical evidence did not support this claim. Was penetration proved? This was only testified to by the appellant. The proviso to section 124 of the Evidence Act states:

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.

Since the medical evidence did not support the contention by the complainant, and having raised suspicion on her trustworthiness, the learned trial magistrate erred in finding that penetration was proved.

13. From the foregoing analysis of the evidence on record, I find that the conviction was not safe. I quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at Homa Bay this 22nd Day of June, 2021

KIARIE WAWERU KIARIE

JUDGE