**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL APPEAL NO. 21 OF 2019**

**JOK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in S.O.A case No.438 of 2016*

*of the Senior Principal Magistrate's Court at Mbita*

*by Hon. Japheth Bii–Senior Resident Magistrate)*

**JUDGMENT**

1. JOK, 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 21st day of September, 2018 in Mbita Sub-County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of TAO a child aged 14 years.

3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.

4. He raised eight grounds of appeal which can be summarised as follows:

   a) That the learned trial magistrate erred in law and in fact by convicting him while the age of the complainant was not proved.

   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 medical evidence.

   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. Ochengo, 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. In her testimony, the complainant (PW1) gave her age as 14 years. This is what George Mbaka Gwako (PW3) testified to. He was the clinical officer who examined her. However, her father, SOO (PW2), testified that she was sixteen years old. He said she was born in the year 2003.

9. Certainly the age of the complainant was not clear; cold she be 14 or 16 years of age?

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.**

Going by the complainant's father's evidence, which I am convinced is correct, then the appellant was charged under the wrong section. The appeal can only turn on this point on the sentence only, if the other ingredients of the offence are proved. He ought to have been charged under section 8 (4) of the Sexual Offences Act which 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.**

10. According to the evidence of the complainant (PW1), the man who accosted her had sexual intercourse with her. This was confirmed by the evidence of George Mbaka Gwako (PW3) the clinical officer who examined her. The prosecution therefore proved the issue of penetration of the complainant's genitalia.

11. The incident according to the evidence of corporal Michael Nyamboki (PW5) took place at 2 a.m. While reporting to him, she said she was held by the neck by a person who dragged her for some distance and then raped her. This witness did not testify that the complainant gave him the name of the culprit. Throughout his evidence he referred to the culprit as "someone".

12. When the complainant reported to her father, she said the culprit was called O, whom he did not know. However, the complainant pointed out the appellant and he was arrested.

13. The complainant in her evidence testified that she knew her assailant for he worked for her uncle. She identified him as the appellant. In the celebrated case of **R. vs. Turnbull and Others [ 1976] 3 All ER 549** Lord Widgery CJ statted as follows:

> **Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be make. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.**

In the instant case, I will endeavor to find how the complainant purported to identify the appellant.

14. Though the complainant testified that there was moonlight, no evidence of its intensity was elicited from her nor was there an attempt to establish whether the place where she was dragged to was lit. If indeed she recognized her assailant, she ought to have given his name to PW5 instead of referring to him as "someone".

15. The complainant testified that the appellant worked for her uncle and gave his name as O. Her father initially said this was not a person he knew. He however later testified that the appellant was the girl's uncle. 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.**

16. I therefore find that there was no sufficient evidence to link the appellant to the offence. I quash the conviction and set aside the sentence meted against the appellant. He 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**