



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 39 OF 2018

FELIX OMONDI MIDAMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No. 30 of 2016 of the Principal Magistrate's Court at Oyugis by Hon. J.S. Wesonga–Senior Resident Magistrate)

JUDGMENT

1. Felix Omondi Midamba, 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 are that on 13th November, 2016 in Rachuonyo North sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of LA, a child aged 14 years.

3. The appellant was sentenced to serve twenty years imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. The appellant was represented by G.S. Okoth & Company Advocates. He raised nine grounds of appeal which can be summarized as follows:

- a) That the right of the appellant to fair trial as provided for under Article 50 of the Constitution was breached.
- b) That the trial magistrate erred in law and in fact in failing to record the entire voir dire examination.
- c) That the trial magistrate erred in law and in fact in failing to appreciate that material witnesses were not called.
- d) That the trial magistrate erred in law and in fact in convicting on inadequate evidence.
- e) That the trial magistrate erred in law and in fact in failing to exercise discretion in sentencing.

4. The appeal was opposed by the state through Mr. Ochengo, learned counsel, on grounds that there was sufficient evidence and that the sentence was legal.

5. 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**.

6. Article 50 of the Constitution of Kenya provides for the right to fair trial. Sub Article 2(g) states:

(2) Every accused person has the right to a fair trial, which includes the right—

g.) to choose, and be represented by, an advocate, and to be informed of this right promptly;

7. It was argued that it was not explained to the appellant that he the right to be represented by an advocate and the trial therefore amounted to a mistrial. The defence relied on the case of **BOO vs. Republic[2020] eKLR where Mrima J stated:**

I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under

Article 50(2)(g) of the Constitution then the trial is rendered a nullity. Qualifying the provisions of Article 50(2)(g) of the Constitution will be tantamount to amending the Constitution through a back door, an act which this Court must frown at. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless Courts, as custodians of justice and the Rule of Law, are prepared to enforce the Constitution as it is the intentions of the People of Kenya as expressed in the Constitution will never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law.

8. I have perused the record herein and I agree that the appellant was not informed of his right to legal representation. This was therefore a mistrial.

9. It would be purely academic to analyse the other issues. I quash the conviction and set aside the sentence. I order that the appellant to be released into police custody and be escorted to Oyugis Magistrate's Court for retrial by a magistrate of competent jurisdiction other than Hon. J.S. Wesonga.

DELIVERED AND SIGNED AT HOMA BAY THIS 26TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE