REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 31 OF 2018

EDWIN ONDITY ODADA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No. 26 of 2016 of the Principal Magistrate's Court at Oyugis by Hon. J.P. Nandi–Senior Resident Magistrate)

JUDGMENT

1. Edwin Ondity Odada, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 0f 2006.

2. The particulars of the offence are that on diverse dates between 26th & 30th September, 2016 at Oyugis Town, Rachuonyo South sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of IAK, a child aged 11 years.

3. The appellant was sentenced to serve life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He was represented by the firm of Omonde Kisera & Company Advocates. He raised eight grounds of appeal which can be summarized as follows:

a. That the trial magistrate erred in law and in fact convicting him without sufficient evidence.

b. That the learned trial magistrate erred in law and in fact in disregarding the appellant's defence.

c. That the sentence meted out was excessive and unlawful.

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

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. In order to sustain a conviction for defilement, the prosecution has to prove the following ingredients:

a. Whether there was penetration;

b. Evidence must show that the accused is 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 they were proved.

7. Sergeant Richard Machasio (PW3) testified that when he received the appellant, he interrogated him and he started confessing. A confession is defined under section 25 of the Evidence Act in the following terms:

> **A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.**

8. Section 25A(1) of the Evidence Act has limited persons who can take a confession from a suspect in the following terms:

> **A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.**

9. PW3 was disqualified to take the confession for he was the investigating officer and was not below the rank of Chief Inspector of Police. His evidence on the purported confession was inadmissible. The learned trial magistrate erred in recording it.

10. Section 8 (2) of the Sexual Offences Act provides:

> **A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

The sentence that was meted herein was therefore legal.

11. There is no doubt the complainant was defiled. This was brought out by the fact that she tested positive for pregnancy. An eleven years child can only be pregnant due to defilement. The issue of her age and penetration were proved beyond any reasonable doubt.

12. As to who was the culprit, we only had the testimony of the complainant to implicate the appellant. The proviso to section 124 of the Evidence Act provide:

> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, <u>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</u>**. [Emphasis added]

13. The learned trial magistrate did not record the reasons why he was convinced that the complainant was telling the truth.

14. IAK (PW1) testified that the appellant called her from where she was selling chips with her aunt. Her aunt was not called to testify. The Court of Appeal in **Bukenya vs. Uganda [1972] EA 549,** (Lutta Ag. Vice President) held:

> **The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.**

15. The evidence of this child's aunt was very crucial in order to establish the identity of the perpetrator. No explanation was tendered and the only inference to make is that her evidence would have been adverse to the prosecution.

16. Investigation of a case like this one where a pregnancy has resulted, would have required DNA on the child of the child. This may have required a bit of waiting. Indeed it would not have been long. This would have been around July, 2017. The investigating officer squandered this chance.

17. The prosecution case was further complicated by the evidence of the complainant that the incident took place not far from where they were selling chips. She said she did not scream. She never said why she did not. It is well known that sex with a child of tender years like the complainant is very painful.

18. From the foregoing analysis of the evidence on record, I find that the conviction was not safe. I accordingly 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 26th Day of July, 2021

KIARIE WAWERU KIARIE

JUDGE