



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 17 OF 2018

JACKTONE OJUKA MASEMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No. 7 of 2018 of the

Principal Magistrate's Court at Oyugis by Hon. J.P. Nandi–Principal Magistrate)

JUDGMENT

1. Jacktone Ojuka Masembo, the appellant herein, was convicted after pleading guilty to the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence are that on 11th May, 2018 at Kalwal sub location Kakdhuu East location, Rachuonyo North sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of C.N.A., a child aged 10 years.
3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
4. The appellant raised grounds of appeal as follows:
 - a) That he was harassed and beaten by unknown people to accept the offence.
 - b) That the offence was not proved against him.
 - c) That he was not given a chance to defend himself.
 - d) That the sentence meted out was harsh and dehumanizing.
5. The appeal was opposed by the state through Mr. Oluoch, learned counsel, on ground that the appellant pleaded guilty.
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 348 of the Criminal Procedure Code provides as follows:

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

The appellant is precluded from raising issues with his plea of guilty. The court can however revisit the issue, if satisfied that the appellant was incapable of understanding the charge due to his mental status or the sentence was harsh and/ or illegal.

8. Though the appellant contends that he was harassed and beaten by unknown people so as to plead guilty, he did not complain to the court. The court did not take note of any injuries or anything to suggest that he was not pleading freely.

9. The Court of Appeal in the celebrated case of **Adan vs. Republic [1973] EA 445** prescribed the mode of taking plea as follows:

The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands; the accused's own words should be recorded and if they are an admission, a plea guilty should be recorded;

In the instant case this was followed and the trial court cannot be faulted.

10. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of **Nilson vs. Republic [1970] E.A. 599**, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in JAMES Vs. REX (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R Vs. SHERSHEWSITY (1912) C.CA 28 T.LR 364.

11. Section 8 (2) of the Sexual Offences Act provides as follows:

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.

12. The prescribed sentence is mandatory and any other sentence would be illegal. I therefore have no basis to interfere with the sentence. The appeal is therefore dismissed.

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

KIARIE WAWERU KIARIE

JUDGE