



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 41 OF 2019

SAMWEL MAGAK OKOTH.....APPELLANT

VERSUS

REPUPLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No. 30 of 2018 of the

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

JUDGMENT

1. Samwel Magak Okoth, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) (3) [sic] of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence are that on diverse dates between 30th October, 2018 and 7th day of November, 2018 in Nyalenda location, Rachuonyo South sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of NAO, a child aged 15 years.

3. The appellant was sentenced to serve fifteen years imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.

4. The appellant raised six grounds of appeal which can be summarized as follows:

- a) That the appellant was not supplied with witnesses' statements.
- b) That the learned trial magistrate erred in law and facts by relying on hearsay and inadequate evidence.
- c) That the sentence meted out was harsh.

5. 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.

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) (3) of the Sexual Offences Act does not exist. The charge to that extent was erroneously drafted. It ought to have read:

...contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act ...

Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the Criminal Procedure Code.

8. Article 50 of the Constitution of Kenya provides for fair hearing. The appellant contended that this article was breached. He contended that he was not supplied with the statements of the witnesses to enable him prepare for the trial.

9. On 12th November, 2018 after a plea of not guilty was entered, the magistrate made an order the he be supplied with the witnesses' statements. On 27th November, 2018 the prosecutor applied to supply the appellant with copies of P3 form, Birth certificate, treatment notes, the charge sheet and statements. The accused confirmed receipt and the learned trial magistrate noted the same. He cannot be allowed to claim that the statements were not supplied.

10. 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.

11. The copy of the Certificate of Birth of the complainant indicate that she was born on 26th June, 2004. At the time of the alleged offence, she was therefore 14 years old and not fifteen as indicated in the particulars of the charge. The complainant was therefore below the age of 18 years.

12. NAO (PW1) testified that the appellant had sex with her on 4th November, 2018 and on 5th November, 2018. On both occasions he threatened to kill her if she reported to anyone. On both occasions he was armed with a machete.

13. She testified that again on 17th November, 2018 he found her where she had gone to pick vegetables and knocked her down. As he was preparing to have sex with her, her brother found them and the appellant fled. He left behind black sandals, a black jumper and a blue mobile phone. These items were identified in court.

14. The evidence of KO (PW2) was that he found NAO lying down and the appellant was on top of her. He got hold of the appellant. A struggle ensued and the appellant overpowered him and fled. He left behind the items that were produced in court.

15. When the complainant was examined on 8th November, 2018 her genitalia was found to be inflamed.

16. The Sexual Offences Act defines penetration as follows:

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

17. From the evidence on record, penetration was proved.

18. The evidence of NAO (PW1) and that of her brother (PW2) left no doubt that the perpetrator was the appellant.

19. Section 8 (3) of the Sexual Offences Act provides:

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.

The sentence meted out to the appellant was therefore illegal. I accordingly set aside the sentence of fifteen years and substitute it with a sentence of twenty years to run from when he was sentenced by the trial court.

20. The appeal is therefore dismissed for lack of merits.

DELIVERED and SIGNED at HOMA BAY this 26th Day of July, 2021

KIARIE WAWERU KIARIE

JUDGE