REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 30 OF 2018

GOO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From the original conviction and sentence in S.O.A case No.6 of 2018 of the

Senior Principal Magistrate's Court at Mbita by Hon. Samson Ongeri–Principal Magistrate)

JUDGMENT

1. GOO, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on diverse dates between the 2016 and the 2nd day of February, 2018 in Suba South sub County of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of JAO, a child aged 10 years.

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

4. The appellant was represented by the firm of H. Obach & Partners, Advocates. He raised four grounds of appeal as follows:

a) That the trial magistrate erred in law and in fact by convicting on evidence which was rife with contradictions.

b) That the learned trial magistrate erred in law and in fact convicting him on insufficient evidence since the prosecution failed to call some material witnesses.

c) That the trial magistrate failed to consider his mitigation.

d) That the sentence meted out was harsh in the circumstances.

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. The appellant through his advocates introduced new grounds of appeal in the written submissions. This was done without the leave of the court and without notice to the respondent. Section 350 the Criminal Procedure Code provides:

> (**2) A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal:**
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> **Provided that—**

iv) save as provided in paragraph (i), a petition of appeal may only be amended with the leave of the High Court and on such terms and conditions, whether as to costs or otherwise, as the High Court may see fit to impose;

(v) notice in writing of an application for leave to amend a petition of appeal shall be given to the Registrar of the High Court and to the Attorney-General not less than three clear days, or such shorter period as the High Court may in any particular case allow, before the application is made; and an application for leave to amend a petition of appeal shall be made either at the hearing of the appeal or, if made previously, by way of motion in open court.

I will therefore disregard the new grounds of appeal which were introduced at the submission stage.

8. The complainant was a girl aged 10 years at the time of the offence and was a daughter of the accused. In her evidence, she identified the appellant as her defiler and narrated how he would seize an opportunity to defile her whenever her mother was away. She further testified that he threatened to stab her with a knife if she informed her mother.

9. During cross examination, she said that in 2016 when she was taken to hospital, the appellant told her to implicate another person. She also denied that there was a boy who had defiled her.

10. JKO (PW2) is the complainant's mother. Her evidence was that the appellant had been defiling the complainant since 2015 but no action was taken was taken for the police were bribed with Kshs. 25,000/= and also owing to the fact that the area chief was his uncle. On 2 nd February, 2018 when the complainant reported to her that the appellant had defiled her, she went to report at Magunga Police Station who took action against the appellant.

11. In this case just like many other sexual offences cases, there were no eye witnesses. The proviso to section 124 of the Evidence Act provides:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, 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.

I will therefore endeavour to establish if the learned trial magistrate arrived at the right conclusion in believing the minor.

12. Stephen Kerario Chacha (PW3) is the clinical officer who examined the complainant on 13th February, 2018. His evidence was that at the time of examination she was 9 years old. There were lacerations and bruises on the vaginal wall and the hymen was missing. She was HIV positive. When her age was assessed, her dental formula indicated that she could be between 11 & 12 years at the time. He also testified on the treatment notes of the appellant from Magunga Dispensary. The notes showed that he was a known HIV patient.

13. The loss of hymen cannot be taken as the sole conclusion of defilement. The Court of appeal in the case of **P. K.W vs. Republic [2012] eKLR** on the issue of broken hymen observed as follows:

15. …Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769.

In the instant case it however, there are other pieces of evidence that point to no other conclusion than that the complainant was defiled. These include the medical finding of lacerations and bruises on the vaginal wall.

14. The complainant was found to be HIV positive and so was the appellant. These coupled with the other evidence which I have pointed out, leaves no doubt that not only was she defiled, but the culprit was identified as the appellant.

15. In his defence the appellant contended that his wife falsely implicated him due to their differences. This defence was clearly an afterthought for the complainant's mother was not confronted with it. The learned trial magistrate was justified to dismiss it.

16. The appellant was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act but was sentenced under section 8 (2) of the Sexual Offences Act. Section 8 (4) of the Sexual Offences Act provides for a penalty where the victim of the offence of defilement is a child a child between the age of sixteen and eighteen years. The sentence upon conviction is imprisonment for a term of not less than fifteen years. Section 8 (2) of the Act on the other hand provides for a penalty where the victim of the offence of defilement is a child a child aged eleven years or less. The sentence upon conviction is imprisonment for life.

17. The complainant and her mother testified that she was ten years old but did not produce any document in support. The medical examination conducted prior to the hearing indicated that she was between 11 & 12 years. The appellant ought to have been found guilty under section 8 (3) of the Act which 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.

18. Before the appellant was sentenced, after his mitigation, the court ordered for a report which was however unfavourable. He cannot

complain that his mitigation was not considered.

19. From the foregoing analysis of the evidence on record, the appeal of the appellant will only succeed on the sentence. I set aside the life imprisonment sentence and substitute it with a sentence of twenty years to run from when he was sentenced by the trial court.

DELIVERED AND SIGNED AT HOMA BAY THIS 19TH DAY OF OCTOBER, 2021

KIARIE WAWERU KIARIE

JUDGE