



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 27 OF 2020

LAZARUS OTIENO ONYIMBOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case No. 30 of 2020 of the

Senior Principal Magistrate's Court at Ndhiwa by Hon. Vincent K. Kiplagat-Resident Magistrate)

JUDGMENT

1. Lazarus Otieno Onyimbo, the appellant herein, was convicted of 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 were that on diverse dates between the 24th day of May, 2020 and 29th day of May, 2020 [Particulars withheld] location in Ndhiwa District of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of SBO., a child aged 15 years.
3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was represented by the firm of Obach & Partners Advocates. He raised seven grounds of appeal which I have summarized as follows:
 - a) That the learned trial magistrate erred in law and in facts in failing to satisfy the principles to be applied in coming to his impugned judgement pursuant to section 8(3) of the Sexual Offences Act.
 - b) That the learned magistrate erred in law and in fact in failing to notice that essential ingredients/elements of the offence as charged were not proved.
 - c) That the learned magistrate erred in law and fact by failing to consider/subject evidence to proper scrutiny, evaluate the same and analyze as required of it. If it did, the trial court would have discovered that;
 - i) There was a likelihood that the charges against the appellant were borne out of malice and ill-will due to the land dispute that exists between the two families.
 - ii) The complainant's statement was inconsistent making her testimony unsafe to accept as evidence.
 - d) That the learned magistrate erred in law and fact in shifting the burden of proof to the appellant and that there was insufficient evidence to support the conviction of the appellant.
 - e) That the learned trial magistrate erred in law and in fact in failing to properly and constructively evaluate the entire evidence on record.
 - f) That the learned trial magistrate erred in law and in fact in giving an excessive sentence of 20 years while putting extraneous factors into consideration in reaching his impugned decision.
 - g) That the learned magistrate erred in law and in fact in relaying on irrelevant evidence and material and by applying the same in reaching his impugned judgement.

5. The appeal was opposed by the state.

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 (4) of the Sexual Offences Act ...

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

9. Section 8(1) of the Sexual Offences Act defines defilement in the following terms:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

An offence of defilement therefore, is established against an accused person when the prosecution has proved the following ingredients:

- a) That there was penetration of the complainant's genitalia;
- b) That the accused was the perpetrator; and
- c) The age of the complainant was 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 the prosecution proved against the appellant.

10. The complainant in her evidence testified that she was 15 years old. She produced her birth certificate. Her age was never an issue.

11. SBO (PW1) in her evidence gave contradictory evidence as to whether she had sex with the appellant. At one point she testified that the appellant defiled her and at another she said they never had sex. Such a witness was described as unreliable by the court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) in the following words:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates makes it unsafe to accept his evidence.

SBO (PW1) was unreliable witness.

12. Nelson Waka (PW6) was the clinical officer who examined SBO. He testified that there was no evidence of penetration.

13. Before a conviction is founded on the evidence of the complainant, the court must comply with section 124 of the Evidence Act.

14. Section 124 of the Evidence Act provides:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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. [Emphasis added]

We have already noted that SBO is untrustworthy witness. The conviction was therefore unsafe. This coupled with the evidence of PW6, the clinical officer, means that penetration was not proved.

15. The upshot of the foregoing is that the appeal succeeds. The conviction is quashed and the sentence is set aside. The appellant is set at liberty unless if otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE