



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. E012 OF 2020

JACK OTIENO AMOLLO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in S.O.A case No. 8 of 2019 of the

Senior Principal Magistrate's Court at Oyugis by Hon. C.A.

Okore–Senior Resident Magistrate)

JUDGMENT

1. Jack Otieno Amollo, 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 the 10th day of May, 2019 in Rachuonyo North sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of IAO, a child aged 17 years.
3. The appellant was sentenced to serve 15 years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was represented by the firm of Robert Ochieng Advocates. He raised the following grounds of appeal:
 - a) The learned trial magistrate erred, and misdirected herself, in law and fact by:
 - i) Giving the prosecution leeway to treat the child complainant as a refractory witness in accordance with Section 152(1) (b) of the Criminal Procedure Code instead of a hostile one in accordance with Sections 153 and 154 of the Evidence Act.
 - ii) Declaring suo moto, that the complainant was a hostile witness when no such leave to declare the said complainant a refractory witness.
 - iii) Erroneously invoking the provisions of section 152(1)(b) of the Criminal Procedure Code and declaring the child complainant a refractory witness.
 - iv) Invoking the provision of Section 152(1)(b) of the Criminal Procedure Code to procure coerced testimony/evidence from the child complainant.
 - b) The learned trial Magistrate erred in law in sustaining a conviction and failing to adhere to the tenets of the appellants constitutional right to a fair hearing espoused under Article 50(4) of the constitution of Kenya 2010 when:
 - i) The complainant was detained irregularly and illegally contrary to article 31 of the constitution, and thus “without just cause” for purposes of coercing her to give testimony against the appellant.
 - ii) The otherwise illegally obtained evidence by the court amounted to an exercise detrimental to the administration of justice contrary to article 50(4) of the Constitution of Kenya 2010.
 - c) The learned trial Magistrate who delivered the Judgment erred in law and fact by misdirecting herself on the effect of relying upon contradictory and inconsistent evidence and excluding /failing to take into consideration exculpatory evidence tendered by the child

complainant.

d) The sentence passed by the leaned trial magistrate was harsh, excessive in the circumstances and bad in law considering the small age gap between the appellant (twenty years) and the complainant (seventeen.)

5. The appeal was opposed by the state through Mr. Ocheng, 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. 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.

8. IAO (PW2) gave two versions as to the identity of the perpetrator. In one version she testified that her boyfriend was one Moses Onyango. She contended that she was forced to implicate the appellant. The other version of her testimony was that the appellant was her boyfriend with whom she had had sexual intercourse severally. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**(Madan, Miller and Potter JJA) held:

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 that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

I find that IAO (PW2) such a witness whose evidence requires corroboration before it is acted upon.

9. The evidence of Richard Otieno (PW3) and that of Irene Ajwang (PW4) was that on 11th May 2019 they arrested the appellant and IAO (PW2) in a room at [Particulars Withheld]. When the girl was examined on 13th May, 2019 by Odhiambo Fredrick (PW1) a clinical officer, he did not find anything significant to support the complaint. He only established that the hymen was missing but observed that it was broken long ago. 10th of May,2019 cannot be described as long time ago by 13th May, 2019. This is the evidence that could have corroborated the evidence of IAO but there was nothing significant to support the charge.

10. Section 8 (4) of the Sexual Offences Act provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

The sentence meted out to the appellant was therefore legal.

11. The upshot of the foregoing is that the conviction was not safe. The same is quashed and the sentence 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