



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 29 OF 2019[SO]

CALEB OTIENO MWALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence delivered by Hon. E. N. Wasike, SRM

at Bondo on 24th April 2019 vide Bondo SO Case No. 52 of 2018)

JUDGMENT

1. The appellant **CALEB OTIENO MWALO** was charged with the offence of **defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. of 2006**. Particulars of the offence were that on the 5th Day of September, 2018 at about 1930 hours at [particulars withheld] Market in Bondo Sub County within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of SAO [full name withheld for legal reasons] a child aged five years.

2. The appellant also faced an alternative charge of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006** by intentionally touching the vagina of the complainant child aged 5 years with his penis.

3. The appellant denied the offence and the prosecution called five witnesses in support of its case. After the trial, the appellant was found guilty and sentenced to serve thirty [30] years imprisonment.

4. Being dissatisfied with the said conviction and sentence, the appellant lodged this appeal dated 29th April 2019 and later he filed amended grounds of appeal and submissions in support of the appeal.

5. As required, this being a first appeal, this court is expected to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, this court neither saw nor heard witnesses as they testified.

6. However, before delving into the evidence adduced in the trial court, this court observes the following:

7. The proceedings by the trial magistrate were irregularly conducted in that there was no signature appended after recording evidence of PW1 both in chief and after cross examination of the witnesses by the appellant. In the same vein, there is no signature of the trial magistrate owning the evidence adduced by the appellant. Section 197 of the Criminal procedure Code deals with manner of recording of evidence by magistrates during the trial Manner of recording evidence before magistrate. The section provides that:

197(1) in trials by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner—

(a) the evidence of each witness shall be taken down in writing or on a typewriter in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the magistrate, and shall form part of the record;

(b) Such evidence shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

8. In addition, whereas PW1 a minor testified after voire dire examination on her was carried out, PW2 too from the record is a minor but the trial court never made any indication that she was a minor and hence no voire dire examination was carried out on her. There is also no

signature after taking down evidence of PW2, PW3 and the defence evidence adduced by the appellant. The language in which the witnesses testified too is not indicated by the trial court.

9. Neither is there signature owning evidence in chief for PW4 and PW5. This practice offends section 197 of the Criminal Procedure Code.

10. At the commencement of the hearing the record only shows language as *ENG/KISW/DHOLUO* but one cannot tell from the evidence on record which language the witnesses spoke, when giving evidence.

11. With all the above inconsistencies and irregularities, iam not satisfied that the trial of the appellant was competent and proper. The proceedings were fatally defective as to vitiate the trial. I quash the appellant's conviction and set aside the sentence imposed on him.

12. I order that the appellant shall be arraigned before Bondo PM's court for retrial on 3/2/20202 for the same offence. The trial court record to be resubmitted forthwith.

Dated, Signed and Delivered at Siaya this 27th Day of January, 2020

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel for the Respondent State

CA: Brenda and Modestar