



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 60 OF 2018[SO]

JULIUS OCHIENG LIGAWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence delivered by Hon. E. N. Wasike, SRM at Bondo on 26th October 2018 vide Bondo SO Case No. 4 of 2018)

JUDGMENT

1. The appellant **Julius Ochieng Ligawa** 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 3.2.2018 about 1400 hours [2.00pm] in Rarieda sub-county within Siaya county intentionally caused his penis to penetrate the vagina of FAO[full name withheld for legal reasons], a child aged 9 years. 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**. Siaya County intentionally touched the buttocks, anus, vagina of FAO a child aged 9 years with his penis.
2. 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.
3. Being dissatisfied with the said conviction and sentence, the appellant lodged this appeal on 30th October 2018 and later he filed lengthy supplementary grounds of appeal.
4. 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.
5. However, before delving into the evidence adduced in the trial court, this court observes the following:
6. PW1 was a minor and before she gave evidence on oath, a proper **voire dire** was undertaken by the trial court on her capability to understand proceedings. However, the language used by the witness who was the complainant was never indicated by the trial court. PW2 who was the mother of PW1 was also sworn and she testified on oath but the language used was never stated. PW3 was the Clinical Officer who was sworn but no language used to testify is indicated on record. PW4 was a minor from what I gather in the proceedings but she was sworn without any **voire dire** examination or indication that she was a minor, there is also no indication of the language used. PW5 was the investigating officer who was sworn but no language is indicated.
7. 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.
8. In addition, when the appellant gave evidence in defense, he gave sworn testimony but no language was indicated. His witness DW2 from the record this court gather was a minor but was not even asked how old he was and no **voire dire** examination was carried out. Besides, it is not indicated what language the witness gave evidence.
9. With all the above discrepancies, iam not satisfied that the trial of the appellant was competent and fair. The proceedings were fatally defective as to vitiate the trial. I quash the appellant's conviction and sentence and discharge the appellant.
10. I order that the appellant shall appear before Bondo PM's court for retrial. As the trial magistrate has since been transferred from the station, the trial to begin afresh before any other magistrate of competent jurisdiction.

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