



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL APPEAL NO. 20 OF 2019**

**JACK ODWUOR OKINDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in S.O.A case No. 135 of 2018 of the*

*Chief Magistrate's Court at Busia by Hon. R.N. Ng'ang'a-Resident Magistrate)*

**JUDGMENT**

1. Jack Odwuor Okinda, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) (2) [sic] of the Sexual Offences Act No. 3 of 2006.

2. The particulars were that on the 27<sup>th</sup> day of November 2018 at County of Busia County, intentionally and unlawfully caused his penis to penetrate the vagina of I.A., a girl aged six years.

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

4. The appellant was in person. His grounds of appeal can be summarised as follows:

- a) That the learned trial magistrate erred in law and in fact by disregarding the fact that he was not supplied with all documentary evidence.
- b) That the learned trial magistrate erred in law and in fact by convicting him on the basis of insufficient evidence.
- c) That the learned trial magistrate erred in law and in fact by failing to appreciate that material witnesses were not called.
- d) That the learned trial magistrate erred in law and in fact by failing to appreciate that no evidence linked him to the offence.

5. The appeal was opposed by the state through Mr. Mayaba, learned counsel who contended that the prosecution proved its case to the required standards.

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) (2) 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 (2) of the Sexual Offences Act ...**

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

8. Article 50 of the Constitution of Kenya provides for fair hearing. The appellant contended that this article was breached. He complained

that he was not supplied with all the documentary evidence the prosecution was to rely on. On 12<sup>th</sup> April 2019 when the matter came for mention, the appellant complained to the court that he had not been supplied with all statements. The court ordered that the matter to proceed on the basis of the supplied statements and the others to be supplied. The hearing of the case commenced on 24<sup>th</sup> May 2019 and the appellant indicated to the court that he was ready to proceed. He did not complain that he had not been supplied with all statements and documentary evidence. We can logically conclude that he had all the necessary documents and that is why he did not complain but informed the court that he was ready for hearing. This ground has no merit.

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) 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.**

In this case, I will endeavour to establish if these ingredients were proved.

10. Though the evidence of the complainant aged 6 years was not explicit on the issue of penetration, the medical evidence adduced by Clesensia Okwero Ogutu (PW4). This was a clinical officer who examined the minor complainant herein. She found during examination that the vaginal wall was reddened. There was odour emanating from the minor's vagina and that the hymen was absent.

11. In her evidence, PW1 said that the appellant made her to lie on his shirt which he spread down after removing it. He proceeded to remove her pair of pants and he inserted his genitalia into his.

12. I therefore find that penetration was proved.

13. The offence was committed during day time. Other than the complainant recognizing the perpetrator, there were other children who, though not called as witnesses, mentioned to PW2 the name of the appellant.

14. Clesensia Okwero Ogutu (PW4) testified that when she was examining the complainant and the latter saw the appellant, she reacted by running away. I am therefore satisfied that the identity of the culprit was established by the prosecution. There was no doubt that it was the appellant who defiled the minor.

15. The birth certificate that was produced indicate that the complainant was born on 29<sup>th</sup> September 2012. At the time of the offence she was aged 6years and two months. The age of the minor was therefore proved.

16. Though the appellant did not indicate which material witnesses he complained that were not called, the record would suggest he had in mind J and the other children of MKO (PW2). In **In Bukenya vs. Uganda [1972] EA 549**, (Lutta Ag. Vice President) held:

**The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**

**Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.**

In the instant case, failure to call these children did not in any way dent the prosecution case. Their evidence would only augmented what was already on record since there were no gaps in the prosecution evidence.

17. Section 8 (2) of the Sexual Offences Act states:

**A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

The learned trial magistrate sentenced the appellant to life imprisonment. He was therefore correctly sentenced. I have no basis for interfering with the sentence.

18. From the foregoing analysis of the evidence on record, I find that the conviction was based on sound evidence. The appeal is therefore dismissed.

**DELIVERED and SIGNED at BUSIA this 25<sup>th</sup> Day of June, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**