



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO: 42 OF 2018**

**BENSON ONDIEKI ODHIAMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal from original conviction and sentence in criminal case (Sexual Offences Act) No.19 of 2017 of the Chief Magistrate's Court at Oyugis dated 31.05.2018 – J.S. Wesonga, SRM)

**JUDGMENT**

[1] The appellant **Benson Ondiek Odhiambo** was charged before the Senior Resident magistrate at Oyugis with sexual assault, contrary to **Section 5(1) a (i)** read with **Section (2)** of the **Sexual Offences Act** and in the alternative, with committing an indecent act with a child contrary to **Section 11(1)** if the **Sexual Offences Act**.

[2] It was alleged that on the 16<sup>th</sup> day of August, 2012, at [particulars withheld] Location, Rachuonyo South , Homa bay County, the appellant caused his male sexual organ to penetrate the anus of DJO, a child aged five (5) years or he intentionally and unlawfully did commit an indecent act with the child by rubbing his male organ against the child's buttocks.

[3] After a full trial, the appellant was convicted of the main count and sentenced to twenty (20) years imprisonment. Being dissatisfied with the conviction and sentence, he preferred the present appeal on grounds contained in the petition of appeal filed herein on 8<sup>th</sup> October, 2018, which seemed to have been abandoned for the grounds contained in the petition of appeal dated 27<sup>th</sup> day of September 2018 and filed herein on 23<sup>rd</sup> day of October 2018.

[4] These later grounds were argued by way of written submissions filed herein on 1/9/2020, indeed the entire appeal was argued by way of written submissions due to the current corona virus (Covid 19) pandemic. The state/respondent filed its submissions on 8<sup>th</sup> day of May 2020 through learned Prosecution Counsel Mr. A.O Olouch (S/ADPP).

[5] Basically as may be gleaned from the operating ground of appeal and as noted by the respondent, the appeal is essentially on sentence.

In that regard, the respondent clearly concedes the appeal with its submissions that the appellant ought to have been charged under Section 8(1)(2) of the Sexual Offences Act as the complainant was a boy aged 5 (five) years as at the time of the offence. That, both the police and the prosecution counsel on record preferred a charge under Section 5(1) (2) (2) of the Act mistaken belief that the complainant being a boy was incapable of being defiled.

[6] The respondent ironically, urged this court to rectify the anomaly by substituting. The sentence of twenty years (20) to life imprisonment. This presupposes that this court should substitute the appellant's conviction under the impugned provision of the sexual offences Act for Section 8(1) (2) of the Act. And enhance the sentence from twenty (20) years imprisonment to life imprisonment. It therefore follows that, after all the respondent does not concede the appeal.

[7] Be that as it may, the duty of this court was to revisit the entire evidence and arrive at its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

In that regard, due consideration was given to the evidence led by the prosecution though the complaints father (**PW 1**) the complainant child (**PW 2**), a motor cycle taxi operator (boda-boda), (**PW3**) a medical doctor, (**PW 4**) and a police officer based at Oyugis police station (**PW 5**).

[8] Also considered was the appellant's sworn evidence in denial of the charge. From the entire evidence, this court is satisfied that the ingredient of the main charge facing the appellant i.e Sexual Assault contrary to Section 5(1) (a) (i) of the Sexual offences Act, were duly established and proved against the appellant such that his alibi defence was discredited and dislodged by placing him at the scene of the

offence on the date that it occurred, this resulting conviction by the trial court was therefore safe and proper. In any event, the appellant does not raise any issue with regard to the conviction.

**[9]** His main concern is the review of the sentence meted out by the trial court i.e twenty (20) years imprisonment which accorded with Section 5(2) of the sexual offences Act but in the opinion of this court rather excessive for a first offender considering that the provision provides for a term of not less than ten (10) years imprisonment which may be enhanced to life imprisonment as desired herein by the respondent. The circumstances of the case did not call for any enhancement of the prescribed sentence.

**[10]** Consequently, even as the appeal (if at all) on conviction cannot succeed the appeal on sentence succeeds by virtue of being rather excess and must now be set-aside and substituted with a sentence of ten (10) years imprisonment with effect from the date of the sentence (i.e 31/5/2018) less the three (3) years imprisonment already served prior to the re-trial of the case on 31<sup>st</sup> day of 2017. In effect the appellant shall serve seven (7) years imprisonment and if the delay in this case caused him to stay in jail for that period of time or more, he may forthwith be released if the prison authorities deem it fit and lawful.

Ordered accordingly.

Delivered and signed this 24<sup>th</sup> day of **September 2020**.

**J.R. KARANJAH**

**JUDGE**