



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.43 OF 2018

MOSE OKOTH ONDIENG.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from original conviction and sentence in criminal case Sexual office No.11 of 2018 of the Principal Magistrate's Court at Oyugis dated 28/9/2018 – Hon. J.S.Wesonga, SRM)

JUDGMENT

1. The appellant, **Moses Okoth Ondieng**, appeared before the Senior Resident Magistrate's court at Oyugis charged with defilement, contrary to **Section 8(1)** read with **Section 8(2)** of the **Sexual Offences Act** and in the alternative, with committing an indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act**.
2. It was alleged that on the 20th July 2018, at Kokwanyo location – Rachuonyo East, Homabay county, the appellant defiled **MA**, a child aged seven (7) years or that he committed an indecent act with her by touching her female sexual organ with his male sexual organ.
3. Upon his plea of not guilty, the appellant was tried, convicted and sentenced to life imprisonment on the main count. However, he was aggrieved by that outcome and preferred this appeal on the basis of the grounds set out in the petition of appeal filed herein on his behalf on 15th October, 2018, by the firm of **Ochillo & Co. Advocates**.
4. As duly directed by the court, the hearing of the appeal proceeded by way of written submission. In that regard, the appellant's submissions were filed on 27th June 2019, while those of the respondent were filed on 15th July 2020, through the learned Senior Assistant Deputy Public Prosecutor, **Mr. A. O. Oluoch**. In essence, the appeal was opposed by the respondent.
5. Having given due consideration to the appeal on the basis of its supporting grounds and those of opposition thereto and also on the basis of the rival submissions, the duty of this court was to re-visit the evidence availed at the trial and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Okeno Vs Republic (1972)EA32**).
6. Accordingly, the prosecution case was briefly that the child complainant, **MA (PW3)**, was at the material time a nursery school pupil at [particulars withheld] Junior Academy and on the material date she went to school as usual. During the lunch break, she met the appellant whom she referred to as "Baba Brian". He sent her to a nearby house and followed her there. On his arrival, he removed her underpants and touched her private parts. He then removed his trousers and using his male sexual organ he penetrated her through her sexual organ.
7. After the incident, the complainant left the house and found a woman unknown to her standing at the door. The woman was **Covin Akinyi (PW2)**, a resident of a neighboring plot. She saw two young children standing outside a neighbors house wall. She enquired as to their mission there and they told her that they were waiting for M, the complainant. Shortly thereafter, she (**PW2**) heard a young girl crying from the neighbour's house saying "Niache Niende" (*i.e let me go*). A male voice responded "Wacha kelele watu watasikia" (*i.e stop making noise, people will hear*).
8. On enquiring from the children outside the house, **Covin (PW2)**, learnt that it was the complainant crying inside the house of "Baba Brian". She then approached the house and knocked at the door in the process, the complainant came out crying and on seeing her, stopped and leaned on the house wall, the complainant's suspected tormentor also came out of the house, padlocked it and left even after she (**PW2**) had already seen him. She decided to talk to the complainant, and on realizing that, the suspect returned to the scene, held the complainant's hand and told her to run to school. All this happened in broad daylight such that she (**PW2**) saw and identified the appellant as the suspect.
9. The witness (**PW2**) did not stop there, she followed the complainant to her school after suspecting that she had been defiled by the

appellant. She met a teacher at the school and told her what complainant had informed her.

The said teacher was **Ruth Achieng Ojala (PW4)**, she took **Covin (PW2)** to the Deputy Principal of the school, **Caroline Juma Otieno (PW6)** who talked to the complainant and confirmed from her that she had been defiled by “Baba Brian”.

10. The Deputy Principal knew the appellant as the person called “Baba Brian”, a motor-cyclist mechanic at Kochola market. He could not be immediately traced at his place of work but the matter was reported to her father, **LOO (PW1)** who knew the appellant. He proceeded to the complainant’s school and after confirming the allegations made against the appellant made a report at Oyugis police station and then took the complainant to hospital.

11. A Clinical Officer at the hospital, **Kibet Serem (PW5)**, examined the complainant, and confirmed that she had been defiled. He prepared the necessary medical notes and reports (**PEx2, 3 and 4**) which he signed and tendered them as exhibits. The matter was investigated by PC **Sammy Meldiki (PW7)**, who confirmed that the complainant was aged seven (7) years old as at the time of the offence. He therefore arrested and charged the appellant with the present offence.

12. In his defence, the appellant denied the offence and contended that it was a frame up by one Stephen Okoth, the owner of the complainant’s school who owed him money for the repair of a generator, a matter which was reported to the police in the month of May 2018. He implied that his arrest for the material offence was without good cause but a vendetta against him by the said Stephen Okoth.

13. After considering all the foregoing evidential facts, the trial court arrived at the conclusion that the case for the prosecutor was proved beyond reasonable doubt against the appellant who now appeals against both conviction and sentence. Basically, under **Section 8(1)** of the **Sexual Offences Act**, a person who commits an act which causes penetration with a child is guilty of defilement and under **Section 8(2)** of the Act, if the child is aged eleven (11) years or below, such person shall upon conviction be sentenced to life imprisonment.

14. The evidence by the prosecution did undisputedly establish that the complainant (PW3) was indeed defiled on that material date and that she was at the time aged below eleven (11) years as per the necessary birth certificate (**PEx 1**) and medical report (**PEx 3**) which placed her age at between 6 years and 7 years.

The medical report (**PEx3**) coupled with the complainant’s evidence and that of the clinical officer (**PW5**) clearly proved that there was penetration which would include partial or complete insertion of the genital organ of a person into the genital organ of another person.

15. In establishing that the complainant was below the age of eleven (11) years and that her female genital organ was penetrated by that of a male sexual or genital organ, the prosecution in effect established the necessary ingredients of the offence of defilement. Therefore, the bone of contention and indeed the main issue which arose for determination by the trial court was whether the appellant was the person responsible for the offence.

16. The defence was a clear denial and an indication that the charge against the appellant was prompted by malice and bad blood between him and the proprietor of the complainant’s school. However, he did not show how his supposed bad relationship with the proprietor of the school was connected to the complainant child or her family. Never the less, the burden to prove that he was responsible for the offence lay squarely on the prosecution and this was discharged by the complainant’s own summary which strongly indicated that the appellant was not a stranger to her. That, she knew him as the father of one Brian i.e ‘Baba Brian’. Indeed the Deputy Principal (**PW6**) confirmed as much.

17. Other than the complainant, there was the evidence of the appellant’s neighbor (**PW2**). She confronted the appellant on hearing the complainant’s cry of help. She did so by knocking at the door to his house only for the distressed complainant to come out of the house and the appellant to padlock the house and leave before returning to the scene and forcing or ordering the complainant to go back to school.

18. Clearly, the complainant’s evidence of identification against the appellant was credible enough and was in any event credibly corroborated by that of the appellant’s neighbor (**PW2**). It was found to be truthful by the trial court and could therefore be relied upon even in the absence of corroboration by dint of **Section 124** of the **Evidence Act**.

19. It would therefore follow that the trial court’s finding that the case against the accused was proved beyond reasonable doubt was correct. His conviction was founded on strong and credible evidence availed by the prosecution and is hereby sustained for being sound and proper. The appellant’s grounds of appeal which are largely on conviction together with the supporting submissions must in the premises be and are hereby overruled.

20. With regard to the sentence, it was consistent with **Section 8(2)** of the **Sexual Offences Act** and therefore lawful.

In summary, this appeal is lacking merit and is hereby dismissed in its entirety.

Ordered accordingly.

(Delivered and signed this 29th day of October, 2020)

J.R. KARANJAH

JUDGE OF THE HIGH COURT