



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.22 OF 2019

EDWARD KEKE AGAWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in criminal case Sexual office No.4 of 2019 of the Principal Magistrate's court at Mbita dated 21st August, 2019 – Hon. Japhet Bii, SRM)

JUDGMENT

[1] The appellant, **Edward Keke Agwa**, was arraigned before the Senior Resident Magistrate at Mbita for the offence of defilement, contrary to **Section 8 (1)** read with **Section 8 (3)** of the **Sexual Offences Act** and in the alternative, committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**.

[2] It was alleged that on diverse dates between 15th November 2018 and 27th January 2017 at [Particulars Withheld], Mbita South within Homa Bay County, the appellant defiled **PAO**, a girl child aged fourteen (14) years or that he committed an act with the child by touching her genital organ using his genital organ.

[3] After trial, the appellant was convicted on the main count and sentenced to Twenty (20) years imprisonment. He was however, dissatisfied with the conviction and sentence and preferred this appeal on the basis of the grounds set out in the petition of appeal filed herein on 4th September, 2019 and amended grounds for appeal filed on 7th October, 2020. The hearing of the appeal proceeded by way of written submissions wherefore the appellant filed his submissions on 7th October, 2020 while the respondent did likewise on 15th July, 2020 through the learned Senior Assistant Deputy Public Prosecutor – **Mr. A. O. Oluoch**.

[4] This court, having given due consideration to the rival submissions against the grounds of appeal and of position thereto and also having re-considered the evidence adduced at the trial as required of a first appellate court – bearing in mind that the trial court had the advantage of seeing and hearing the witnesses, is of the opinion that the fact that the offence of defilement was committed was really not in dispute and was in any event duly established by the complainant evidence as corroborated by that of the clinical officer at Magunga Health Center.

[5] The complainant **PAO (PW1)** testified on how she met and befriended the offender in the month of November, 2018. She said that the offender somehow hypnotized her and took her to live with him in Nairobi at Kibera Estate where she was held incommunicado for about a month before they returned to Homa bay County. They engaged in sexual activity all that time before she was traced by her relatives and the matter reported to the police.

[6] The Clinical Officer, **Richard Odoyo Ojuok(PW5)** examined the complainant after she was referred to him. He thereafter completed the necessary P3 form (**P.Ex.1 (a)**), and related documents (**P.Ex.1 (b)** and **(c)**) which confirmed the complainant's age and the fact that she was defiled. The complainant pinpointed the appellant as the person who enticed and secretly took her to Nairobi. She implied that being a musician, he mesmerized and took advantage of her vulnerability to engage in sexual activities with her.

[7] The complainant's father **AOO (PW2)**, indicated that the complainant had gone missing from home and school. He reported accordingly and was later to learn that she had been traced having eloped with the appellant. The appellant's mother **MAO (PW3)**, confirmed that the appellant took the complainant to her home before they left for Nairobi. She heard from the two that the complainant was a dancer. They later returned to her home and it was at that time that he (appellant) told her that the complainant was his wife.

[8] The appellant's brother, **KOA (PW4)**, confirmed that the appellant brought the complainant to their family home. It is then that he learnt from the appellant that the complainant was called "QV" a dancer and also his girlfriend. **Sgt. George Obango (PW6)**, an administration police officer based at Ogongo Administration police camp was at the same time informed by the appellant's brother that he (appellant) was staying at their home with an underage girl as his wife.

[9] The officer proceeded to the home but the appellant escaped. The complainant was taken in police custody and after the appellant was handed to the police by his brothers the two were taken to Mbita police station and then Magunga police station from where the complainant was referred to hospital for necessary medical examination.

[10] **Sgt John Soke (PW7)**, investigated the case and thereafter preferred the present charge against that appellant.

Other than establishing the material ingredients of the charge of defilement, the prosecution through its aforementioned witnesses also established that the appellant a known person in his locality, was the person responsible for the offence in as much as he took advantage of the complainant's vulnerability and engaged in consensual sex with her under the illusion that they were a married couple.

[11] The defence raised by the appellant was a local denial of the offence and all that was stated against him by the prosecution witnesses and a confession that he was fined for the offence due to an existing land dispute within his family. He alleged that the case against him was a witch hunt by his family and that of the complainant. However, the prosecution evidence against him was not only sufficient but also cogent and credible enough to disprove his defence and prove beyond reasonable doubt that he committed the offence of defilement against the complainant.

[12] Even though the evidence strongly suggested that the complainant was a willing participant, the appellant ought to have known better than take advantage of her naivety and vulnerability. In doing so, he allowed his sexual perverty to cloud his mind and ended up engaging in sexual activity with a child thereby committing the offence of defilement.

[13] This appeal is therefore unmerited on all grounds. The appellant's conviction by the trial court was proper and sound and is hereby affirmed. The sentence imposed on the appellant was lawful.

In the upshot, the appeal is dismissed in its entirety.

Ordered accordingly.

(Delivered and signed this 22nd day of October, 2020)

J.R. KARANJAH

JUDGE OF THE HIGH COURT