



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.27 OF 2019

JOSEPH OGOLA BWANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in criminal case No.14 of 2018

of the PM's court at Oyugis dated 19th October, 2019 –J.S. Wesonga, SRM)

JUDGMENT

1. The appellant, **Joseph Ogola Bwana**, also known as **Josy** was arraigned before the Senior Resident magistrate at Oyugis with the offence of defilement, contrary **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 **Act**.

2. It was alleged that on the 7th June 2018, at Sino Kagola location, Rachuonyo South, Homabay County, the appellant defiled **EAO**, a girl child aged ten (10) years or committed an indecent act with the child by rubbing her genital organ with his. After trial, the appeal was convicted on the main count and sentenced to life imprisonment. He was aggrieved and preferred the present appeal against the conviction and sentence.

3. The appellant was argued by way of written submissions. In that regard, the appellant's submissions were filed herein on 1st September, 2020 while those of the respondent were filed on 13th October, 2020 by the learned Senior Assistant Deputy Public Prosecutor (S/ADPP), **Mr. A.O. Oluoch**. In essence, the appeal was opposed by the respondent.

4. The rival submissions together with the grounds of appeal and those in opposition thereto were given due consideration by the court whose primary duty at this juncture was to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses. In that regard, the prosecution case was briefly that the complainant, **EAO (PW1)**, was at the material time a primary school pupil of about Ten (10) years to Eleven (11) years old and on the material date at about 7.00am she was heading to school when she was waylaid by a person armed with a matchet (panga) who forced her into a bushy area and defiled her before running away.

5. Thereafter, the complainant proceeded to school but did not inform anybody for fear of being killed by the offender who had threatened to do so. It was after two days that her mother, **EAN (PW2)**, was notified that she (complainant) was walking with an unusual gait. The mother questioned and examined her genitalia and confirmed that she had been defiled allegedly by the appellant, a person previously known to her.

6. The information reached the complainant's father, **JON (PW3)**, who later took her to the hospital where she was examined by **Dr. Peter Ogolla (PW6)** who thereafter, completed the necessary P3 form (**PEx3**) and related documents (**PW1 and 2**) confirming that the complainant was indeed defiled. **APC Kingangi Musa (PW4)**, then based at Mawego AP Post arrested and handed the appellant to Oyugis police station from where **PC Sammy Meldiki (PW5)**, carried out necessary investigations and ultimately preferred the first charge against the appellant.

7. The defence by the appellant was a denial and an indication that he was a victim of a frame up perpetrated by the complaints father due to an outstanding debt of kshs.2000/- owed by him to the complainant's father. He (appellant) contended that it was him and another who were arrested as suspects but none of them was pointed out by the complainant as being the offender. That he was only charged after the complainant's father gave a bribe of kshs.4, 000/- to a police officer.

8. From all the foregoing evidence, it was clear that the occurrence of the offence as alleged by the complainant was a factor which was not

at all or substantially disputed. In any event the complainant's evidence coupled with that of the doctor (PW6) did establish the material ingredients of the offence of defilement hence confirming and proving that the complainant was indeed defiled.

9. The bone of contention and indeed the crucial issue for determination was the alleged identification of the appellant as the person responsible for the offence. In that regard, the appellant denied responsibility and claimed that he was framed by the complainant's father, yet the complainant failed to identify the assailant among the two people including himself who were arrested as suspects. He attributed his predicament to a bribe given to a police officer to charge him.

10. Other than the complainant, none of the other prosecution witnesses were present at the scene when the offence occurred. None of them could therefore identify the appellant as the offender. The sole evidence of identification was that of the complainant. It was uncorroborated by independent evidence of identification but was found to be credible by the trial court hence the appellant contested conviction.

11. Findings based on the credibility of witnesses, are in most cases better and safely determined by the trial court which had the advantage of seeing and hearing the witnesses and may not be interfered with by an appellate court unless of course such findings could not have been made by a reasonable trial or its showing that there existed errors of law or the findings are not based on cogent evidence (see, **Karingo Vs Republic (1982) KLR 213, Mwita Vs Republic(2004)2 KLR 60 and Republic Vs Oyier (1985) KLR 353**).

12. Herein, none of the shortcomings specified above are evidenced in the proceedings and judgment of the trial court. As such, it may safely be stated that the conviction of the appellant by the trial court was sound and proper even if it was based on the complainant/victim's credibility in the identification of the appellant as the person who offended her.

13. In any event, prior to the conviction, the trial court properly directed and warned itself of the dangers of convicting an accused person on the basis of the uncorroborated evidence of identification by a single witness. Beside, in Sexual Offences, by dint of **Section 124** of the **Evidence Act** corroboration of the sole evidence of the victim is not necessary. The provision thereto states that:-

“Where in a criminal case including a sexual offence the only evidence is that of the alleged victim of the offence. The court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”

14. In this case, the trial court was satisfied that the complainant told the truth when she positively identified the appellant as the culprit and thereby, disproved his defence and rendered it an afterthought. This court does not see any solid reason to depart from that finding and therefore, upholds the appellant's conviction by the trial court.

15. As regards the sentence, the prosecution had sufficient documentary evidence showing that the complainant was of the age of Eleven (11) years or below at the material time of the offence.

Section 8(2) of the **Sexual Offences Act**, provides for life imprisonment for a person who commits an offence of defilement.

Therefore, the sentence preferred upon the appellant by the trial court was neither unconstitutional nor unlawful and is hereby upheld.

16. In sum, this appeal is without merit on both conviction and sentence. It is henceforth dismissed in its entirety.

Ordered accordingly.

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

J.R. KARANJAH

JUDGE OF THE HIGH COURT