



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

SEXUAL OFFENCES APPEAL NO.52 OF 2018

TCO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from original conviction and sentence in Sexual Offences case No.3 of 2017 of the Principal Magistrate's Court at Mbita dated 5/11/2018 – Hon. J.A.Owiti, SPM)

JUDGMENT

1. The appellant, **TCO**, was charged before the Principal Magistrate's Court at Mbita with defilement, contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**, in that on diverse dates between the 1st April 2016 and 7th august 2016 at [Particulars withheld] village Lambwe West Mbita within the county of Homa Bay defiled BAO, a child aged thirteen (13) years or in the alternative, committed an indecent act with the said child contrary to **Section 11(1)** of the **Sexual Offences Act**.

2. After a full trial, the appellant was convicted on the main count and sentenced to twenty(20) years imprisonment. But, being dissatisfied with the conviction and sentence he preferred the present appeal on the basis of the ten(10) grounds set out in the petition of appeal dated 13th November 2018.

At the hearing of the appeal, Learned Counsel, **Mr. Oding'o** appeared for the appellant while the Learned prosecution counsel, **Mr. Oluoch (S/ADPP)**, appeared for the state/respondent. He opposed the appeal.

3. Having proceeded by way of written submissions. Both parties filed their respective submissions and this court having given due considerations to the submissions in the light of the grounds in support of the appeal was obliged to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses. The principle was clearly enunciated in the leading case of **Okeno Vs Republic[1972]EA 32**.

4. In that regard, the prosecution case was briefly that the appellant and the child complainant, **BAO (PW1)** were known to each other as neighbors.

Whereas the appellant was a local herds boy, the complainant was a primary school pupil aged at the time between twelve(12) to thirteen(13) years.

5. On the material month of April 2016, the appellant did one day meet the complainant in the company of her siblings and requested them to assist him graze some cattle. The complainant accepted but her siblings declined. She was left behind with the appellant who shortly thereafter, directed her into a bushy area and defiled her. That, was the first time, but the appellant did at a later stage on two occasions meet and engage in sexual relation with the complainant who did not at anytime report the incident to her parents until such time that her teachers discovered that she was pregnant.

6. The complainant's mother, **CAO (PW2)**, was accordingly notified. The complainant thereafter informed her that the appellant was responsible for the pregnancy.

The matter was reported to the police at Mbita and **IP. Kilonzo(PW4)**, took charge of the investigations. In the process, **John Wekesa(PW3)**, a clinical Officer at Ogongo dispensary examined the complainant and confirmed that she was pregnant. He also confirmed that she was defiled. He then completed the necessary P3 form and produced it in court (**PEx2**).

7. The Government Analyst, **Peter Luta Kweyu(PW5)**, confirmed through the DNA test that he carried out, that the appellant was the father

of the complainant's child conceived after she was defiled.

In his defence, the appellant denied the offence and contended that the allegation against him was a lie.

The obligation to prove his guilt beyond reasonable doubt lay with the prosecution and from the evidence adduced against him by the prosecution, the trial court concluded that the prosecution's burden of proof was discharged.

8. In this court's opinion, it was clearly evident that the appellant engaged in sexual escapades with the complainant after failing to resist the alluring attraction he saw in her or by exploiting her naivety and innocence. Apparently, the complainant was a willing participant in the escapades with the appellant making use of any opportunity that presented itself. In doing so and knowing that the complainant was a minor, a girl child, he ventured "where eagles dare". However, the law caught up with him and revealed him for what he actually was, a child sexual predator or pest. The evidence against him proved as much as it was immaterial that the complainant consented to his sexual escapades against her.

9. Although the outcome of the sexual escapades was a bouncing baby boy for the complainant, the manner in which the child was conceived was against the law and went beyond the moral standards of a just society. It is instructive to note that after his conviction by the trial court, the appellant, notwithstanding that he vehemently denied the offence, had the audacity to ask for parental obligations over the complainant's child conceived through him.

10. For all the foregoing factors, this court is satisfied that the conviction of the appellant by the trial court was proper and lawful. Therefore, grounds one(1) to nine(9) of the grounds of appeal are devoid of merit and are hereby overruled.

With regard to grounds ten(10) which is on sentence, there was sufficient documentary evidence proving that the complainant was between the ages of twelve(12) and thirteen(13) at the material time of the offence. In that regard the appellant was correctly and lawfully sentenced under **Section 8(3)** of the **Sexual Offences Act**, which provides for imprisonment for a term of not less than twenty(20) years. Consequently, the appellant cannot be heard to say that the sentence was harsh. Grounds ten(10) of the appeal is also devoid of merit.

11. In his submissions, the appellant through his counsel raised the issue of fair hearing or trial yet this was not among the grounds of appeal for consideration by this court. Nonetheless, this court's perusal of the proceedings of the trial court reveals that at no time during the hearing was the appellant denied the opportunity to state his case and present any evidence to disprove the allegations against him. Indeed the court did not defeat or "sniff out" the alleged violation of the appellant's constitutional right to a fair trial.

Therefore, the issue pertaining to this right as raised by the appellant is at most an afterthought and unsustainable in any event.

In sum this appeal is wanting on merit and is hereby dismissed in its entirety.

Ordered accordingly.

(Delivered and signed this 26th day of November, 2020)

J.R. KARANJAH

JUDGE OF THE HIGH COURT