



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 39 OF 2017

JOSPHAT ONYANCHA OMOGA

ALIAS NYAMWEYA.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. N. Kahara – RM dated and delivered on the 14th day of June 2017 in the Original Keroka Principal Magistrate’s Court Criminal Case No. 930 of 2016}

JUDGEMENT

The appellant was charged with defilement of a child aged eight years contrary to Section 8 (1) as read with Section 8 (2) of the Penal Code and in the alternative committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. He was convicted on the charge of defilement and sentenced to life imprisonment.

The particulars of the charge were that on 31st July 2016 within Nyamira County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DMM, a child aged eight years.

The appellant being aggrieved by the conviction and sentence has preferred this appeal. The appeal is premised on eleven grounds, namely:

“1.THAT the Learned Trial Magistrate erred in law and facts in convicting the appellant of the offence of defilement notwithstanding that the evidence before the trial court, when properly analysed and evaluated, did not support conviction.

2.THAT the trial magistrate erred in law and fact by failing to afford the appellant a fair trial.

3.THAT the Learned Trial Magistrate erred in law and fact in convicting the appellant without considering his mental status.

4.THAT the Learned Trial Magistrate erred in law and fact by not finding that the prosecution had not proved its case beyond reasonable doubt.

5.THAT the learned trial magistrate erred in law and fact in convicting and sentencing the appellant on insufficient evidence.

6.THAT the conviction and sentence by the learned trial magistrate was unfair and unjust to the appellant.

7.THAT the learned trial magistrate erred in law and fact in putting the appellant on his defence without the evidence from the arresting or investigating officer.

8.THAT the learned trial magistrate erred in law and fact in by giving a sentence which was harsh, excessive and hard in law given that he never committed the alleged offence.

9.THAT learned trial magistrate failed to appreciate that the prosecution case was riddled with contradictions.

10.THAT the learned trial magistrate erred in law and fact by failing to evaluate, analyse and appreciate that the medical evidence was not enough to sustain a conviction.

11.THAT the learned trial magistrate erred in law and fact by failing to record and ascertain the language the appellant understood properly.

He has by the appeal urged this court to set aside the sentence and preferably order a re-trial.

The appeal was canvassed by way of written submissions and it is vehemently opposed. However, I am satisfied that the conviction and sentence of the lower court cannot stand. Whereas the trial magistrate did have jurisdiction to try the offence, this court has noted that she did not record the language in which the witnesses gave evidence. Contrary to prosecution counsel's submission that the appellant understood Kiswahili and Ekegusii and indeed he is on record as saying so, there is nothing on the record to show that those were the languages used during the trial. The record shows that only the voire dire was conducted in Kiswahili. The appellant did not ask questions at the trial and it could very well be that he did not understand the language used at the trial.

This court is unable to affirm that the trial was fair. The submission that the court misled him into remaining silent because Section 211 of the Criminal Procedure Code has no provision for that has no basis as Article 50 (1) (i) of the Constitution which supersedes all other statutes gives an accused person a right to remain silent and not to testify during the proceedings.

The appellant was sentenced on 14th June 2017 and has served only 18 months of his life sentence. The evidence in the lower court was sufficient to warrant a re-trial. Accordingly, this appeal is allowed and the conviction is quashed, the sentence set aside and substituted with an order for re-trial by a magistrate other than N. Kahara.

Dated, signed and delivered at Nyamira this 31st day of January 2019.

E. N. MAINA

JUDGE