



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.22 OF 2018

GEORGE OKOTH OGUTU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from original conviction and sentence in Sexual Offences Act No.12 of 2017 of the PM's court at Magunga dated 5.6.2018
– Hon. Samson Onger, PM)*

JUDGMENT

[1] The appellant, **GEORGE OKOTH OGUTU**, appeared before the Principal Magistrate at Magunga charged with defilement, contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences act**, in that on the 9th October 2016 in Gwassu North-Suba within Homa Bay County, he defiled **LAM**, a child aged ten (10) years. He was alternatively charged with committing an indecent act with a child, contrary to **Section 11 (1)** of the **Sexual Offences Act** in that he touched the sexual organ of the child with his male sexual organ.

[2] After trial, the appellant was convicted on the alternative count of indecent act and sentenced to ten (10) years imprisonment. He was however, aggrieved by the conviction and sentence and preferred this appeal on the basis of the grounds in the petition of appeal dated 21st June 2018. He was represented at the hearing of the appeal by learned counsel, **M/S OMORO**, duly instructed by **NYONGA & CO. ADVOCATES**, who presented written submissions dated 15th January 2019 and fully relied on them.

[3] The Senior Assistant deputy Director of Public Prosecutions, **MR. OLUOCH**, learned Prosecution Counsel, appeared for the state/respondent and opposed the appeal by orally submitting that PW1, as confirmed by the defence, was previously known to the appellant. That, he (appellant) inserted his penis on her vagina after he felled her down. That, penetration was confirmed by the clinical officer (PW3) but this fact was disregarded by the trial court which therefore proceeded to convict the appellant on the alternative count.

[4] Learned prosecution counsel, further submitted that the appellant's defence of an alibi was found by the trial court to be an afterthought as it was raised for the first time. He beseeched this court to dismiss the appeal and correct the anomaly made by the trial court and impose a proper sentence upon the appellant.

[5] In response, learned counsel, **M/S OMORO**, submitted that the trial court did not err in finding that the prosecution failed to prove the offence of defilement. However, the trial court erred in convicting and sentencing the appellant on the alternative count.

Learned counsel, contended that the fact that the complainant knew the appellant did not prove the prosecution case. She urged this court to allow the appeal.

[6] In this first appeal, the duty of this court was to re-consider the evidence 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] E.A. 32**).

In that regard, the evidence led by the prosecution through the complainant, (**PW1**), her mother, **FAO (PW2)**, the clinical officer, **OMWOYO CHANJIMA (PW3)** and the investigating officer, **P.C VANE KERUBO (PW4)**, was re-visited by this court against that led by the appellant in his defence and that of his witness, **MARTIN OGANDA OWAGO (DW1)**.

[7] From the evidence and the submissions presented herein both orally and in writing by both sides, it was apparent that the basic issue for determination was whether the offence of defilement was committed against the child complainant and if so, whether the appellant was the person responsible for it.

[8] The trial court in its findings found that the evidence by the complainant and the clinical officer (PW3) did not establish penetration which is a vital ingredient of the offence of defilement. However, the trial court appreciated that the complainant felt pain but attributed the same to the weight exerted by the accused when he lay on her.

This explained the appellant's conviction on the alternative count.

[9] It was clear from the foregoing that the credibility of the complainant's evidence was not in doubt but was not upheld by the trial court with regard to the fact of defilement because it was not corroborated by the clinical officer's (PW3) medical evidence.

In this court's opinion, if the credibility of the complainant was not in doubt; it would follow that her testimony that the appellant held and had sex with her was truthful and did not require corroboration by dint of **Section 124** of the **Evidence Act**.

[10] Having sex implied full penetration of the male sexual organ into the female sexual organ. However, penetration does not have to be full for purposes of establishing defilement, such that even if there was partial or slight penetration of the appellant's sexual organ into the complainant's sexual organ, the offence of defilement was fully proved.

Indeed, the complainant's evidence pointed towards that direction even without corroborative medical evidence.

[11] She (complainant) confirmed in cross-examination that she was defiled by the appellant and that she felt pain when he inserted his penis in her vagina. So, the pain attributed by the trial court to be the weight exerted by the appellant on the complainant, was actually and truly attributable to the penetration of the appellant's penis into the complainant's vagina thereby confirming the offence of defilement rather than indecent act.

[12] To lend more credence to the complainant's evidence was the fact that she informed her mother (PW2) almost immediately after the offence and mentioned the appellant whom she had previously known, as the offender. Her mother found her crying and took her to a nearby hospital where she could not immediately be examined because it was already night time.

Perhaps, this is what caused the generation of a negative medical report by the clinical officer (PW3) a day after the fact.

[13] The fact that the complainant's hymen remained intact, did not disprove defilement but strongly implied that the degree of penetration was not high enough to cause a break of the hymen. It is instructive to note that the age of the complainant was placed at eleven (11) years as at the time of the offence and this fact was never disputed. It is also instructive to note that the complainant stated that the appellant disengaged before he was fully done and ran away when he heard the complainant being called by her mother.

[14] For all the foregoing reasons, this court must find and hereby finds that the material ingredients of the offence of defilement were fully established against the appellant on the basis of the complainant credible evidence. On the same premises, the appellant's identification as the person who sexually offended the complainant was credibly established.

[15] In sum, all the grounds of appeal raised by the appellant and the submissions in support thereof are hereby overruled. The appeal fails. However, the appellant's conviction by the trial court on the offence of committing an indecent act with a child, contrary to **Section 11 (1)** of the **Sexual Offences Act**, is hereby quashed and substituted for a conviction on the offence of defilement, contrary to **Section 8 (1)** as read with **Section 8(2)** of the **Sexual Offences Act**. Invariably, the sentence of ten (10) years imposed by the trial court is hereby set aside and substituted for life imprisonment in terms of **Section 8 (2)** of the **Sexual Offences Act**.

J.R. KARANJAH

JUDGE

28.02.2019

[Delivered and signed this 28th day of February, 2019].