



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.51 OF 2018

ZACHARIA KIBOMA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

[1] The appellant, **ZACHARIA KIBOMA**, appeared before the Senior Resident Magistrate at Homa Bay charged with defilement, contrary to **Section 8 (1) (2)** of the **Sexual Offences Act**, in that on the 12th April 2015 Ndhiwa-Homa Bay County, he defiled **RAO**, a child aged 4½ years.

[2] In the alternative, the appellant faced a charge of committing an indecent act with the said child, contrary to **Section 11 (1)** of the **Sexual Offences Act**.

After a full trial, the appellant was convicted on the main count and sentenced to life imprisonment. This appeal is an expression of his dissatisfaction with the conviction and sentence and is based on the grounds contained in his petition of appeal as fortified by the supplementary ground of appeal.

[3] At the hearing of the appeal, the appellant appeared in person and presented written submissions in support of his case.

MR. OLUOCH, the learned Senior Assistant Deputy Public Prosecutor, appeared for the respondent and opposed the appeal by submitting that the complainant narrated in detail how she was defiled by the appellant. Her mother (PW2) confirmed the fact by noting that she (complainant) was bleeding from her vagina. There was also some seminal fluid on the organ.

[4] Learned Prosecution Counsel, further submitted that the appellant disappeared from the scene after the offence. This fact was consistent with his guilt and his complaint with regard to the age of the complainant, was rebutted by the prosecution evidence in that regard.

Learned Prosecution Counsel called for dismissal of the appeal for lack of merit.

[5] Being a first appeal, the duty of this court 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 evidence adduced by the complainant (PW1) hitherto unsworn was considered along with that of her mother, **DAO (PW2)**, a neighbor, **Hellen Atieno Oguta (PW3)**, her father, **PON (PW4)**, the arresting officer, **APC Wilson Kadhenya (PW5)**, the Clinical Officer, **Stephen Keraro (PW6)** and the Investigating Officer, **CPL Julius Mutuku (PW7)**.

[6] The appellant's evidence in defence was also considered. He denied the offence and indicated that he was confronted by some people while inside his house and taken to the chief's camp where he was placed in custody before being moved to Ndhiwa police station after which he was arraigned in court for the present charge which he knew nothing about. He contended that the complainant was a stranger to him and that he met her for the first time in court.

[7] A person who commits an act which causes penetration with a child is guilty of an offence termed defilement and shall upon conviction be sentenced to imprisonment for life. (See, **Section 8 (1)** and **8 (2)** of the **Sexual Offences Act**).

From the evidence adduced by the complainant (**PW1**) as supported by that of her mother (**PW2**) and father (**PW4**) as well as her neighbor (**PW3**) and most importantly that of the Clinical officer (**PW6**), the fact of defilement was clearly established without any dispute from the appellant.

[8] As to the age of the complainant, the medical evidence by the clinical officer (PW6) indicated that she was aged Five (5) years as at the

time of assessment of age.

Her mother (PW2) indicated that she was born on 2nd May 2011, and this was confirmed by the relevant clinical card (**P. Exhibit 4**) thereby implying that she (complainant) was less than five years at the time of the offence.

Apart from establishing her child status, the evidence pertaining to the complainant's age was vital for purposes of sentencing upon conviction.

[9] This court is satisfied that the trial court's findings on the commission of the offence and the age of the complainant were proper in both fact and law. Therefore, grounds one, two, three and four of the appellant's supplementary grounds of appeal and grounds one, two, three and four of the additional grounds of appeal as well as the appellant's submissions in that regard are unsustainable.

[10] Basically, the main issue which fell for determination was the alleged identification of the appellant as the offender given that he denied the charge and indicated that he was implicated by the prosecution witnesses without good cause. However, contrary to what he stated, he was not a stranger to the complainant who knew him very well and also knew that he was commonly known as "**Jakisii**". Indeed, her mother (PW2) and the rest of the witnesses (**PW3 and PW4**) confirmed that the appellant was popularly known as "**Jakisii**".

[11] The complainant vividly narrated to the trial court the circumstances leading to her defilement by the appellant. The trial court believed her in all aspects of the offence i.e. the commission of the unlawful sexual act and the positive identification of the appellant as the offender. This court finds no reason to interfere with the findings of the trial court on the credibility of the complainant and indeed any other witnesses called by the prosecution.

[12] The defence raised by the appellant was considered by the trial court and found to be lacking in credibility in the attempt to disprove the fact that he was recognized and positively identified by the complainant as the culprit. The rest of all his grounds of appeal and the submissions in respect thereof are also unsustainable.

In the end result, the appellant's conviction by the trial court was proper and sound. The resultant sentence of life imprisonment was lawful. This appeal is therefore dismissed for want of merit.

J.R. KARANJAH

JUDGE

21.02.2019

[Delivered and signed this 21st day of February, 2019].