



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 2 OF 2018

JOHN WABWIRE OJJI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

*(From the original conviction and sentence in SOA case No. 104 of 2016 of the Chief Magistrate's Court at Busia by Hon. G.N Wakahu-
Chief Magistrate)*

JUDGMENT

1. **John Wabwire Ojji**, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) (3) (sic) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that on 31st October 2016 at **[particulars withheld]** estate, in **Township** location of **Busia** County, intentionally and unlawfully caused his penis to penetrate the vagina of **SA**, a child aged 15 years.
3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised the following grounds of appeal:
 - a) That the trial magistrate erred both in fact and in law by disregarding gross infringement of the appellant's constitutional rights.
 - b) That the trial magistrate erred both in fact and in law by relying on hearsay and contradicting evidence.
 - c) That the trial magistrate erred both in fact and in law by adopting prosecution evidence that had no probative value.
 - d) That the trial magistrate erred both in fact and in law by disregarding appellant's defence.
 - e) That the trial magistrate erred both in fact and in law by disregarding his mitigation.
5. The state opposed the appeal through Ms. Ngari, learned counsel.
6. The facts of the prosecution case were briefly as follows:

On 31st October 2016 when **SA** was going to school, the appellant asked her to pass by his house but she declined. On the same day, he asked her to go and live with him. She therefore went to the appellant's house in the evening. He defiled her on a sack on the floor.
7. In his defence, the appellant contended that he was arrested on his way to the shop.
8. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will therefore be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

9. A charge ought to be properly drafted by citing the section under which such a charge is based, correctly. In the case against the appellant, the drafter of the charge sheet cited a non-existent section of the law. Indeed, the trial magistrate did not notice the same for in his judgment he cited the non-existent section 8 (1) (3) of the Sexual Offences Act. The charge ought to have read: "contrary to **section 8 (3) of the Sexual Offences Act**", or if the drafter intended to include the definition section it ought to have read: "**contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act.**" I however note that the appellant understood the charge and fully participated in the trial. He was

not therefore prejudiced.

10. I have carefully perused the record and did not come across any instance of the violation of the rights of the appellant. Twice the appellant indicated to the court that he was sick and that he had not been supplied with the statements of the witnesses. The matter had to be adjourned. It proceeded to hearing on the day the appellant indicated that he was ready to proceed. The contention by the appellant that his rights were violated has no merits.

11. The appellant has challenged the conviction which he claims was not supported by the evidence on record. What was therefore the evidence at the disposal of the trial magistrate? According to the evidence of SA, when she went to the house of the appellant, he closed the door and the windows. He then peeped to see whether people were passing. When he laid her on a sack on the floor, she screamed. He then proceeded to defile her after removing her pants.

12. A red flag ought to have been raised in the mind of the trial court at this juncture. This is a girl who gave her age as 13 years (though in the charge sheet it was indicated that she was 15 years). Although in her evidence she had indicated that the appellant had defiled her on three previous occasions, it is common knowledge that even in consensual sex, unless a female is adequately prepared, she would experience pain. She never testified of any pain during the alleged defilement nor did she testify of crying or screaming, for the court to infer pain.

13. Kenneth Yatich (PW4) is a clinical officer who produced the P3 form in respect of the complainant after she was examined by Dr. Aloice Kamito. There were no bruises to the genitalia and the only positive finding noted was the absence of the hymen. From the findings the hymen was not perforated on that day for the doctor would have indicated. The medical evidence did not therefore establish penetration on the day alleged there was defilement. Even where the hymen may have been perforated earlier, bruises ought to have been noticed due to the alleged haste with which the appellant defiled the complainant as testified to.

14. There was contradiction as to how the appellant and the complainant were found. In her evidence, the complainant testified that when her father found her in the house of the appellant, she had all her clothes on including her pair of pants. Her mother also joined her father there. Her mother's version was different. She testified that after her husband had knocked at the door of the appellant, the latter opened it after her husband had identified himself as "mimi ni Mtu". He however closed immediately on realizing it was the complainant's father. They sent a boda-boda rider whom she accompanied. When the boda-boda knocked at the door, the appellant opened, she entered and found the complainant wearing a pair of under pants only while holding her other clothes in her hands. The appellant had a long sword. When she told the complainant to wear her clothes, she said she feared he was going to kill her with the sword.

15. Other than contradicting her daughter's evidence, this witness (PW2) contradicted the medical evidence. She testified during cross examination that the doctor said the girl was two months pregnant. In the medical evidence adduced by Kenneth Yatich (PW4), there was no finding of pregnancy. He indicated that pregnancy test was negative.

16. The evidence of the complainant's father, PJL (PW3) was that he found the appellant and his daughter in the bedroom. This was after he was directed to the house she had entered. The complainant was wearing her clothes when he found her. He did not testify as to how he gained access into the appellant's house and his version is certainly at variance with that of his wife.

17. One of the important ingredients of defilement is the prove of the age of the victim. This is because the sentence is pegged on the age of the complainant. According to the charge sheet and the medical evidence, SA was 15 years. However, SA in her evidence said she was 13 years old. There was no attempt to reconcile these two versions.

18. From the foregoing analysis of the evidence on record, I am satisfied that the appellant is right in describing the prosecution evidence as being rife with contradictions. Had the learned trial magistrate addressed his mind to the evidence on record, he would not even have placed him on his defence, for the prosecution had not established a prima facie case against the appellant. A prima facie case was described by the Court of appeal in the case of **Ramanlal Trambaklal Bhatt Vs. Republic (1957) E.A. 332** as follows:

It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

19. I therefore find that the appeal is merited. I quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 20th Day of February, 2019

KIARIE WAWERU KIARIE

JUDGE