



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO. 35 OF 2017**

**BETWEEN**

**BENSON OTIENO LANGO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being appeal from original conviction and sentence of SRM's Court in Oyugis Sexual Offence Act Case No.12 of 2016 dated 25<sup>th</sup> July, 2017 – Hon. J.R. Ndururi. PM)*

**JUDGMENT**

1. The appellant **BENSON OTIENO LANGO**, was convicted on a charge of defilement contrary to **Section 8 (1)** as read with **Section 8 (4)** and sentenced to serve 15 years imprisonment. He denied the charge whose particulars were that on 5/5/2016 in North Rachuonyo, he intentionally and wilfully caused his penis to penetrate the vagina of **HAO** a girl then aged 17 years.
2. The appellant was employed by a neighbour to **HAO**'s home and on 5<sup>th</sup> May 2016 he summoned **HAO** to his employer's house to pick her sandals which she had given him the previous day to repair. Once she got into the house, he locked the door and demanded to have sex with her. **HAO**<sup>[1]</sup> told the trial court that she was 17 years, having been born in 1998 and she referred to a copy of her birth certificate.
3. She described how after luring her to the house, and threatening her, the appellant removed his trousers and her clothes then had sex with her.
4. **PW2 (M A)**, the victim's sister saw her going to the home where the accused was, after he told her to go and collect her sandals.  
Later **PW1** informed her that the appellant had defiled her.
5. The Clinical Officer who examined **HAO** assessed her age as 16 years noted that an open hymen with lacerations on the cervical opening.
6. The appellant in his defence referred only to events surrounding the date of his arrest.
7. The trial magistrate upon considering the evidence held that the charge was proved. The appellant was aggrieved by the finding and filed his appeal.
8. The State conceded the appeal and Mr. Oluoch submitted that the trial magistrate failed to observe the provision of **Section 200 (2) Criminal Procedure Code**, pointing out that the appellant informed the court that he insisted the matter be heard *De Novo*. Yet the trial magistrate overruled him and directed otherwise. It is submitted that this was a fatal violation of the law and the appellant was prejudiced.
9. Counsel however urges the court to order for a re-trial saying that taking into account:-
  - (1) **The nature of the offence (under Sexual Offences Act).**
  - (2) **The age of the complainant.**
  - (3) **The availability of witnesses.**
  - (4) **The misdirection was caused by the court.**

10. It is argued that the ends of justice tilts towards the prosecution and wants a retrial.

11. The appellant was agreeable to a retrial – it is confirmed witnesses are available

12. **Section 200 (3) Criminal Procedure Code** provides that:

**“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”**

13. The matter was initially heard by **S.M. MOKUA (PM)**, who was transferred from Oyugis and **J. NDURURI (PM)** took over.

14. To be fair to the trial magistrate, he recorded the sentiments of the prosecutor who objected to De Novo hearing on the ground that the complainant was a student, the case had taken too long and other witnesses were willing to be traced. The trial magistrate agreed, saying the case had progressed considerably and there was possibility that the complainant would not be willing to appear in court a second time to testify.

15. As at the date of making those orders on 1/3/17, only three witnesses had testified i.e. **HAO**, her sister and their neighbour – it was not disclosed what would make it difficult to secure their attendance and the trial magistrate went ahead to theorize on why **HAO** would probably not attend court.

16. Taking into account the nature of the offence and the penalty it attracts justice demanded that the appellant be given a chance to exhaust the avenue available and not be shut out so casually. I concur with the DPP that in the trial magistrate so deny the appellant suffered prejudice.

17. I also agree that the evidence presented is such that ends of justice will be met through a trial.

18. I therefore allow the appeal and quash the conviction and set aside the sentence.

19. I direct that the matter be sent back to Oyugis Law Court for retrial before a magistrate other than the one who heard it.

(2) If the appellant was on bond during the trial, he should be admitted to similar terms.

(3) The appellant shall appear at Oyugis Law Courts on 3<sup>rd</sup> April 2018 for trial directions.

**Delivered and dated this 22<sup>nd</sup> day of March, 2018 at Homa bay**

**H.A. OMONDI**

**JUDGE**

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**[1] Initials used to protect her privacy**