



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 64 OF 2016**

**SULEIMAN KONGOTI..... APPELLANT**

**VERSUS**

**REPUBLIC..... REPUBLIC**

*( From the original conviction and sentence in SOA No.110 of 2014 of the Chief Magistrate's Court at Busia by Hon. J.N Maragia- Resident Magistrate)*

**JUDGMENT**

**SULEIMAN KONGOTI**, 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.

The particulars of the offence were that on 17<sup>th</sup> October 2014 at **[particulars withheld]** of **BUSIA** County, he intentionally and unlawfully caused his penis to penetrate the vagina of **V.A**, a child aged 10 years.

He was sentenced to life imprisonment. He has appealed against both conviction and sentence.

The appellant was in person. He raised five grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by ignoring gross violation of his rights to fair trial.
2. That the learned trial magistrate erred in law and in fact by relying on hearsay and contradictory evidence.
3. That the learned trial magistrate erred in law and in fact by convicting the appellant on the basis of evidence of a single minor witness without corroboration.
4. That the learned trial magistrate erred in law and in fact by convicting the appellant on the basis of medical evidence that did not support the charge.
5. That the learned trial magistrate erred in law and in fact by disregarding the appellant's defence.

**The state opposed the appeal through Mr. Owiti, the learned counsel.**

The facts of the prosecution case were briefly as follows:

On 17<sup>th</sup> October 2014, **V.A** was at their home with her younger siblings. The appellant went and told her that he wanted to send her to the shop. When she had finished feeding the baby, she went to him so that he could send her. He grabbed her and made her to sit on his lap and proceeded to defile her.

In his defence the appellant contended that the complainant's mother owed him some money for work he had done for her. He denied any involvement in the offence.

As expected, I have analyzed 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 be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

The charge was erroneously drafted. It ought to have read contrary to "...section 8(1) as read with section 8(3) ..."

From the record, the appellant understood the charge before pleading to it. He subsequently participated fully in the trial. I make a finding that he was not prejudiced in any way and the defect is curable under section 382 of the Criminal Procedure Code.

Though the appellant contended that his right to fair trial was violated, my perusal of the record did not disclose any such instance. I therefore dismiss this ground of appeal.

V.A testified what befell her on the material day. This is direct evidence. Reading through the judgment of the learned trial magistrate it is evident that her conviction of the appellant was not based on hearsay. This ground of appeal lacks merit.

It is trite law that a conviction can be based on the evidence of a single witness where circumstance are favourable without looking for corroborative evidence. This was held in the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166** by the Court of Appeal for Eastern Africa when it stated as follows:

*Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.*

In the instant case it was an issue of recognition. The incident took place during day time.

The learned trial magistrate was guided by the proviso to section 124 of the Evidence Act which states:

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

The ingredients of defilement were stated in the case of **FAPPYTON MUTUKU NGUI Vs REPUBLIC [2012] eKLR** as follows:

*The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. (Emphasis mine)*

There was sufficient evidence to connect the appellant to the offence. He was a person known to the victim. The age of the victim was established to be ten years.

Two issues emerge. One, the appellant was erroneously charged under section 8(3) instead of under section 8(2) of the Sexual Offences Act. It was not open to the learned trial magistrate to pass a sentence under section 8 (2) without calling for the amendment of the charge. Two, the medical evidence did not support the charge.

According to the evidence of **Lazarus Makokha (PW3)**, a clinical officer, the victim's genitalia had swellings on the outside which according to him was evidence of an attempt to penetrate. The appellant ought to have been convicted for the offence of attempted defilement under section 9(2) of the Sexual Offences Act. I quash the conviction by the trial magistrate and set aside the sentence and substitute it with a conviction under section 9(2) of the Sexual Offences Act. I substitute the sentence with 10 years imprisonment to run from the time the sentence by the learned trial magistrate was imposed. This appeal therefore succeed to that extent.

**DELIVERED and SIGNED at BUSIA this 29<sup>th</sup> day of November, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**