



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 19 OF 2008

SAMUEL OLIMA GOMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. D. O. Rabala (R.M)

in Kericho PMCC No.2401 of 2006 delivered on 30/5/2008)

JUDGEMENT

1. The Appellant was sentenced to life imprisonment for the offence of defilement contrary to section 8 (2) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on 23/11/2006 in Kericho District of the Rift valley Province, the Appellant unlawfully had carnal knowledge of BC, a girl under the age of 11 years.
3. The Appellant was charged with an alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006 in that on the same material particulars as in count 1 (above), the Appellant unlawfully indecently assaulted BC a girl under the age of 11 years by touching her private parts.
4. The prosecution evidence in summary is that on the material day, the complainant was inside their house in the bedroom where she wanted to sleep as she was feeling sleepy.
5. The Appellant went to the bedroom, found the complainant inside the bedroom, removed her inner wear, removed his trousers and defiled her.
6. The complainant's auntie (PW2) was called by PW5 and she found the accused with his trousers down lying on the child and she screamed.
7. PW5 HEZRON KIPNGENO KORIR was grazing cows near the home of the complainant when he saw the complainant with the Appellant. He called PW2 and they screamed and the Appellant ran away.
8. PW6 the Clinical Officer who examined the complainant said she had no visible injuries but the hymen had been tempered with but no actual penetration. He said there was spermatozoa from the complainant's vagina.
9. When put on his defence, the Appellant elected to keep quiet and await court's judgment.
10. The trial court found the Appellant guilty as charged on the main count and sentenced him to life imprisonment.
11. The Appellant lodged the first appeal at the High Court in Kericho against the conviction and sentence of the trial court in Criminal Case No. 2401 of 2006 which was summarily dismissed on 18/12/2008.
12. The Appellant lodged a second appeal at the Court of Appeal in Nakuru vide Criminal Appeal No. 12 of 2012.
13. The Court of Appeal in its judgment dated 7/8/2020 allowed the appeal and quashed the summary rejection of the appeal.

14. The Court of Appeal remitted back the case to the High Court to hear the appeal.

15. The Respondent conceded the appeal on the following grounds:-

(i) **THAT** the victim's age was never proved.

(ii) **THAT** section 200 of the CPC was not complied with when the appellant was charged during the trial.

16. The victim's age is an essential ingredient when proving defilement charge as sentencing is hinged on the victim's age as provided in section 8 Sexual Offences Act No. 3 of 2006. In the case of **JOHN OTIENO OBWAR VS. REPUBLIC (2011) eKLR** Asika Makhandia J. (as he then was) observed that:-

“Defilement is a strict offence, whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim be proved by credible evidence. In the circumstances of this case, the charge sheet talks of the complainant being aged 14 years. Other than that allegation, there was no other proof. The clinical officer who examined her never assessed her age. It would have been easy for the prosecution to tender in evidence the complainant's birth certificate to prove her age. This was not done with the consequence that the age of the complainant was not

proved as required.” Similarly, in the case of **HILARY NYONGESA VS. REPUBLIC [2010] eKLR** where Mwilu J. (as she then was) stated that :- *“On my part I have thoroughly perused the evidence at trial and I find that nowhere in it was the age of the victim established. All there is as concerns age is the victim's word for it. The victim also told the doctor examining her that she was 15 years old. In my considered view those two statements by the victim in the absence of a birth certificate or medical age assessment reports do not suffice. Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim. In this case the age of the victim was not proved and hence any sentence passed and meted out to the accused would be a matter of conjecture which would not stand in criminal cases where the offence must be proved beyond any reasonable doubt.”*

17. I also find that the trial court erred by not complying with the provisions of section 200 (3) of the Criminal Procedure Code. The succeeding magistrate ought to have informed the appellant of the statutory right to have his witnesses re-summoned and re-heard.

18. In the Court of Appeal case of **ABDI ADEN MOHAMED VS. REPUBLIC (2017) eKLR** the court allowed the appeal for non-compliance with section 200 (3) of the Criminal Procedure Code, the learned judges considering the history of the case found that a re-trial was not feasible and proceeded to quash the conviction, set aside the sentence and set the appellant free.

19. In the present case ordering a re-trial would greatly prejudice the appellant.

20. The Appellant has been in custody since 30/5/2008 and it may not be in the interest of justice to remit this case back to the trial court for re-hearing.

21. Since the appeal is conceded I allow the same and order that the Appellant be released forthwith unless lawfully held for any other reason.

Delivered, signed and dated at Kericho this 4th day of February 2021.

A. N. ONGERI

JUDGE