REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 37 OF 2019

MO .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From the original conviction and sentence in S.O.A case No.20 of 2019 of the Chief Magistrate's Court at Homa Bay by Hon. J.P Nandi– Principal Magistrate)

JUDGMENT

1. MO, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on diverse dates between the 25th day of April and 28th April in Rachuonyo South Sub-County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of PA, a child aged 11 years.

3. The appellant was sentenced to serve life imprisonment. He has appealed against both conviction and sentence.

4. He raised ten grounds of appeal which can be summarised as follows:

a. That the learned trial magistrate erred in law and in fact by contravening Articles 26 (1) (a), (b), (c) and (d) [sic] and 159 (b), (d) & (e) of the Constitution.

b. That the learned trial magistrate erred in law and in fact by failing to accord to him a fair trial.

c. That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.

d. That the learned trial magistrate erred in law and in fact by failing to give proper evaluation and weight to the defence offered by the appellant.

5. The appeal was opposed by the state through Mr. Oluoch, learned counsel.

6. This is a first appellate court. 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.**

7. Article 26 (1) of the Constitution of Kenya provides as follows:

Every person has the right to life.

It however does not contain the paragraphs cited by the appellant. There is no indication from the record that this right was breached. The appeal cannot therefore, turn on this point.

8. The right to fair hearing is provided for under Article 50 of the Constitution of Kenya. The plea was properly taken in the language the appellant understood and before the trial commenced, the court ensured that the appellant had been supplied with all the statements and copies of documentary exhibits which the appellant confirmed he had received on 3rd May 2019.

9. After each witness had testified, the appellant was accorded an opportunity to cross examine the witnesses. When the appellant was placed on his defence, he was given an opportunity to call witnesses but he indicated to the court he had none to call.

10. I therefore find that he cannot be heard to complain that he was not accorded a fair hearing.

11. Section 8(1) of the Sexual Offences Act defines defilement in the following terms:

> **A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

An offence of defilement therefore, is established against an accused person when the prosecution has proved the following ingredients:

a. That there was penetration of the complainant's genitalia;

b. Evidence must show that the accused is the perpetrator; and

c. The age of the victim must be below eighteen years.

In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** Joel Ngugi J. said:

> **Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. 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.**

These are the ingredients I will endeavour to find if the prosecution proved against the appellant.

12. The evidence of the complainant is that the appellant summoned her to follow him to his house where they had sexual intercourse. She testified that she followed him for she suspected he could be armed. While she was outside the house of the appellant washing utensils, one Daisy (PW3) saw her and went and reported to her mother. When the appellant learnt that she was being searched for, he summoned one Tiget who took her to another house on a motor bike.

13. Daisy Atieno (PW3) testified that when she saw the complainant washing utensils outside the house she later learnt belonged to the appellant, she went and informed her (complainant's) mother.

14. What has emerged from the evidence of PW1 and PW2 is that the complainant went to the house of the appellant on her own free will and that her contention that she followed him out of fear is not supported by any evidence on record. What the evidence reveal, is that she had an opportunity to run away but she did not seize it. This makes her contention unbelievable. Due to her age, she lacked the capacity to give consent.

15. The medical evidence is that the complainant had several epithelial cell. The evidence of Willis Omondi (PW4) a clinical officer who examined her, indicated that either this was from friction from a long distance walk or sexual intercourse. He also said that he concluded that there was sexual intercourse due to presence of fungi. I have looked at both the P3and the medical card. In both these documents, there is no indication of fungi. So, when this witness testified of its presence one wonders where he got it from.

16. The conclusion by PW4 that the complainant was defiled is therefore not supported by sufficient evidence on record.

17. In her evidence PA. testified that the appellant had sexual intercourse with her severally between 25th and 28th April 2019. She also testified that after Daisy (PW3) had discovered where she was, she was taken to another house where some two other boys defiled her. If true, this was an ordeal for an eleven years old girl which could not have escaped the notice on examination by the clinical officer. The complainant made allegations which were not supported by the evidence on record. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) held:

> **The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates makes it unsafe to accept his evidence.**

The evidence of the complainant is wanting for she has painted herself as a witness who cannot be relied upon to tell the truth.

18. In the particulars of the charge sheet, the age of the complainant is given as eleven years. She also testified to be eleven years. This is what her mother testified to. A certificate of birth to that effect was produced. However, the evidence of Willis Omondi (PW4) a clinical officer who examined her, is that she was about 13 years. This is what appears in the documents he produced. It has therefore emerged that in estimation it is easy to make a mistake on age assessment that is not done scientifically.

19. Throughout the trial, the appellant maintained that he was seventeen years old. When the appellant was taken for age examination, the following were the remarks of the medical officer who examined him:

> **According to physically (sic) and psychological age assessment Ma age is estimated to be 18 years of age (sic).**

There is no indication this estimate was scientific or not. We cannot therefore rule that he must be eighteen years of age and not seventeen. The prosecution did not prove that he was an adult. He therefore ought to have been tried as a minor.

20. From the foregoing analysis of the evidence, the prosecution did not prove that the genitalia of the minor was penetrated by the appellant. I accordingly quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 5TH DAY OF MAY, 2021

KIARIE WAWERU KIARIE

JUDGE