



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 51 OF 2018

DERRICK OWEN BWIRE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.19 of 2018

of the Principal Magistrate's Court at Oyugis by Hon. J.P. Nandi –

Senior Resident Magistrate)

JUDGMENT

1. Derrick Owen Bwire, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on the night of 4th day of August, 2018 within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of YBO, a child aged 14 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 four grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law and in fact by convicting him without the evidence of crucial witnesses.
 - b) That the learned trial magistrate erred in law and in fact by failing to appreciate that the age of the complainant was not proved.
 - c) That the learned trial magistrate erred in law and in fact by convicting him on insufficient evidence.
 - d) That the learned trial magistrate erred in law and in fact by meting out an unconstitutional and illegal sentence.
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. 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) That the accused was 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.

8. In his written submissions, the appellant contended that the learned trial magistrate failed to conduct *voir dire* for the minor. The complainant minor was aged 14 years at the time she testified. The requirement of *voir dire* is for a child of tender years. On a child of tender years, the Court of Appeal in the case of **Kibageny vs. Republic [1959] E.A. 92**, stated as follows:

There is no definition in the oaths and Statutory Declarations Ordinance of the expression 'Child of tender years' for the purpose of section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age of under fourteen years.

This therefore means that the complainant in this case was not a child of tender years and *voir dire* was not necessary.

9. The clinical officer who examined the complainant was not called as a witness. The P3 form was produced by the investigating officer. There was nothing incriminating in the P3 form so produced. The appeal cannot therefore turn on the failure to call this witness. In any case, the P3 form was produced with the consent of the appellant.

10. The only evidence of penetration was adduced by the complainant. This was a girl aged 14 years. She testified that the appellant had sex with her three times against her will. If indeed this was true, the clinical officer ought to have observed the obvious tell-tale signs of forced defilement. No injuries were noted. The learned trial magistrate erred on finding that penetration was established on the basis of the white discharge.

11. Though the appellant contended that the age of the complainant was not proved, this is not true. The prosecution produced a copy of her birth certificate which indicate that she was born on 22nd February, 2004. She was therefore 14 years old at the time of the alleged offence.

12. Section 8 (3) of the Sexual Offences Act provides:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

The learned trial magistrate therefore meted out the only legal sentence available. There was nothing unconstitutional about it. The appellant erroneously misunderstood the Supreme Court's decision in the case of **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR**.

13. After a careful analysis of the evidence on record, I find that the conviction was unsafe. I quash the said conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 6TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE