



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 5 OF 2020

EOA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.47 of 2019 of the Principal Magistrate's Court at Oyugis by Hon. B.O Omwansa-Principal Magistrate)

JUDGMENT

1. EOA, 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 after pleading guilty to the offence.
2. The particulars of the offence were that on the night of 18th day of November, 2019 in Rachuonyo East Sub-County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of CAO a child aged 12 years.
3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.
4. He raised eight grounds of appeal which can be summarised as follows:
 - a) That the learned trial magistrate erred in law and in fact by rushing the case contrary to Article 50 of the Constitution of Kenya.
 - b) That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant was not represented by an advocate.
 - c) That the learned trial magistrate erred in law and in fact by relying on shoddy investigations.
5. The appeal was opposed by the state through Mr. Ochengo, 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 348 of the Criminal Procedure Code provides:

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

In the instant appeal, the issues that have been raised are questioning the legality of the charge and the mode of taking the plea.

The charge and the particulars ought to be read in a language that the accused understands. This forms the basis of fair trial. An accused must understand the charge for him to respond adequately. This is what the Court of Appeal in the celebrated case of **Adan vs. Republic [1973] EA 445** held. It stated as follows;

The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands; the accused's own words should be recorded and if they are an admission, a plea guilty should be recorded;

The record indicates that the charge was read to the appellant on 21st November, 2019 in Dholuo. This is the language he informed the court

that he understood. The case was adjourned for the reading of facts to the following day. The appellant pleaded guilty to the charge and confirmed that the facts were correct.

8. His contention that the trial was rushed lacks merit. Once an accused has pleaded guilty, the court has no other option but to call for the facts. Again, if the accused confirms that the facts as read to the court were correct, the duty of the court is to convict. At no time did the appellant claim to the court that he had been tortured. Indeed this claim is displaced by his mitigation. This is what he stated:

I am sorry of what happened. I pray for forgiveness from the parents of the child. I am a student. I will be going to form 3 next year. When the complainant gets healed, I hope she will forgive me. I further pray for forgiveness from my parents for the embarrassment I have brought to the family.

I am satisfied that the appellant pleaded guilty freely. Section 348 of the Criminal Procedure Code is clear that he cannot appeal against his conviction.

9. Section 8 (3) of the Sexual Offences Act states:

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.

10. When the appellant stated that he was going to form three the following year, the learned trial magistrate ought to have enquired about his age and if need be, order an age assessment to be done. This was not done.

11. There are two documents in the original file that give conflicting age of the appellant. The probation officer's report gives his age as 19 years while the details on his warrant of commitment indicate that he was 18 years old. The court ought to have ordered for his age to be assessed given this scenario coupled with the fact that he was in form two at the time.

12. Due to this conflicting facts on the appellant's age I made an order for his age to be ascertained. The assessment report dated 6th July, 2021 indicate that the appellant is above 18 years. This does not assist much for it is vague on his age. It cannot help us to know his age at the time of the offence for it gives the present status without being specific on appellant's age. I will therefore give him the benefit of doubts and assume that he was still a child at the time the offence was committed.

13. Section 189 of the Children Act, CAP. 141 laws of Kenya provides:

The words "conviction" and "sentence" shall not be used in relation to a child dealt with by the Children's Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.

The learned trial magistrate ought to have found him guilty of the offence. It was not proper for him to have convicted him. Equally, he ought not to have been sentenced. The sentencing magistrate ought to have made an order upon finding him guilty.

The conviction is quashed and the sentence set aside. I am therefore making an order for substitution of the conviction with a finding of guilty. The appellant has been in prison with adults from 28th November, 2019 I will therefore make an order that he be supervised under probation for a period of three years. He is therefore to be released from prison forthwith.

DELIVERED AND SIGNED AT HOMA BAY THIS 8TH DAY OF JULY, 2021.

KIARIE WAWERU KIARIE

JUDGE