



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO. 5 OF 2019**

**JOSEPH ODONGO OGENDO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in S.O.A case No.11 of 2017 of the Chief Magistrate's Court at Homa Bay by Hon. L. Simiyu–Principal Magistrate)*

**JUDGMENT**

1. Joseph Odongo Ogendo, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on the night of 22<sup>nd</sup> day of July, 2017 at [Particulars withheld] estate, Homa Bay District within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of B.A.O, a child aged 13 years.
3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was represented by Quinter Adoyo & Company Advocates. He raised four grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and in fact by convicting him while relying on insufficient evidence.
  - b. That the learned trial magistrate erred in law and in fact by ignoring glaring inconsistencies in the prosecution case.
  - c. That the learned trial magistrate erred in law and in fact by overlooking the fact that the complainant was sexually active and could have had sex with someone else before the medical tests were done.
  - d. That the learned trial magistrate erred in law and in fact by overlooking the fact that DNA test would have been the best in the circumstances of this case.
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 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. B.A.O. (PW1) testified that the appellant is their neighbour. After he had enquired from her whether her mother was present and she answered in the negative, he went away and then called her to his house. When she entered, he grabbed her and covered her mouth. He then took her to his bed where he defiled her. After the ordeal, she went and reported to MA what had befallen her.

9. In her evidence RAO a.k.a MA(PW3) testified that she saw the appellant enter into the house where the complainant lives with her mother. She later saw the complainant enter the house of the appellant and became suspicious for it took her (the complainant) long and all was quiet. Later upon probing the complainant, she informed her that the appellant had defiled her.

10. When OM (PW4) examined the complainant on 24<sup>th</sup> July, 2017 he found presence of numerous red blood cells showing inflammation due to penetration. The hymen was ruptured though not recently.

11. The appellant opted to exercise his right to keep mum when he was placed on his defence. The learned trial magistrate was left with the evidence tendered by the prosecution.

12. From the evidence of B.A.O (PW1) and that of the clinical officer (PW4), the prosecution proved to the required standards that the genitalia of the complainant was penetrated. Equally the evidence of B.A.O (PW1) and that of MA(PW3) left no doubt as to who did it; the appellant was the culprit.

13. EAO(PW2) testified that her daughter was born on 10<sup>th</sup> October 2004. The complainant gave her age as 13 years. OM(PW4) testified that when he examined her, she was aged 13 years. In the case of **Francis Omuroni vs. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** It was held thus:

**In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ....**  
[Emphasis added]

In **Fappyton Mutuku Ngui (supra)** Joel Ngugi J. held:

**... that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.**

I am satisfied that the prosecution proved the age of the complainant to the required standards.

14. In the circumstances of this case, DNA was not necessary.

15. Section 8(4) of the Sexual Offences Act states:

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

16. Certainly the appellant was charged under the wrong section given the age of the complainant. The learned magistrate however, meted out the appropriate sentence for what is prescribed under Section 8(4) of the Sexual Offences Act was only the minimum. In the circumstances, the sentence cannot be described as excessive. I will not therefore interfere with the same.

17. The upshot of the foregoing is that the appeal is dismissed.

**DELIVERED AND SIGNED AT HOMA BAY THIS 6<sup>TH</sup> DAY OF JULY, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**