REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 20 OF 2020

JOSEPH OTIENO OYUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No. 43 of 2019

of the Senior Principal Magistrate's Court at Mbita

by Hon. Japheth Bii–Senior Resident Magistrate)

JUDGMENT

1. Joseph Otieno Oyugi, 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 the 15th day of August, 2019 at Kayanja sub location in Mbita sub County of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of D.A.O, a child aged 9 years.

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

4. The appellant was in person. He raised one ground of appeal that he was a minor at the time of the trial.

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. After the plea was taken, the court ordered that the age of the appellant be assessed. On 4th September, 2019 the prosecutor presented the age assessment for the appellant which indicated that he was at least 18 years old. DR. Odhiambo Erick, a dentist, who examined him reached his conclusion on the basis that the appellant had all his teeth including the 3rd molars. He said that the 3rd molars grow into the mouth at age 16 and their root formation is usually completed 2-3 years later. The appellant did not challenge this report.

8. When the appellant was called to mitigate, he informed the court that he was 20 years old. On appeal he alleges that he is 16 years old and presented a copy of Certificate Birth. He has not convinced this court that he was a minor going by the medical evidence and his failure to challenge the prosecution assertion that he was over 18 years. Had he done so, the court ought to have requested for another examination so as to remove the doubts. The appeal will not turn on this point.

9. D.A.O (PW1) testified as follows:

> **On 15th August, 2019 I was home. Junior, my sister was sent to get money from the accused. The accused took me to my grandmother's bedroom and did *tabia mbaya* to me.**

10. There was no attempt by the prosecution to reconcile the apparent contradiction. If Junior was sent to the appellant, It was not explained

how he got himself where the complainant was, in her grandmother's house. Secondly, her statement suggests that there was another person who sent Junior away. It was not explained where this person was at the time of the alleged defilement.

11. The evidence of BAO(PW3) is that when she went to her grandmother's home, she found CO having been send to buy soap. She does not tell us by whom and she did not say anything about Junior. She went on to say that when she looked into the bedroom, she saw the complainant naked and the appellant was on top of her. She informed her husband. Her evidence contradicted that of the complainant who only testified on the appellant taking off her panty and no other clothes.

12. AOO(PW4) is B's husband. His evidence was that when he went to his mother's home, He found the appellant having sexual intercourse with the complainant on his mother's mattress. He however changed and said that his wife (PW3) informed him what had happened.

13. The evidence by these three witnesses is contradictory in some material aspect. 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.**

These three witnesses cannot be relied upon. Their contradictions were never resolved or reconciled.

14. Herbert Ochieng Ouma (PW6) examined the complainant. His evidence was that the genitalia was not bruised. What he noted of importance was the whitish discharge and the perforated hymen. He however did not explain to the court the significance of the discharge. The Court of appeal in the case of **P. K.W vs. Republic [2012] eKLR** on the issue of broken hymen observed as follows:

> **15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?**
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> **16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769.**

In the instant case it is doubtful whether the defilement occurred. I have observed previously that sexual intercourse with an adult is a harrowing experience for a child of the complainant's age. It also leaves tell-tale signs for all to see. The complainant did not talk of any pain.

15. From the foregoing analysis of the evidence on record, I find that the conviction was not safe. I therefore quash the conviction and set aside the sentence by the learned trial magistrate. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and **SIGNED** at **Homa Bay** this **5th Day** of **July, 2021**

KIARIE WAWERU KIARIE

JUDGE