



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 7 OF 2017

DANIEL ODHIAMBO AGER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 397 of 2015 of the

Senior Resident Magistrate's Court at Ndiwa by Hon. B.R. Kipyegon –

Senior Resident Magistrate)

JUDGMENT

1. Daniel Odhiambo Ager the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) (2) [sic] of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence were that on the 23rd day of May, 2014 at [particulars withheld] village in Ndiwa District of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of VAO, a child aged 8 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 two grounds of appeal as follows:

a) That the learned trial magistrate erred in law and fact by failing to have him supplied with the statements.

b) That the learned trial magistrate erred in law and fact by disregarding the defence of the appellant.

5. The appeal was opposed by the state, through Ochengo Justus who submitted that all the ingredients of the offence were proved.

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) (2) of the Sexual Offences Act does not exist. The charge to that extent was erroneously drafted. It ought to have read:

...contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act ...

8. Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the Criminal Procedure Code.

9. When the plea was taken on 3rd November, 2015 the court on its own motion made an order that the appellant be supplied with copies of statements. The first witness was taken on 4th January, 2016. When the prosecutor informed the court that he was ready to proceed, the appellant equally said that he was ready. He did not inform the court that he had not been supplied with the statements, in spite of the order. The court could not have known that he had not been supplied with the statements unless he brought this to the attention of the court. Having failed to inform the court that the order had not been complied with, he cannot claim that his right was breached.

10. 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 complainant was 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 that the prosecution must prove against an accused person.

11. The complainant in her evidence testified that she was 11 years old at the time of the hearing and 9 years at the time of the offence. The age assessment report which was done on her after the offence was reported, put her age at 8 years. For the purposes of the offence under section 8 (2) of the Sexual Offences Act, age of the complainant was proved.

12. According to Grace Anyango (PW3), she was attracted by cries of distress by the complainant. The complainant alleged that the appellant had defiled her. She called him by name. When they confronted the appellant, he said it was the devil who led him to do the act. Monica Atieno Ogotu (PW4) also confirmed that the complainant said the appellant was the culprit. This was the gist of the evidence of Dan Oyier Gilo (PW2).

13. When DR. Kahega examined the complainant on 24th May, 2014 he found vaginal lacerations bilaterally and the hymen was ruptured. The complainant appeared pale and traumatized.

14. Daniel Odhiambo Ager, the appellant in his defence contended that he was framed up after failure to pay him his dues. This issue was brought for the first time during his defence. He never confronted the witnesses with these facts. This was clearly an afterthought and the trial magistrate cannot be faulted for dismissing it.

15. From the foregoing recap of the evidence on record, I find that the prosecution proved its case against the appellant to the required standards.

16. Section 8 (2) of the Sexual Offences Act provides:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

17. The appellant was sentenced to serve the prescribed sentence.

18. The upshot of the foregoing analysis of the evidence on record, the appeal lacks merit and is accordingly dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 2ND DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE