



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 42 OF 2019

JOHN OUMA OGINDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.21 of 2019 of the Senior

Principal Magistrate's Court at Mbita by Hon. Jacinta A. Owiti–Senior Principal Magistrate)

JUDGMENT

1. John Ouma Ogindo, the appellant herein, was convicted of 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 24th day of April, 2019 in Suba District within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of SAA a child aged 17 years.

3. The appellant was sentenced to serve 15 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 on evidence full of contradictions;
- b) That the learned trial magistrate erred in law and in fact by convicting him without any medical evidence that linked him to the offence;
- c) That the learned trial magistrate erred in law and in fact by failing to appreciate his defence; and
- d) That the learned trial magistrate erred in law and in fact by meting out unconstitutional sentence.

5. The appeal was opposed by the state through Mr. Oluoch, learned counsel, who contended as follows:

- a) That the appellant was recognised;
- b) That the defence was an afterthought; and
- c) That the contention that the sentence was proper.

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.

This position was echoed in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** when 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.

8. SAA (PW1) testified that on 26th April, 2019 at about 4 p.m. she was weeding in their family land which was next to the lake. She entered a thicket to answer a call of nature. Just before she embarked on her mission, she saw the appellant. He approached her and held her chest from behind. A struggle ensued and the appellant asked her what she wanted. She asked to be set free. He told her that he wanted to have sexual intercourse with her. She resisted. He pushed her to the ground and held her by the neck. She was running out of breath for he was choking her. He threatened to kill her. He subsequently defiled her.

9. After the ordeal he gave her Kshs.200/= which she declined. She went home and reported to her father. She pointed him out and he was arrested.

10. John Ouma Ogindo, contended in his defence that he was falsely implicated by the father of the complainant for he constantly demanded to be supplied with fish for his domestic consumption. When he resisted the demands, he told him that he was going to fix him.

11. These were the two versions placed before the learned trial magistrate.

12. SAO (PW2) that the complainant went home while screaming. She was bleeding from the neck and her clothes were soiled. She was carrying her underpants in her hands. This is the gist of the evidence of JOA (PW3) who met with the complainant while she was going home. She added that the complainant could not talk properly.

13. When Maurice Ouko Ogallo (PW4) examined the complainant on the same day, high vaginal swab showed the presence of semen. He also observed that she had a bruise on the neck and her clothes were torn and stained with blood.

14. The medical evidence support the contention by SAA that she was defiled. This coupled with the evidence of PW2 and PW3 leaves no doubt that she was indeed defiled.

15. Though the appellant contended that there were contradictions; I did not establish any.

16. According to SAA, the perpetrator of the offence was the appellant. The offence was committed during daytime and the complainant saw the perpetrator when he approached her, during the defilement and after when he offered her Kshs.200/= which she declined.

17. Though the appellant contended that he was falsely implicated, this was clearly an afterthought for he never confronted PW2 with the allegation. The learned trial magistrate was justified to dismiss it.

18. I therefore find that the evidence proved beyond any reasonable doubts that the appellant committed the offence he was convicted of.

19. Section 8 (4) of the Sexual Offences Act provides:

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.

The sentence meted out was therefore legal and there is nothing unconstitutional about it.

20. The upshot of the analysis of the evidence on record is that the appeal lacks merit. The same is dismissed.

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

KIARIE WAWERU KIARIE

JUDGE