



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 15 OF 2018

SILA ONYANGO KIJONJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.12 of 2017 of the

Senior Principal Magistrate's Court at Mbita by Hon. Japheth Bii-Senior Resident Magistrate)

JUDGMENT

1. Sila Onyango Kijonji, the appellant herein, was convicted of 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 night of 15th day of August, 2017 in Mbita Sub-County within Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of SAO 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 eighteen grounds of appeal which I have summarised as follows:
 - a) That the learned trial magistrate erred in law and in fact by meting out a sentence as though he was an adult and which was also unconstitutional.
 - b) That the learned trial magistrate erred in law and in fact by failing to accord him the right to a fair trial.
 - c) That the learned trial magistrate erred in law and in fact by convicting him on uncorroborated evidence.
 - d) That the learned trial magistrate erred in law and in fact by failing to appreciate that he was underage at the time of conviction.
 - e) That the learned trial magistrate erred in law and in fact by dismissing his alibi defence.
5. The appeal was opposed by the state through Mr. Oluoch, learned counsel, who contended as follows:
 - a) That the evidence on record went unchallenged.
 - b) That the contention that the appellant was underage was disproved by production of his identity card.
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 that the prosecution must prove against an accused person.

8. On 29th September, 2017 the appellant complained to the court that he had been remanded with adults who were molesting him. The learned magistrate made an order that he be secluded from adults. Later on the same day, the prosecutor informed court that he had obtained a copy of the appellant's identity card which indicated that he was born on 3rd December, 1997. The learned trial magistrate perused the copy and was satisfied that the appellant was an adult. He cannot be heard to argue that he was a minor.

9. The appellant has contended that he was not advised on his right to engage an advocate. Article 50(2) paragraph(g) provides:

Every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

10. In the case of **BOO vs. Republic [2020] eKLR Mrima J** addressed a similar issue as follows:

17. The right under Article 50(2)(g) of the Constitution must be distinguished from the right under Article 50(2)(h) of the Constitution given that in many instances the rights under Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution.

The effect of non-compliance is that the entire trial is vitiated for it amounts to a mistrial.

11. I have perused the record herein and I have found that the appellant was not informed of his right of representation by an advocate. The trial therefore amounted to a mistrial. In the interest of justice, I will not evaluate the merits of the other grounds. I therefore quash the conviction and set aside the sentence.

12. I make an order that the appellant to be released, within 7 days of this judgment, into police custody and be taken to Mbita court for retrial by any other magistrate of competent jurisdiction other than Hon. Japheth Bii.

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

KIARIE WAWERU KIARIE

JUDGE