REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 32 OF 2020

VICTOR OMONDI OTIENO .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O.A case No. 17 of 2019 of the

Senior Principal Magistrate's Court at Oyugis by Hon. C.A. Okore–

Senior Resident Magistrate)

JUDGMENT

1. Victor Omondi Otieno, 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 diverse dates between 15th day of April, 2019 and 25th day of April, 2019 at Kachien location in Rachuonyo South sub county of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of VAJ, a child aged 15 years.

3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised the following grounds of appeal:

a. The learned trial failed to find that no evidence linked him to the offence.

b. The learned trial Magistrate convicted him on evidence full of contradictions.

c. The learned trial Magistrate sentenced him to an unconstitutional sentence.

5. The appeal was opposed by the state through Mr. Ochengo, learned counsel. He contended that the prosecution proved its case to the required standards.

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. For the prosecution to establish the offence of defilement, the following ingredients must be proved beyond any reasonable doubts:

a. Whether there was penetration;

b. Evidence must show that the accused is 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.

8. The copy of birth certificate in the name of the complainant indicated that she was born on 4th June, 2004. In April, 2019 at the time of the alleged offence, she was 15 years and 10 months. The age of the complainant was therefore proved.

9. VAJ (PW1) testified that she had gone to the house of the appellant to be prayed for; she had eye problems. The appellant prayed for her then preyed on her sexually. She testified that the appellant was not the first man to have sex with. She told the court that she had previously had sex with other three men.

10. MJ (PW2) testified that his daughter disappeared from home on 18th April, 2019 and nobody knew where she was. He therefore reported to the area chief. On 26th April, 2019 he was told that she had been found. This evidence raises credibility issue of the complainant.

If indeed the complainant had an eye problem and needed to be prayed for, the first people to know were here parents. Her father testified that he did not know where she was and nobody in the family knew. The court of Appeal in the case of 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.

It was unsafe to rely on the evidence of the complainant especially having stated on her own volition that she had had sex with three other men prior to the complained of incident.

11. The Court of Appeal in the case of **Bukenya vs. Uganda [1972] EA 549,** (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

12. In the instant case, the area chief who allegedly arrested both the appellant and the complainant was not called to testify on this issue. In view of the doubts the complainant raised in her credibility, the chief's evidence was very material. Since he was not called and no explanation was tendered, we can infer that his evidence would have tended to be adverse to the prosecution.

13. 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.

It is evident that the appellant ought to have been charged under section 8 (3) of the Sexual Offences Act.

14. Section 179 of the Criminal Procedure Act provides:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

The import of this section is that an accused person can only be convicted of a minor offence which is proved by the evidence adduced. He cannot be convicted of a serious offence he was not charged with. The learned trial magistrate erred in sentencing him for an offence she had not convicted him of.The judgment was clear that she convicted the appellant 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.

15. The upshot of the foregoing is that the conviction was not safe. The same is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE