



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 36 OF 2019

CHRISNTUS ODUORI

KHALIABUSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.108 of 2018 of the Chief Magistrate's Court at Busia by Hon. P.Y. Kulecho–Senior Resident Magistrate)

JUDGMENT

1. **Chrisntus Oduori Khaliabusa**, 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 were that on the 21st day of September 2018 in Nangosia location of Busia County, he caused his penis to penetrate the vagina of **AK**, a girl aged eleven years.
3. The appellant was sentenced to life imprisonment. He appeals against both conviction and sentence.
4. The appellant was represented by the firm of D.K Nabalindo & Company Advocates. He raised ten grounds of appeal which can be summarized as follows:
 - a) That the learned trial magistrate erred in law and in fact by disregarding gross violations of Article 50 of the Constitution of Kenya.
 - b) That the learned trial magistrate erred in law and in fact by convicting the appellant on the basis of insufficient evidence.
 - c) That the learned trial magistrate erred in law and in fact by convicting on the basis of contradictory evidence.
 - d) That the learned trial magistrate erred in law and in fact by not appreciating an existing land dispute.
5. The appeal was opposed by the state through Mr. Mayaba, learned counsel who 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. Article 50 of the Constitution of Kenya provides for fair hearing. Other than stating that the appellant was not accorded a fair trial, it was not demonstrated in what instances this right was breached. My perusal of the record, does not reveal any instance when the appellant was denied a fair hearing. This ground is therefore baseless.
8. The evidence of **AK (PW1)** is that on 17th September 2018, the appellant went to their home and grabbed her. He took her inside her grandmother's house and placed her on a chair. He then inserted his genitalia into hers. She screamed and the appellant fled. At the time, her grandmother was bathing. Neighbours gave chase and apprehended the appellant.
9. **Monica Juma Obinya (PW2)** testified that at about 2 p.m. on 21st September 2018, the appellant found her seated outside and joined her for a while before he left. She went into the bathroom and while bathing, she heard her granddaughter scream from the house. She dressed up quickly and when she went out, she saw the appellant fleeing. She screamed for help. She testified that she noticed that her granddaughter

was bleeding.

10. These are two different dates of the alleged incident. The evidence of Nicholas Ojiambo (PW3) testified that the incident was on 21st September 2018. The medical evidence adduced by Edwin Imo (PW5) a clinical officer at Nangina Dispensary is that AK was seen at the facility on 21st September 2018.

11. We can therefore reconcile the discrepancy on the date as testified by AK, and make a finding that the incident complained of must have taken place on 21st September 2018 and not 17th September 2018. It has to be appreciated that the complainant was a young child aged eleven years.

12. The medical evidence by Edwin Imo (PW5) was that when the complainant was examined, the following were observed:

- a) Dry whitish discharge on the labia majora;
- b) A tear on the vaginal fornix;
- c) Bruises on the labia minora;
- d) Torn hymen; and
- e) Bruised vaginal wall which was hyperemic.

He therefore concluded that there was forceful vaginal penetration. This medical evidence therefore supported the contention of the complainant and her grandmother.

13. Section 8 (1) of the Sexual Offences Act defines defilement as an act which causes penetration with a child. It states:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

14. In order for the offence of defilement to be established the prosecution ought to prove the following ingredients beyond any reasonable doubts:

- a) Whether there was penetration of the complainant's genitalia;
- b) Whether the complainant is a child; and
- c) Whether the penetration was by the appellant.

This was held Joel Ngugi J. in the case of **Fappyton Mutuku Ngugi vs. Republic [2012] eKLR**. He stated:

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.

15. In the instant case I have already made a finding that the evidence of penetration was proved beyond any reasonable doubt. Was the age of the complainant proved? The certificate of birth in respect of the complainant was produced. It indicated that her date of birth was 3rd July 2007. The date of the offence was 21st September 2018. It was therefore proved that at the time of the offence, AK was aged eleven years. The children Act defines a child as:

“child” means any human being under the age of eighteen years;

The complainant was therefore a child at the time of the commission of the offence.

16. The evidence of the complainant was that her defiler was the appellant. Her evidence was bolstered by that of her grandmother who testified that when she went out, she saw the appellant fleeing. She raised an alarm and members of the public pursued and apprehended him. The arresting mob inflicted injuries on him and this was confirmed by medical evidence that was adduced by Edwin Imo (PW5). The account of the appellant on how he sustained injuries was unconvincing and was rightly dismissed by the learned trial magistrate.

17. All the three ingredients for the offence of defilement were therefore proved to the required standards.

18. The alleged existing land dispute did not at all arise during the trial. There was no way the trial magistrate could have considered what was not canvassed before her. This was clearly an afterthought.

19. 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.

20. Though it was contended that the trial magistrate did not consider the mitigation, this is not true. She did and pointed out the seriousness of the offence which called for a deterrent sentence. I therefore have no reasons to interfere with the sentence that was meted out. This is a legal sentence.

21. The appeal is accordingly dismissed.

DELIVERED and SIGNED at BUSIA this 8th Day of April, 2020

KIARIE WAWERU KIARIE

JUDGE