



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 38 OF 2019

VINCENT KADASIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From the original conviction and sentence in S.O.A case No. 31 of 2018 of the
Chief Magistrate's Court at Busia by Hon. T.Madowo-Resident Magistrate)*

JUDGMENT

1. Vincent Kadasia, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) (3) [sic] of the Sexual Offences Act No. 3 Of 2006.
2. The particulars of the offence are that between 9th and 10th day of March, 2018 at [Particulars Withheld] village, Chakol Division within Busia County, intentionally and unlawfully caused his penis to penetrate the vagina of I.N, a child aged 15 years without her consent.
3. The appellant was sentenced to serve twenty years imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
4. The appellant raised four grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law and facts by ignoring the gross violations and infringements of his constitutional rights to fair trial;
 - b) That the learned trial magistrate erred in law and facts by relying on hearsay and contradictory evidence;
 - c) That the learned trial magistrate erred in law and in facts by relying on medical evidence with no probative value; and
 - d) That the learned trial magistrate erred in law and in facts by disregarding the entire defence evidence.
5. The appeal was opposed by the state through Mr. Mayaba, learned counsel, on grounds that there was sufficient evidence and that the sentence was legal.
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) (3) 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 (3) of the Sexual Offences Act ...

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.

8. It is immaterial whether or not a child to a sexual congress has given consent. Any child under the age of 18 years lacks capacity to give consent. To that extent, the particulars of the offence were defective. This however did not prejudice the appellant. The defect is equally curable under section 382 of the Criminal Procedure Code.

9. Article 50 of the Constitution of Kenya provides for fair hearing. The appellant contended that this article was breached. He did not specify in what instances the breach occurred. I have gone through the record, and what emerges therefrom, is the upholding of his rights by the court. On 15th March 2018 the prosecution wanted to call its first witness but the court ruled, without any prompting, that it would be contrary to the constitution to proceed without giving the appellant the right to prepare. The learned trial magistrate cannot be faulted for there is no instance in the entire record where she failed to observe the rights of the appellant. This ground has no merit.

10. In order to make a conviction for defilement, the prosecution has to prove the following ingredients:

- 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.

11. The girl in question was aged 15 years at the time of the defilement. The evidence was abundantly clear that the girl and the appellant had sexual intercourse. The girl narrated the entire process from when it started. It is not lost that though I.N did not lay bare all the details, she was in this adventure willingly. Were it not for somebody responsible who detected and reported to the police, the rest of the world would not have known what had transpired.

12. Corporal Fredrick Ambale (PW4) testified in part as follows:

On 10th March 2018 at 4.30 a.m. I was called by Inspector Wamalwa with information that in Limara there were boys seen with girls from Ojamong Primary. I went to the said house and knocked and identified ourselves. One of them opened the door. We found the accused and a girl in civilian clothes. Her uniform was in the house. [Emphasis added]

13. From this evidence we can be able to see that this escapade was planned way ahead and the girl took precaution to carry her home clothes. We also learn a very important fact that was lost to the learned trial magistrate; that this was a boys and girls affair. I am very deliberate in saying so. The Sexual Offences Act defines penetration as follows:

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

This definition means that both the girl child and the boy child can be defiled.

14. With the evidence of Corporal Fredrick Ambale (PW4) that it was reported to them about girls and boys, the prosecution had a legal duty to prove that the appellant was not a boy but an adult. Though the appellant did not raise this issue, it would be irresponsible on my part to pretend that he was an adult just because the charge sheet on the face describes his apparent age as an adult. If he was a child under the age of 18 he was sinned against in equal measure as he sinned against the girl.

15. In view of this *lacuna* of establishing the age of the appellant, the conviction cannot stand. I accordingly quash the same and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 11th Day of November, 2020

KIARIE WAWERU KIARIE

JUDGE