



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO. 47 OF 2017**

**DOMINIC MOGERE MBAKA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Appeal from the conviction and sentence of Hon. L. Simiyu, Senior Resident Magistrate dated and delivered on the 12<sup>th</sup> day of October, 2017, in the original Homa Bay CMCR Sexual Offences case No.40 of 2016)*

**JUDGMENT**

[1] The appellant, **Dominic Mogere Mbaka**, was convicted and sentenced to life imprisonment by the Senior Resident Magistrate's Court at Homa Bay for the offence of defilement, contrary to **section 8 (1) and (2)** of the **Sexual Offences Act**.

It was alleged that the appellant defiled a girl aged six (6) years on the 30<sup>th</sup> November 2016 in Rangwe – Homa Bay County. It was alternatively alleged that he committed an indecent act with the child, contrary to **Section 11 (1)** of the **Sexual Offences Act**.

[2] Five prosecution witnesses including the child victim testified against the appellant who in his defence denied the charge and called four witnesses to testify in support of his case.

The trial court considered the evidence in its totality and arrived at the conclusion that the main charge of defilement had been proved against the appellant beyond reasonable doubt.

[3] Consequently, the appellant was convicted on the main count and sentenced accordingly. However, being dissatisfied with the conviction and sentence, he preferred five grounds of appeal. These are set out in the amended grounds of appeal filed together with the appellant's written submissions in support of the appeal.

Basically, the appellant complains that his conviction was based on evidence which did not prove the fact of penetration and the complainant's alleged age. That, his conviction was also based on assumptions and presumptions and on a defective charge.

[4] The appellant contended that the trial court disregarded his defence, particularly with regard to the fact that there was an existing grudge between him and a relative of the complainant i.e. PO (PW1). He therefore urged this court to quash the conviction and set him free.

His grounds of appeal are reiterated and fortified by his written submissions, but vehemently opposed by the respondent through the learned prosecution counsel, **Mr. Oluoch**, Senior Assistant Director of Public Prosecutions (S/ADPP), who argued that this was one of those rare cases where a suspect is caught in the act of committing the offence of defilement.

[5] Learned Prosecution Counsel, submitted that there was sufficient evidence from **PW3** showing that the appellant was caught in the act. That, evidence from the complainant (**PW2**) established the circumstances under which the offence was committed. It was therefore counsel's contention that there existed direct evidence against the appellant such that his conviction by the trial court was proper. He urged this court to dismiss the appeal while stating that the sentence imposed on the appellant was lawful.

[6] This court, having given due consideration to the grounds of appeal and the rival submissions in support and opposition thereto and also having re-visited the evidence adduced at the trial bearing in mind that the trial court had the opportunity to see and hear the witnesses, is of the considered view that the fact that the complainant (**PW2**) was defiled was not in dispute and was indeed established by her own testimony as duly corroborated by that of her sister, **AMA (PW3)** and that of the Clinical Officer, **Dancan Bosire (PW4)**.

[7] Under **Section 8 (1)** of the **Sexual Offences Act**, a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

The Act defines “penetration” as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

The medical examination report (P3 form) (**P. Exhibit 3**) was compiled and signed a few minutes after the fact. This meant that the complainant was medically examined on the same day that she was allegedly defiled.

[8] Parts “**B**” and “**C**” of the report clearly shows that the complainant’s sexual organ was indeed penetrated by a male sexual organ (i.e. Phallus) which was described as the “probable type of weapon” used by the offender to sexually assault the complainant. In her evidence, the complainant stated that the offender inserted his male genital organ into her female genital organ. By so doing, the offender completed the act of penetration as was confirmed by medical evidence (i.e. **P. Exhibit 3**).

[9] It was rather suspicious that in his oral evidence, the clinical officer (PW4) made an attempt to renege on his own documentary evidence with regard to the fact of penetration. However, the attempt proved futile as his oral evidence in that regard was discredited and eliminated by the documentary evidence which included not only the P3 form (**P. Exhibit 3**) but also the medical notes (**P. Exhibit 2 and P. Exhibit 1**).

[10] The trial court noted as much and went ahead to correctly make a finding that penetration was proved by the availed documentary evidence which also proved that the complainant was aged six (6) years at the material time of the offence thereby confirming the contents of the age assessment form (P. exhibit 4) and her relative’s (PW1) testimony in that regard.

Indeed, if the complainant was born in the year 2011, it would follow that her age was six (6) years at the material year of the offence i.e. 2016.

[11] Basically, the bone of contention and indeed the key issue which presented itself for determination by the trial court was the alleged identification of the appellant as the person responsible for defiling the complainant.

In that regard, the trial court considered the complainant’s evidence coupled with that of her sister (**PW3**) and made a finding that the appellant was positively identified as the offender.

[12] This finding was based on the credibility and cogency of the complainant’s evidence together with that of her sister (PW3). This court, does not see any factual or legal reason to interfere with the finding.

Indeed, the offence occurred in broad daylight and the appellant was no stranger to the complainant and her sister.

The conditions favouring positive and reliable identification of the appellant existed at the time. He could not be heard to deny the charge as he was clearly seen and recognized by the complainant and her sister (PW3). This explained why PO (PW1) was able to link the appellant with the offence when his name was called out by the complainant’s sister (PW3). He was a known figure in the area, a fact which was confirmed by his own witnesses.

[13] Besides, he was actually caught or literally caught in “flagrante delicto” (caught in the act) by the complainant’s sister (PW3). His defence was therefore discredited and reduced into an obvious lie if not an afterthought. He could not be heard to deny responsibility for the offence and imply that he was a victim of a set up by PO (PW1) prompted by an alleged sour relationship between him and her.

[14] For all the foregoing reasons, this court must find that all the appellant’s grounds of appeal are lacking in merit. His conviction by the trial court was sound and proper and the sentence imposed on him was lawful.

Accordingly, this appeal must and is hereby dismissed.

**J.R. KARANJAH**

**JUDGE**

**05.12.2019**

[Dated and delivered this 5<sup>th</sup> day of **December, 2019**]