REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.40 OF 2018

KENNEDY ODIEMBO OGULO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence of the principal Magistrate's Court

at Magunga/Mbita in Sexual Offences act No.3 of 2017 – Hon. J. Orwa, Principal Magistrate)

JUDGMENT

[1] This is an appeal by **Kennedy Odiembo Ogulo** (appellant), against his conviction and sentence by the Magistrate's Court at Magunga-Mbita for the offence of defilement, contrary to **Section 8 (1)** read with **Section 8 (2)** of the **Sexual Offences Act**.

It was alleged that, on the 22nd December 2016 at [Particulars Withheld] Village-Suba Homa Bay County, the appellant defiled VAO, a girl aged thirteen (13) years.

After trial, the appellant was however convicted and sentenced on the accompanying alternative charge of committing an indecent act with the said child, contrary to **Section 11 (1)** of the **Sexual offences Act**. A sentence of twenty (20) years imprisonment was therefore imposed on him.

[2] Being aggrieved by the conviction and sentence, the appellant preferred this appeal on the basis of the grounds set out in his petition of appeal dated 24th September 2018 and those set out in the amended grounds of appeal filed together with the appellant's written submissions which were fully relied upon in support of the appeal.

The appellant therefore urged this court to allow the appeal and set him at liberty.

[3] The state/respondent opposed the appeal through the learned **Senior Assistant deputy Public Prosecutor, Mr. Oluoch**, who orally and briefly, submitted that the complainant (**PW1**) narrated to the court how she was confronted and defiled by the appellant, a person she had previously known and was able to identify at the material time of the offence.

That, the offence of defilement was established even if the hymen was not broken as indicated by PW3 and that the trial court proceeded on wrong principles of law in finding the appellant guilty of the alternative charge instead of defilement.

Learned Prosecution counsel therefore urged this court to dismiss the appeal.

[4] Having considered the grounds of appeal and the rival submissions in support of and opposition thereto, and having re-considered the evidence adduced at the trial by both the prosecution and the defence with a view to arriving at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses, this court is satisfied that the ingredients of the charge of defilement were duly established by the prosecution through the evidence of the complainant, **VA (PW1)** as corroborated by the medical evidence provided by the Clinical Officer, **Stephen Kerario (PW3)**.

[5] Defilement as defined in **Section 8(1)** of the **Sexual Offences Act**

is an act which causes penetration with a child and penetration as defined by the Act means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

The evidence by the complainant and the clinical officer (PW3) showed that an act of defilement was indeed committed against the complainant on the material date.

[6] The complainant testified that the offence occurred at about 10.00 p.m. in a house where she and her infant sister called I, aged six (6) years old, had gone with a view to assist in the cooking of a meal for a "father" or priest of their Legio Maria religious sect. They were to spend the night in the house, but as she was sleeping she felt a person on top of her and engaging in "bad manners". She flashed her mobile phone torch and recognized the offending intruder who again assaulted her sexually and retreated to his sleeping area thereafter.

[7] The complainant further testified that she did not find the intruder in the house on the following morning, but he returned later with bananas which he gave her to cook. He drank tea and ate the cooked bananas before he left. She later met her grandmother but never told her what had happened to her during the night. She disclosed the incident to the grandmother at a later stage when she (grandmother) again sent her to take food to her assailant.

[8] The grandmother, **CA (PW2)**, confirmed as much but indicated that the complainant had to be forced to disclose what had happened to her by being beaten. This was after she refused to take food to where she had been sent.

The clinical officer (**PW3**) examined the complainant, two weeks or so after the offence and compiled the necessary report (P. Exhibit 3) confirming that the complainant was defiled inasmuch as it was indicated that she had penetrative sex.

[9] It is clear from the foregoing, the material ingredients of the charge of defilement were duly established and proved. Not only was an act or penetration committed against the complainant, her age was established as twelve (12) years as at the material time of the medical examination in the year 2017. This meant that she was aged eleven (11) years as at the material time of the offence in the year 2016.

[10] It would therefore follow that the trial court's finding that the offence of defilement was never established by the evidence availed by the prosecution was erroneous inasmuch as it was based on a misapprehension of the law with regard to the necessary ingredients of a charge of defilement.

Even if the hymen was intact, a partial insertion of the genital organs of a male person into the genital organs of a female person would still amount to defilement if such insertion does not cause the tearing of the hymen or lacerations to the female sexual organs.

[11] Further, the clinical officer (PW3), having documented his findings on the necessary P3 form (P. Exhibit 3) which findings established that the complainant was defiled, he could not later be heard to state in open court that there was no penetration. His oral testimony in that regard was completely eliminated and discredited by his documentary evidence and was clearly meant to mislead the trial court which unfortunately fell for it and erroneously found that it was the offence of indecent act with a child which was established by the prosecution rather than the offence of defilement.

[12] Be that as it may, on the issue of identification of the offender, the complainant was firm in stating that the appellant was the offending "priest" or "father". She was previously known to him and this explained why she was picked by her grandmother to proceed to his nearby house to cook food for him. She indicated that the offence occurred in darkness but the flashlight from her mobile phone enabled her to see and positively recognize the appellant who vehemently denied the charge against him and implied in his defence that he was arrested and implicated without good cause.

[13] The appellant did however, confirm, that the complainant, was known to him as she used to stay at their church with her grandmother. His denial of the charge was however, discredited by her evidence which was found by the trial court to be credible.

On matters of credibility, a trial court is always at an advantaged position to make findings in that regard rather than an appellate court because the trial court saw and heard the witnesses.

[14] This court is therefore satisfied that the complainant's evidence of identification was credible and reliable in proving that the offending "priest" was no other person than the appellant herein. His conviction by the trial court on the alternative count of indecent act with a child, contrary to **Section 11 (1)** of the **Sexual Offences Act** is hereby quashed and substituted for a conviction on the main count of defilement, contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual offences Act**.

[15] Consequently, the sentence of twenty (20) years imprisonment imposed on the appellant by the trial court on the alternative count is hereby set aside and substituted for a sentence of life imprisonment on the main count in accordance with **Section 8(2)** of the **Sexual Offences act** as the complainant was aged eleven (11) years at the time of the offence.

In sum, this appeal is devoid of merit and is hereby dismissed in its entirety.

Ordered accordingly.

J.R. KARANJAH

JUDGE

11.12.2019

[Delivered and signed this 11th day of December, 2019]