



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.60 OF 2017

BETWEEN

V O O APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in Sexual Offences Act Case No.10 of 2017 of the SRM's court at Oyugis)

JUDGMENT

[1] When the appellant, **V O O**, appeared before the Senior Resident Magistrate at Oyugis, he faced a charge of defilement, contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act** and in the alternative, a charge of indecent act with a child, contrary to **Section 11 (1)** of the **Sexual Offences Act**.

[2] It was alleged that on the 20th February 2017 and the 19th March 2017, within Homa Bay County, the appellant defiled **R A O**, a child aged fourteen (14) years or intentionally and indecently touched her private parts. He was after trial convicted for the offence of incest contrary to **Section 20(1)** of the **Sexual Offences Act** and sentenced to life imprisonment.

[3] Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds in the petition of appeal filed herein on 15th December 2017, in which he complains of being convicted on the basis of false evidence or allegation by the complainant's mother who colluded with the complainant's teachers. He also complains that the trial court arrived at its judgment without a DNA test to ascertain his involvement in the offence.

[4] At the hearing of the appeal, the appellant appeared in person and fully relied on his written submissions in support of his case.

The respondent, through the learned prosecution counsel, **MR. OLUOCH**, opposed the appeal and submitted that the trial court found that the appellant was related to the complainant and was therefore correct in convicting him under **Section 20(1)** of the **Sexual Offence Act**. That, no prejudice was suffered by the appellant as he would still have been sentenced to life imprisonment even if he had been convicted for defilement contrary to **Section 8 (1)** read with **Section 8 (2)** of the **Sexual Offences Act**.

[5] The respondent further submitted that it was established that the complainant was aged fourteen (14) years and therefore, the complaint that the complainant's age was not ascertained was unmerited.

The respondent contended that this appeal lacks merit and urged this court to dismiss it.

[6] Having considered the appeal on the basis of the supporting grounds and those in opposition thereto as well as the submissions by both the appellant and the respondent, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **OKENO –VS- REPUBLIC [1972] EA 32**).

[7] In brief, the case for the prosecution was that the complainant, **R A O (PW1)**, was at the material time aged 14 years and a class four (4) primary school pupil at [particulars withheld] Academy. She lived with her mother, **Z O O (PW2)** and step father, the appellant herein who on the 19th March 2017, sent her younger siblings to their grandmother's house and thereafter took her (complainant) into the bedroom and defiled her on a second occasion after having previously done so on the 20th February, 2017.

[8] On both occasions the appellant threatened her (complainant) with harm if she ever disclosed to anybody what he had done. Later, on 20th May 2017, she was called to the office of her teacher, **W E O (PW3)** who questioned her about the changes in her physical appearance before enticing her with a trip to Mombasa. She (complainant) then decided to disclose to the teacher that she had been defiled on two occasions by her step father (appellant).

[9] The teacher in charge of guidance and counselling at the complainant's school, **W A B (PW4)** had already suspected that she (complainant) could be pregnant and on questioning her she denied the fact. However, on 20th May 2017, rumours spread in the school that she (complainant) was pregnant as she had told her colleagues that she had been defiled by her step- father. Her mother (PW2) was notified accordingly and advised to report the matter to the police at Oyugis. She later took her to the hospital where the pregnancy was confirmed by a Clinical Officer, **KIBET SEREM (PW5)**.

[10] The Clinical Officer also confirmed that the complainant had been defiled. He established that the pregnancy was sixteen (16) weeks as at 20th May 2017 thereby implying that the defilement occurred in February or March 2017.

CP MAXINE NEKESA (PW6), received the necessary report and investigated the matter. She later preferred the present charge against the appellant who had already been apprehended by members of the public and handed over to the police.

[11] In his defence, the appellant implied that he did not commit the offence as alleged. He said that he was a watchman by occupation and resided near a slaughter house within Oyugis Township.

He arrived home on 23rd January 2017, from work but before he could rest was confronted by a village elder with an allegation of having defiled his step daughter. He was escorted to the police station where he found his wife, his step daughter and a teacher recording statements. He contended that his wife and step daughter had been coached by the teachers at the step daughter's school where he had sent both of them for purposes of sorting out the issue. His wife was instead chased away by the teachers who then coached his step daughter on what to say in court.

[12] After considering the foregoing evidence in its totality, the learned trial magistrate concluded that the appellant was guilty of incest and not defilement due to the relationship between the appellant and the complainant in that the appellant was married to the complainant's mother (PW2) hence, a step father to the complainant.

The learned trial magistrate invoked the provisions of **Section 186** of the **Criminal Procedure Code** in finding the appellant guilty of incest under **Section 20(1)** of the **Sexual Offences Act**.

[13] In this court's opinion the evidence remained undisputed with regard to the fact that the complainant was defiled between the months of February and March 2017. She indicated as much and her testimony in that regard was corroborated by the medical evidence availed by the Clinical officer (PW5). The incident occurred while the complainant was aged 14 years or thereabout and that is why **Section 8 (3)** of the **Sexual Offences Act** was invoked in the charge.

[14] The said provision provides for imprisonment for a term of not less than twenty (20) years for a person who defiles a child of between the age of twelve and fifteen years.

Section 20(1) of the **Sexual Offences Act**, on the other hand provides for life imprisonment for a person who commits an act of incest with a female person under the age of eighteen (18) years.

The former provision carries a harsher sentence than the later provision.

[15] Be that as it may, the appellant did not dispute the complainant's pregnancy arising from an act or acts of defilement against her. His apparent defence was that he was not responsible for the said acts and hence the pregnancy. However, there was credible evidence from the complainant that he actually defiled her. This was sufficient proof of his criminal culpability whether or not a DNA test was carried out to determine paternity of the unborn child.

It also disproved the appellant's allegation that he was implicated by the complainant's mother in collusion with the complainant's teachers.

[16] In the circumstances, this court would also find that the complainant was indeed defiled and that the person responsible for the offence was the appellant and the appellant only. He thus deserved a conviction and sentence under **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**.

With due respect, this court thinks that the learned trial magistrate misdirected itself by invoking **Section 186** of the **Criminal Procedure Code** and convicting the appellant under **Section 20 (1)** of the **Sexual Offence Act**. This was possible if there was cogent proof that the complainant was less than fourteen (14) years at the time of defilement. Herein, the baptism certificate (**P. Exhibit 1**) was not cogent proof that the complainant was aged less than fourteen (14) years at the material time.

[17] The charge sheet and the complainant's own evidence placed her age at 14 years. In the absence of a birth certificate, this was her undisputed probable age at the material time of the offence and it was the more reason that **Section 8 (3)** of the **Sexual Offences Act** was invoked.

For the foregoing reasons, it is the finding of this court that the appellant's conviction under **Section 20(1)** of the **Sexual offences Act** was not proper and is hereby quashed and substituted for a conviction under **Section 8(1)** read with **Section 8 (3)** of the **Sexual Offences Act**.

[18] The resultant effect on the sentence imposed by the trial court is that the same is set aside and substituted for a sentence of twenty (20) years imprisonment.

Otherwise, the appeal is dismissed.

[19] Ordered accordingly.

J.R. KARANJAH

JUDGE

05.07.2018

[Delivered and signed this 5th day of July, 2018]