



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRA NO. 29 OF 2018**

**FREDRICK OGOLLA OPONDO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[Being an appeal against the conviction and sentence of the Principal Magistrate's,*

*Court at Winam (Hon. J. Mitey RM) dated the 7<sup>th</sup> March 2018*

*in Winam PMCCRC No. 474 of 2014]*

**JUDGMENT**

1. The Appellant, **FREDRICK OGOLA OPONDO**, was convicted for the offence of **Defilement** Contrary to **Section 8(3)** of the **Sexual Offences Act**.
2. The learned trial magistrate made a special finding, pursuant to the provisions of **Section 166** of the **Criminal Procedure Code**, that the Appellant was insane at the time he committed the offence.
3. In the light of the said special finding, the trial court ordered that the Appellant would remain in custody, at the prison in Kisumu. The Officer-In-Charge of the said prison was directed to regularly escort the Appellant to the Jaramogi Oginga Odinga Teaching and Referral Hospital, for medical review and management of his mental condition.
4. In his appeal, the Appellant submitted that the age of the Complainant was not proved beyond any reasonable doubt.
5. The Appellant pointed out that there was no documentary evidence, such as a Birth Certificate, Baptismal Card or an Age Assessment Report.
6. Secondly, he observed that the mother of the Complainant did not testify, although she was in court when the Complainant gave her evidence.
7. The second issue raised by the Complainant was that the trial court ought to have given him protection in terms of Section 12 of the Penal Code.
8. The Respondent opposed the appeal, noting that it had been proved that Complainant had been defiled.
9. Mr. Muya, learned State Counsel, submitted that although the medical evidence initially indicated that Appellant was unfit to stand trial, the mental status of the said Appellant later improved sufficiently, enabling him to comprehend the trial process.
10. The Respondent submitted that the trial was proper, as it was conducted when the Appellant was lucid.
11. Finally, the Respondent pointed out that the trial court was well aware of the Appellant's mental condition at the time when the offence was committed, hence the order that the Appellant be held at the President's pleasure.
12. This appeal has given me anxious moments. I say so because the Complainant was definitely a victim of a heinous crime; Defilement.

13. A young girl, who was then in Class 6, at [particulars withheld] Primary School, travelled from [particulars withheld] to Kisumu. Her mission was to seek the assistance of her uncle, L O, with regard to her school fees.
14. On arrival at the Kisumu Bus Stage, the young girl met the Appellant, who offered to escort her to [particulars withheld], where the girl's uncle lived.
15. Regrettably, the Complainant was escorted to the Appellant's house, in Nyalenda.
16. And it is in that one-roomed house where the Appellant defiled the Complainant.
17. When the Complainant cried out, some passersby heard her and rescued her from the Appellant.
18. Both the Complainant and the Appellant were examined by medical doctors. The reports showed that the Complainant had been defiled, and that she had a severe urinary tract infection.
19. Luckily, the results were negative for ailments such as Syphilis and HIV.
20. On his part, the Appellant had cut wounds on his fore-head. The said injuries were consistent with the beatings he received from the hands of the persons who had rescued the Complainant.
21. The Appellant was also found to have a severe urinary tract infection; but without Syphilis or HIV.
22. There is no doubt that the Complainant was defiled.
23. I also find that the identity of the person who defiled the Complainant is not in doubt. Indeed, the Appellant did not raise any issue concerning identification.
24. His complaint was that the age of the Complainant was not proved as required by law.
25. **Section 8(1) of the Sexual Offences Act** stipulates that;  
  

***“A person who commits an act which causes  
penetration with a child is guilty of an offence  
termed defilement.”***
26. In this case, the medical evidence proved that there had been penetration.
27. One of the essential ingredients of the offence of defilement is the age of the complainant. It is essential in two distinct aspects;  
  

***(i) If the Complainant is not a minor, the offence  
Cannot be defilement; and  
  
(ii) depending on the age of the Complainant who  
is a minor, the perpetrator would be subject to  
the appropriate sentence.***
28. Age of the Complainant is ordinarily proved through documents such as Birth Certificates, Baptismal Cards, School Reports or Medical Assessment Reports.
29. It is also acceptable that oral evidence be received from persons who are closely connected to the minor, such as parents, siblings and teachers.
30. In this case, the Complainant testified that at the material time, she was 12 years old.
31. Ordinarily, a person who was over the age of about 6 years, would know their own age. Therefore, unless it is shown that the minor was of such a tender age that he/she may not yet appropriately appreciate his/her age, the evidence of the Complainant should be admissible.
32. Of course, when medical examination is conducted, the evidence tendered would, most probably be objective and accurate.
33. Meanwhile, documents such as Birth Certificates and Baptismal Cards are also generally considered reliable because they are usually

made in the ordinary course of business, when there was no anticipation that they would be required as evidence in court.

34. In this case, the Complainant's mother was present in court when her daughter gave evidence. She had accompanied the Complainant to court as the young girl needed assistance with her child who was about 2 weeks old.

35. In principle, the mother could have been a competent witness on the question of the Complainant's age. However, when she sat in court during the testimony of the Complainant, it was then objectionable to have her give evidence.

36. Witnesses are required to stay outside the court before they are called to testify. If a witness sat inside the court-room before he gave evidence, that would mean that he could simply repeat what the earlier witness had already said.

37. The court can only verify or ascertain the veracity of evidence when witnesses are available for cross-examination; and cross-examination works best through testing the testimony of one witness to the testimony of other witnesses, or through a comparison of the evidence tendered and statements which the witness had made earlier.

38. I reiterate that the mother of the Complainant may have been objected to, as a witness, once she had sat in court when her daughter was giving evidence.

39. Nonetheless, the evidence of the Complainant was sufficient in proving that she was a minor.

40. At the second level, when the Appellant had been convicted, the correct sentence is determinable on the basis of the age of the victim. At that stage, it would be insufficient to know that the victim was a minor.

41. Pursuant to **Section 8** of the **Sexual Offences Act**, the perpetrator would be jailed for life if the victim was eleven years or less. If the victim was between 12 and 15 years, the perpetrator would be liable to imprisonment for not less than 20 years. And if the victim was between 16 and 18, the perpetrator would be jailed for not less than 15 years.

42. Without proof of the age of the victim, the trial court would have a challenge handing down an appropriate sentence.

43. In this case, the Appellant was guilty but was not mentally sound. In the circumstances, the provisions of **Section 166** of the **Criminal Procedure Code**, provided a solution on the dilemma which the trial court may have had to address. The said statutory provision says that;

*“(1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act or omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.”*

44. The learned trial magistrate did comply with **Section 166(1)**. He then ordered that the Appellant be held in custody, from where he would be accorded the necessary review and management of his mental condition.

45. The Appellant submitted that pursuant to **Section 12** of the **Penal Code**, he should have been given protection of the law, by being found not criminally responsible. That section reads as follows;

*“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other effects above mentioned in reference to that act or omission.”*

46. It is only when a person is incapable of understanding what he was doing or when he was incapable of knowing that he ought to do the act or make the omission, that the person would not be criminally responsible, if his mental condition was attributable to disease affecting his mind.

47. But even if he has a mind that was affected by disease, he would be criminally responsible, unless the act done or the omission made was attributed to his inability to understand what he was doing or unless he was rendered incapable of knowing that he ought not to do the act or to make the omission.

48. In this case, the Appellant had sufficient presence of mind to deceive the Complainant that he would escort her to her uncle’s place in [particulars withheld]. Instead he led to his house in Nyalenda.

49. He then demanded that the Complainant should remove his panty. When the Complainant refused, the Appellant removed the panty forcibly.

50. The Appellant told the Complainant that he would “sleep with her”, by force.

51. And when the Complainant made noise, the Appellant put a piece of cloth in her mouth.

52. All the actions of the Appellant show that he was well aware of what action he wanted to do, and that it was wrong.

53. In the circumstances, the Appellant cannot have been given the benefit of the provisions of **Section 12** of the **Penal Code**.

54. In conclusion, I find no merit in the appeal, and I therefore dismiss it. I uphold the conviction and the Directions which the learned trial magistrate made, pursuant to **Section 166** of the **Criminal Procedure Code**.

**DATED, SIGNED and DELIVERED at KISUMU this 17<sup>TH</sup> day of SEPTEMBER 2018.**

**FRED A. OCHIENG**

**JUDGE**