



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 127 OF 2016

(DEFILEMENT)

(CORAM: J. A. MAKAU - J.)

NABOTH ODHIAMBO OKUMU.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 28.07.2016 in Criminal Case No. 888 of 2016 in Bondo Law Court before Hon. M. Obiero – P.M.)

J U D G M E N T

1. The Appellant **NABOTH ODHIAMBO OKUMU** was charged with an offence of defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that between the 19th day of July, 2016 and 25th day of July, 2016 at unknown time at [particulars withheld] in Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of VAO, a child aged 15 years.
2. That upon the charge being read and explained to the Appellant in Kiswahili language, which he understands, he admitted the charge, a plea of guilty was entered and upon the facts of the charge being given the Appellant admitted the facts as correct, consequently he was convicted and sentenced to serve 20years imprisonment.
3. The facts of the prosecution case are as follows: that on 9th July 2016, the Complainant was at her home when the accused person went and picked her. The accused went with her to his home. They stayed there as husband and wife until her grandmother reported the matter at Akala Police Station. On the 25th July 2016, police officers from Kolenyo AP Post arrested both the accused person and the Complainant and escorted them to the police station. Subsequently, they were escorted to Rera Sub-District Hospital and were examined. The Complainant was found to be pregnant. The P3 forms were filled. The Clinical officer confirmed that the girl had been defiled. Later the accused was charged with this offence.
4. Aggrieved by the conviction and sentence, the appellant preferred this appeal, setting out the following six (6) grounds of appeal: -

1. That the sentence imposed on the appellant is so manifestly harsh and excessive as amount to misdirection.

2. That the Learned Trial Magistrate erred in law in arriving at a judgment and conviction without appreciating that the language in which the charges was read and proceedings taken. That the Learned Trial Magistrate erred in law and facts by convicting the Appellant on his plea of guilty without informing him the right to choose and be represented by an Advocate notwithstanding that the Appellant was a layman in law pursuant to Section 50(2) of the Constitution of Kenya.

3. That the Learned Trial Magistrate erred in law in failing to inform the Appellant, the consequences of the offence.

4. That the Learned Trial Magistrate erred in law and facts by appreciating the Appellant's plea of guilty of a sensitive charge he was facing and to give adequate time to consult pursuant to Section 50(2) of the Constitution of Kenya.

5. That the Learned Trial Magistrate erred in law and facts by convicting the Appellant without allowing him to mitigate yet it is his constitutional right.

6. That the Appellant was misled by the Prosecution (Police) not knowing the danger of the offence in question.

5. At the hearing of the appeal, the Appellant urged the appeal against the conviction and sentence. The Appellant urged that the Complainant was not a minor, was his wife and aged 19 years whereas he urged he was 17 years. The court ordered that the Complainant, who was present before court at the time of the hearing of the appeal and who urged she was wife to the Appellant and aged 19 years be subjected to age assessment together with the Appellant.

6. On 27th March 2017, the appeal came up for further hearing, Court received the age assessment for both the Complainant and the Appellant from the Ministry of Health which stated as follows: -

Age Assessment of V A – OP/No. [particulars withheld]

“The above patient is aged between 18-19 years old.

This is due to the fact that all the last molars are completely erupted in the oral cavity.”

In respect of the Appellant: -

Age Assessment of Naboth Odhiambo Okumu – OP/No. 5923/17

“The above patient is aged between 16-17 years old.

This is due to the incomplete eruption of the last molars.

The lower left last molar only half-way erupted.”

7. Mr. Ombati, Learned State Counsel submitted the age assessment of the complainant confirms that at the time of the commission of the offence, she was either 18 or 19 years while the Appellant was aged either 16 or 17 years and urged the charge was unlawful as the Complainant was not proved to be a minor.

8. I have very carefully considered the charge and its particulars and I am satisfied that in view of the age assessment report in respect of the Complainant, the particulars were at variance with the age assessment report. That the facts as given before the trial court did not disclose the age of the complainant was 15 years as suggested though the State produced birth certificate as exhibit 3 which the Appellant was not shown. I have perused the photocopy of exhibit 3, which is purportedly certified by undisclosed person from [particulars withheld] School, indicating the Complainant was born on 1st April 2001, meaning the

Complainant was as of July 2016 aged 15years. However, as the Complainant appeared before this Court, disputed the age attributed to her and upon age assessment having been done on her the Court has found from her age assessment report at the time of the alleged commission of the offence, she was either 18years or 19years, and not a minor as per charge sheet, the appellant should therefore get the benefit of doubt, thus he did not defile the Complainant as the Complainant was then an adult, as the Appellant stated that the Complainant was his wife, a fact the trial court did not take into account in convicting the Appellant.

9. Section 8(1) of the Sexual Offences Act defines ‘defilement’ as follows: -

“8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

10. In view of the facts of this case, the age assessment report, confirming the complainant’s age was at the borderline as she was either 18 years or above and not of the age attributed to her of 15 years, I find the Complainant was then not a minor. The Appellant’s age confirmed he was and is still a minor. I therefore, find the conviction of the Appellant with an offence of defilement to be unlawful as the purported Complainant was then an adult. The sentence meted on him of 20 years imprisonment is illegal; as the evidence before trial court did not disclose any offence against the Appellant as it is clear the Complainant at that time of the alleged offence was an adult.

11. The upshot is, I find and hold that the conviction is unlawful, it is therefore quashed and the sentence set aside. The Appellant to be set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 30TH DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Appellant: in person, present

Mr. Ombati: for State

Court Assistants:

1. George Ngayo
2. Patience B. Ochieng
3. Sarah Ooro

J.A. MAKAU

JUDGE