



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.15 OF 2017

BETWEEN

STEPHEN OYOO MAMBO APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal

Case No.81of 2015 of the SRM's court at Mbita)

JUDGMENT

1. **STEPHEN OYOO MAMBO** (the appellant) was convicted on a charge of defilement of a girl contrary to **Section 8 (2)** of the **Sexual Offences Act No.3 of 2006** whose particulars stated that on 1st February 2015 **IN MBITA**, he intentionally and unlawfully caused his penis to penetrate the genital organs namely vagina of **LAA** a child aged 7 years.

2. The appellant admitted the charge and was sentenced to serve life imprisonment.

3. The facts as narrated to the trial court were that on 01/02/2015 **LAA** (while her mother was away) was playing, when the appellant lured her into his house and defiled her. He then gave her Kshs.10/= (ten) and warned her not to tell her mother about the incident – so she did not.

4. The next day she went to school then returned home for lunch but could not go back to school. She went to her mother's cafeteria where she lay down on the floor in pain – which is where her mother found her. Her mother realized **LAA** had difficulty walking and implored the child to tell what was wrong – that is when **LAA** narrated how the appellant had defiled her. She was taken to hospital and an examination result as contained in the P3 form showed that her hymen was broken, there was laceration on the perineum and labia majora. Both the treatment notes from Mbita District Hospital (where she was treated) and the P3 form were produced as exhibit.

5. The appellant's response to these facts was recorded thus:-

“The facts are correct.”

6. The appellant argued his appeal by way of written submissions saying the facts were read to him in a language that he did not understand thereby prompting him to admit everything.

7. He also claims to have been on drugs which affected his faculties at the time of plea and prays to be given a chance to prove his innocence.

8. In opposing the appeal Mr. Oluoch submitted that the charge and facts were read to the appellant on Dholuo and there was no error on the record. Further that the life sentence meted was in accordance with the legal provisions of the Act and urged the court to dismiss the appeal as having no merit.

9. I have perused the record and confirm the court where plea was taken initially on 09/02/2015 had recorded the language in use and the charge is shown as being read out to the appellant in Dholuo. When the matter came up for hearing in a different court on 28/10/2015 and the appellant requested that the charge be read to him afresh – the trial magistrate did record that the same was read in Dholuo.

10. The file was then placed aside until noon when the facts were narrated – unfortunately when the court reconvened, the quorum record does not show what language was used when the facts were narrated. Of course it is most likely that the facts were interpreted to the appellant in Dholuo – that would be the logical sequence given that at each turn the charge was read over and explained to him in Dholuo.

Yet that would be making an assumption which is not supported by the record, especially because after reading the charge afresh the file was placed aside and called out later at noon.

11. Did the trial court forget the language the appellant had chosen for use in the proceedings and proceed to have the facts narrated in a language not well understood by the appellant? Or did the trial magistrate forget to record the language of the court after the facts were narrated to the appellant in the language that had been used to read the charges afresh? The latter is probably what happened but the record does not defend such presumption.

12. I take into account that the appellant faced a charge which upon conviction attracts a life sentence, and also taking into consideration the ordeal the victim went through I make the following finding.

13. The record fails to disclose the language used in narrating the facts and this caused prejudice to the appellant who then admitted the facts. The provisions of **Section 198(1)** and **(4)** of the **CPC** are clear that:-

“198(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

(4) The language of the High Court shall be English, and the language of a subordinate court shall be English or Kiswahili.”

14. It is as a consequence of this that I declare there was a mistrial and the conviction is quashed. However the appellant shall have a re-trial where proceedings and the language in use must be recorded to avoid allegations of groping in the dark. He shall appear before the magistrate at Mbita law courts (other than the one who recorded the facts which led to the conviction) on 23rd March 2017 for plea and trial directions.

Delivered and dated this 13th day of March, 2017 at Homa Bay

H.A. OMONDI

JUDGE