



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO. 2 OF 2016**

**BETWEEN**

**MICHAEL LENNOX ODERO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 143 of 2015 at Chief Magistrates Court at Homa Bay, Hon. N. R. Kariuki, RM dated 15<sup>th</sup> January 2016)***

**JUDGMENT**

1. The appellant, **MICHAEL LENNOX ODERO**, was charged with the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006*** in the subordinate court. He was convicted and sentenced to life imprisonment. The particulars of the charge were that on 3<sup>rd</sup> March 2015 [particulars withheld] within Homa Bay County, he willfully and unlawfully caused his penis to penetrate the vagina of VAO, a child aged 7 years. He also faced an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts.
2. The appellant appeals against conviction and sentence based on the grounds set out in the Petition of Appeal dated 29<sup>th</sup> January 2016. Mr Ogutu, counsel for the appellant, relied on written submissions and condensed his arguments to three main grounds. Firstly, that the charge sheet, which referred to “**section 8(1)(2)**” of the ***Sexual Offences Act*** which is a non-existent offence, was defective and that the accused could not be charged with an offence not known in law. He referred to the case of ***Kipkurui arap Sigilai and Another v Republic KRC HCCRA Nos. 8 & 9 OF 2004[2004]eKLR*** to support this position. Secondly, that the prosecution did not prove penetration as a necessary ingredient of the offence of defilement. Counsel contended that the medical evidence presented was insufficient to establish the offence. Thirdly, counsel urged that the sentence was harsh and excessive as the child was over 11 years old and could not be sentence under **section 8(2)** of the ***Sexual Offences Act***.
3. Mr Oluoch, counsel for the respondent, submitted that the prosecution proved all the elements of the offence. He conceded that the charge sheet contained an error but the error did not prejudice the appellant as it was curable under **section 382** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. He maintained that the prosecution proved every element of the offence and that the sentence was appropriate in the circumstances.
4. As regards the defective charge, the court is generally guided by **section 382** of the ***Criminal***

**Procedure Code (Chapter 75 of the Laws of Kenya)** which provides;

382. *Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

*Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.*

5. While it is correct that to state that the **Sexual Offences Act** does not contain “**section 8(1)(2)**”, the facts constituting the offence were clearly set out in the charge sheet leaving no doubt that the appellant was facing a charge of defilement. He was therefore not prejudiced as sufficient information was provided in the charge. I therefore adopt the sentiments of the Court in **Kipkurui arap Sigilai & Another v Republic (Supra)** where it was held that:

*The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence to the charge.*

6. The other grounds of appeal require this court to review the evidence. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).
7. In order to prove its case under **section 8(1)** of the **Sexual Offences Act**, the prosecution must show that the appellant did an act that amounted to penetration of a child. “**Penetration**” under **section 2** of the **Act** means, “*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*”
8. On the issue of penetration, the complainant (PW 2) gave unsworn testimony. She narrated how a man took her to the bush as she was coming from school, threatened to stab her with a knife if she screamed and proceeded to insert his penis into her private parts. Her testimony clear and consistent and remained unshaken in cross-examination. Although her testimony did not require any corroboration under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** as long as learned magistrate was satisfied she was telling the truth, there was sufficient corroborative evidence.
9. There was direct testimony of PW 4 who testified that she heard a child crying in a nearby bush and when she went to check what was happening she found the appellant, whom she recognized, on top of PW 2. He had dropped his trousers. When the appellant saw her, he ran away. PW 4 noted that PW 1 was bleeding. PW 4 screamed and her screams attracted people. PW 3, who was nearby and saw PW 2 immediately after the incident testified that PW 2 was crying and on that day she checked her private parts and some blood and a whitish discharge. The complainant’s mother, who was informed of PW 2’s ordeal much later, testified that she took her to hospital on the next day and noted that PW 2 was walking with her legs apart.
10. When PW 2 was taken to hospital on the same day, she was examined by PW 7, a medical officer at Homa Bay County Hospital. He noted that PW 2’s labia majora was red and slightly swollen and her vagina had some blood stained discharge which did not reveal sperm but had pus cells. He concluded that there was no immediate penetration but that there was evidence of vagina trauma with a blunt object but could not ascertain when it took place. He noted that hymen was torn but

that there were no traces of a fresh tear.

11. In my view and consistent with the proviso to **section 124** of the **Evidence Act**, I find that there was penetration as narrated by PW 2 which was clearly corroborated by the direct testimony of PW 4 and also the testimony of PW 1 and PW 3. Although the doctor was ambivalent about the issue of penetration, the blunt trauma of the vagina merely corroborated the testimony of PW 2 and PW 4 and did not negate it at all. In this respect I accept the dicta of the Court of Appeal in **Geoffrey Kioji v Republic, NYR Crim. App. No. 270 of 2010 (UR)** where it stated that;

*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the provision to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.*

12. Contrary to the appellant's submission, I hold that lack of spermatozoa does not imply that there was no penetration. The Court of Appeal observed in **Mark Oiruri Mose v Republic KSM CA Criminal Appeal No. 295 of 2012[2013]eKLR** that;

*In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.*

13. I now turn to the issue whether it is the appellant who committed the felonious act. The appellant in his sworn defence stated that on the material day as he was coming from fishing, he was attacked by a crowd and questioned about a conflict between the PW 4 and the police. He denied this and stated that PW 4 wanted him to live with her as her husband which he rejected. The mob set upon him and accused him of defiling PW 2.

14. The appellant's defence does not hold any water in light of the prosecution evidence. There was no grudge between the appellant and PW 2 or her mother, PW 1. Likewise PW 4 denied that she called the appellant to be her husband when the question was put to her. I reject any suggestion that the charges against the appellant could have been motivated by a grudge. In any case, the incident took place at about 4.00pm, in broad daylight, when PW 2 was coming from school. PW 4, who caught him red-handed, recognized him and screamed and he was arrested immediately after committing the felonious act. After his arrest, PW 2 identified the appellant at Ngegu Police Station. I therefore find that it is the appellant who defiled PW 2.

15. As regards the age of PW 2, she stated in the *voire dire* that she was 7 years old while PW 1 produced a birth certificate which showed that she was born on 6<sup>th</sup> December 2003. The learned magistrate accepted the birth certificate as proof of her birth and found that she was aged 11 years and a few months at the time the offence was committed. There was no suggestion that PW 2 was not child hence the essential ingredient of the offence was proved. In any case the learned magistrate appreciated the contradiction between the age as stated by PW 2 in the *voire dire* and the age stated in the birth certificate by relying on the case of **Moses Nato Raphael v Republic [2015]eKLR** where the Court of Appeal stated;

*As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant*

*avoid criminal culpability.*

16. Since PW 2 was born on 6<sup>th</sup> December 2003 and the offence took place on 3<sup>rd</sup> March 2015, she was aged 11 years 3 months. It is clear that this is a case that does not fall within the brackets for sentencing set out in **section 8** of the ***Sexual Offences Act***. A similar situation arose in ***Robert Ole Gweni v Republic, KSM CA Criminal Appeal No. 329 of 2011[2015]eKLR*** where the complainant was a child aged 11 years and one month, the trial court sentenced the appellant to life imprisonment. Although his first appeal to the High Court was unsuccessful, the Court of Appeal reversed the sentence and observed as follows;

*There is, however, no provision for sentence in cases of defiled minors who are between the ages of 11 and 12. Despite the mathematical precision that went into drafting of the Sexual Offences Act especially with regard to sentence, there is obviously a lacuna in the two sub-sections: [8(2) and 8(3)].*

*It however does not follow that the appellant in this case should not be given any sentence at all. In the circumstances we have to give the appellant the “benefit of doubt” and move to section 8(3) of the Act which provides for a minimum sentence of 20 years where the victim of the sexual assault is between the age of 12 and 15 years.*

17. I affirm the conviction but allow the appeal in respect of the sentence. The sentence of life imprisonment is substituted with a sentence of 20 years imprisonment.

**DATED and DELIVERED at HOMA BAY this 7<sup>th</sup> day of April 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Ogutu instructed by Nyauke and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.