



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT SIAYA

H.C.CR.A NO. 46 OF 2015

(J.A. MAKAU – J.)

JOSEPH WAMBIA MAERO.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

*(An Appeal from the Original Conviction and Sentence dated 5.3.2014*

*in Criminal Case No. 590 of 2013 of P.M'S Court*

*At Siaya By J.N. SANI (AG. SRM)*

**JUDGMENT**

1. **JOSEPH WAMBIA MAERO** was charged with the offence of **defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 6th day of August, 2013 in Gem District within Siaya County, intentionally caused his penis to penetrate the vagina of **H.A.W.**, a child aged 13 years. The appellant also faced an alternative charge of committing an indecent **Act with a child Contrary to Section II (1) of the Sexual Offence Act No. 3 of 2006**. The particulars of the offence are that on the 6th day of August 2013 in Gem District within Siaya County, intentionally touched the vagina of **H.A.W.** a child aged 13 years with his penis.
2. The substance of the charge and every element of the charge was read by the court to the appellant in Kiswahili language initially and the appellant denied the charge. The prosecution subsequently called evidence through PW1, Everlyn Odhumo who produced P3 form as exhibit P1 and treatment notes as exhibit P2 and Appellant's P3 form as exhibit P3. PW1 testified that there was possibility of defilement.
3. That before prosecution could call the remaining four (4) witnesses the appellant on 11.02.2014 informed the court he wished to change his plea as he had committed the offence. The charge was then read a afresh to the appellant and explained to the appellant in Dholuo language which he understands and preferred. The appellant admitted the offence and stated "***Its true I committed the Sexual Offence.***"
4. Once again the appellant was brought to court on 19.02.2014 after court had ordered him to be taken for mental assessment, having been found fit to stand trial, the facts were read on 5.3.2014 and the appellant admitted all facts as true. The appellant was consequently convicted on the main charge of defilement contrary to **section 8(1) (3) of the Sexual offences Act No. 3 of 2006** on his own plea of guilty and sentenced to 30 years imprisonment.

5. Aggrieved by the sentence the appellant preferred this appeal setting out two (2) grounds of appeal thus as follows:-

***a. The learned trial magistrate erred in law and facts by failing to consider that the interpreter in this matter misinterpreted his plea of not guilty hence praying for a retrial in the circumstances of the case.***

***b. The sentence imposed on him is harsh and excessive and pray for leniency.***

6. At the hearing of the appeal the appellant appeared in person while the state was represented by the prosecution counsel M/s. M. Odumba.

7. The Appellant relied on his written submissions submitting that it was not proved the complainant was dumb, that her testimony was key and essential to show what had transpired, that due to complainant's delay in reporting to the hospital laboratory examination could not be conclusive, that clinical officer concluded possibility of defilement but failed to establish the act of penetration, that the appellant was prejudiced as the offence had not been investigated, that the appellate court need to evaluate the evidence, that the appellant pleaded guilty to the offence, that the sentence was harsh and the trial court did not take into account the mitigation sentence in favour of the appellant.

8. The State in opposing the appeal submitted that the conviction and sentence was proper, that the appellant pleaded guilty to the charge, that there was proper interpretation after charge was read and explained in Dholuo language which the appellant understood, that the sentence was proper and legal in view of the seriousness of the offence. That the minor was aged 13 years as proved through evidence of Pw1, and P3 form and treatment notes. That learned State Counsel prayed that the appeal be dismissed.

9. The ingredients of an offence of defilement are identification, penetration and age and lack of consent.

10. The prosecution called PW1, Evelyn Odhuno, a Clinical Officer, who had examined the complainant, who was 13 years old at the time of examination, thus on 9.8.2013, after she had been defiled by person known to her. That complainant was mentally challenged and could not communicate well. On examination on her genital organs she noted hyperemic region, on the vaginal introitus, thus redness on the vaginal opening. That there was tenderness on both labias, hymenal tag meaning hymen had been broken and healed. The P3 form exhibit P1 confirmed the injuries noted by PW1.

11. That the prosecution gave facts of the case after the appellant offered to change his plea when he addressed the Court thus:-

***“I want to change my plea as I did commit the offence.”***

That after the charge was read and explained in Dholuo Language the appellant replied:-

***“Its true I committed the Sexual Offence.”***

That after his mental examination the appellant stated:-

***“I still plead guilty to the offence I was charged with may we proceed.”***

That facts as given by the prosecution clearly points to the fact that the complainant was as of 6.8.2013 a minor, that the appellant was well known to her, that he called her to his, house and defiled her, that she later led her mother to appellant's home, that the P3 form, and treatments notes was produced. The appellant after the facts were read to him he replied as follows:-

***“All facts are true.”***

12. On evaluation and analysis of the proceedings and the facts as given by the prosecution I am satisfied

that the prosecution proved the three ingredients of the offence of defilement than the identification, penetration and lack of consent as of the time of the the commission of the offence the complainant was a minor as per evidence of PW1, facts of the case and P3 form as she was aged 13 years. That through the age assessment of the complainant was not produced, the P3 form produced by PW1 confirmed her age as 13 years. The age of the complainant was not challenged by the appellant at the time of giving facts of the charge and the appellant having not raised the same at the earliest opportunity he cannot now complain that the complainant's age was not given, though the prosecution should have either produced a birth certificate, or any other document such as baptism card, school leaving certificate or immunization card to show the age of the complainant or any other relevant document..

13. In the instant appeal the Appellant is not challenging conviction but as he raised the issues relating to his conviction I have considered the same and I am satisfied that the trial court had the proceedings interpreted to the appellant in Dholuo language which he understands and he pleaded guilty to the charge after he understood the same. That when he appeared before this court he confirmed the conviction was proper and he is not challenging it but the sentence. In view of the court's records, the petition of appeal, the appellant's submissions and the submissions by the State Counsel I am satisfied that the conviction was proper and that no basis has been laid before me to warrant for an order for retrial as sought in to appellant's ground No. 1 of the appeal. I therefore find no merits in ground No. 1 of the appeal. I dismiss the same.

14. On sentence **Section 8 (1) (3) of the Sexual Offences Act** provides:-

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

***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”***

15. The appellant according to evidence of PW1 and facts of the case had defiled the complainant, a dumb child not once but twice. He had taken advantage of her condition and abused her. The complainant is a normal minor but of vulnerable group. The section under which the appellant was charged has a minimum sentence of 20 years. Twenty years in view of the age of the appellant whose P3 form showed 47 years is not a short time. I am in view of the fact that the appellant admitted the offence and saved on court's valuable time and that he is not challenging of the conviction, of the view that a sentence of 30 years is harsh and excessive for a 47 year old. I shall therefore set aside the sentence of 30 years and substitute it with 20 years.

**16. The upshot is that conviction is upheld, the sentence of 30 years imprisonment is set aside and substituted with 20 years imprisonment. The sentence of 20 years to run from 5th March, 2014.**

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 12TH DAY OF MAY, 2016.**

**J. A. MAKAU**

**JUDGE.**

**DELIVERED IN THE OPEN COURT**

**IN THE PRESENCE OF:-**

**Appellant in person: Present**

**M/s Odumba for State: Present.**

**Court Clerk: 1. Kevin Odhiambo**

**2. Mohammed Akide:**

**J. A. MAKAU**

**JUDGE**