



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 125 OF 2014

BETWEEN

PATRICK OCHWALA BWANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 682 of 2012 at Chief Magistrates Court at Homa Bay, Hon. S. O. Ongeru, SRM dated on 6th June 2012)

JUDGMENT

1. In the subordinate court, the appellant was charged with the offence of defilement contrary to **section 8(1) and (3)** of the *Sexual Offences Act, 2006*. The particulars were that on diverse dated between 1st June 2012 and 4th June 2012 at [Particulars Withheld] Village Sub-location in Suba District within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of LAO, a child aged 14 years old.
2. The appellant was convicted on his own plea of guilty and sentenced to 20 years imprisonment. He now appeals to this court against the conviction on the following grounds set out in the petition of appeal filed on 13th October 2014. He contends that he was not in the right state of mind when he took the plea and that the learned magistrate erred in failing to call for more evidence to prove the offence. He also contends that the learned magistrate failed to order a psychiatric evaluation. He urged the court to set aside the conviction and sentence in his written submissions.
3. In opposing the appeal and supporting the conviction, Mr Oluoch, learned counsel for the State, submitted that the charge and elements thereof were read to the appellant and the plea of guilty entered by the court was free from error from the facts on record.
4. The requirements recording a guilty plea provided for under **section 207** of the *Criminal Procedure Code (Chapter 75 Laws of Kenya)* were elucidated in *Adan v Republic [1973] E.A. 445* as follows:-
 - i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands
 - ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
 - iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the fact or add any relevant facts.

- iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered.
 - v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.
5. Even where the accused has admitted the facts as read to him, the court may yet record a plea of not guilty where the accused says something in mitigation that negates the offence. The Court of Appeal in ***John Muendo Musau v Republic*** NRB CA No. 365 of 2011 [2013]eKLR observed that, “*We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence.*”
 6. The proceedings show that the procedure for recording a guilty plea was adhered to. The charge was read to the appellant in ***Dholuo*** which is the language he understood and he stated that ‘*it is true*’. From the proceedings, the following facts were read to the accused

Prosecutor:

The complainant who is aged 16 years old a pupil at KPS in Standard 6. On 1.6.12, the complainant met the accused on the way when she was going to the shopping center. The accused approached her and convinced her to accompany him to her home. The complainant agreed. The accused convinced her to remain and accept to be his wife. The complainant [stayed] with the accused and had sex till 4.6.2012. The grandmother looked for the complainant [and] reported at AP's. A good Samaritan passed the information where the girl was. The accused was arrested together with the complainant and escorted to Magunga police station. The complainant was examined at Sindo Hospital. The P3 Form was issued. It shows she was defiled .

7. The appellant in response to the statement of facts stated that, “*It is true.*”
8. The facts narrated by the prosecutor disclose the offence of defilement as defined under the ***Sexual Offences Act***. Under **section 8(1)** of the ***Act***, the prosecution must establish that the person has committed an act which causes penetration with 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.*” The Medical examination report, the P3 form, which was prepared after examination of the complainant, shows that medical officer observed that there visible tears on the labia minora and there was seminal fluid on the vagina and cervix. He also observed traces of blood on the external genitalia.
9. I am satisfied the facts together with the medical evidence confirm that the offence of defilement took place and the appellant admitted to it.
10. The appellant complains that the charge sheet stated that the age of the child was 15 years old while the P3 form and the facts read to the court showed that the child was 16 years old. He submits that in view of this inconsistency, the appeal should be allowed. The proof of the child age is critical in the prosecution of sexual offences. It is not disputed that the victim was a child. The only issue is the age of the child which is necessary to determine the penalty to be imposed. Likewise, the reference to **section 8(3)** and not **8(4)** of the ***Sexual Offences Act*** to reflect the proper penalty section is a minor error.
11. I find and hold that the defects identified by appellant to be minor and curable by **section 382** of the ***Criminal Procedure Code*** which states;

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.

12. In any event, the error is to the advantage of the appellant as the sentence for the defilement of a child aged 16 years under **section 8(4)** of the **Sexual Offences Act** is a term of not less than 15 years imprisonment.

13. I am satisfied that the appellant's plea of guilty was unequivocal and I affirm the conviction. I allow the appeal to the extent that I quash the sentence imposed and substitute it with a term of imprisonment of 15 years.

DATED and DELIVERED at HOMA BAY this 9th day of March 2015

D.S. MAJANJA

JUDGE

Appellant in person.

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