

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 94 OF 2014

(Former Kisii Criminal Appeal No. 135 of 2012)

BETWEEN

BEN ODHIAMBO alias TABU.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B.O. Omwansa, SRM in Principal Magistrates Court at Ndhiwa in Criminal Case No. 167 of 2011 dated 15th May 2012)

JUDGMENT

1. The appellant, **BEN ODHIAMBO alias TABU** was charged and convicted of the offence of defilement contrary to **sections 8(1) and (2)** of the ***Sexual Offences Act***. The particulars of the charge were that on 20th August 2011 at [Particulars Withheld] of Ndhiwa District, he intentionally caused his penis to penetrate the vagina of QA, a child aged 11 years. He was sentenced to life imprisonment. He now appeals against conviction and sentence primarily on the grounds that there was insufficient evidence to found the conviction.
2. At the hearing of the appeal Ms Andabwa, learned counsel for the respondent, conceded that the conviction could not be supported as the appellant was not given an opportunity to cross-examine the child. She submitted that the learned magistrate did not give the appellant an opportunity to cross-examine her nor did he record the fact that he did not have any questions to ask.
3. The right to cross-examine the complainant is a fundamental right protected under **Article 50(2)(k)** of the Constitution and I therefore find that the accused's right was violated when he was not afforded such an opportunity. Where, like in this case, the accused is unrepresented, the magistrate has an obligation to inform the accused of the opportunity and record it. The trial court must also record the fact that the accused has no questions to ask where such an opportunity has been afforded and the accused has no question to put the witness. In this respect the conviction cannot be supported and it is therefore quashed and the sentence set aside.
4. Whether or not to order a re-trial is a matter for the discretion of the court. I have reviewed the evidence and I cannot say that the evidence is overwhelming. Furthermore, the appellant was said to be 18 years old at the time the offence was committed although no age assessment was done. I give him the benefit of the doubt on account of his age and since he has been in prison for 3 years, I will not order a retrial.
5. Accordingly, the appeal is allowed. The conviction and sentence quashed. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 3rd day of June 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

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