



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 9 OF 2013

BETWEEN

KEVIN ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*[Appeal from the Conviction and sentence in Criminal case of the Chief Magistrate's court dated 22.4.2013 at RONGO: HON. P. RUGUT ESQ., - S.R.M.]*

*IN*

*PM'S C. RONGO NO. 112 OF 2013]*

**JUDGMENT**

1. In the court below the appellant was charged with defilement Contrary to **Section 8(1) (3)** of the Sexual Offences Act.

The particulars of the charge were that on 17<sup>th</sup> March, 2013 at [particulars withheld] Rongo Township within Migori County in the Republic of Kenya he intentionally caused his penis to penetrate the vagina of M A a child aged 13 years.

He was also charged with an alternative count of committing an Indecent Act with a child Contrary to **Section 11(1)** of the Sexual Offences Act.

2. He pleaded not guilty and a trial ensued. The Trial Magistrate then evaluated the evidence of both the prosecution and the accused and found the accused guilty. She convicted him and sentenced him to serve 20 years imprisonment. Being aggrieved he appealed.
3. In his Petition filed on 7<sup>th</sup> May, 2013 he listed three grounds as follows:-
  1. **"I pleaded not guilty to the charges.**
  2. **The trial magistrate erred in both law and facts by not specifying on which count I was to serve 20 years.**
  3. **The trial magistrate erred in both law and facts by sentencing me a harsh and excessive sentence despite my true mitigation"**

He also expressed his desire to be present during the hearing of this appeal.

4. At the hearing he relied on written submissions in which he stated that the evidence did not meet

the required threshold. He contended that that there was no evidence of penetration. He also contended that the age of the complainant was not proved; that the birth certificate tendered was just a photocopy and that the complainant was beaten to say she was defiled. Further that she denied that her vagina was touched and as such the alternative charge cannot stand either he urged this court to order his release.

5. The appeal was opposed. Mr. Oluoch appearing for the State submitted that in the Petition of Appeal was against sentence only and so submissions relating to conviction must be ignored in view of **Section 352** of the Criminal Procedure Code.

He submitted that the sentence imposed was the minimum provided by Law and so that ground has no merit. He further submitted that in the last paragraph of the judgment the trial magistrate stated the offence for which he was convicted and so that ground has no merit either. That moreover even if there was such an error the same is curable under **Section 382** of the Criminal Procedure Code as the appellant was not prejudiced at his trial. He urged the court to dismiss the appeal. He however well understood the submissions of counsel for the Respondent.

6. When asked if he wished to say anything in reply the appellant reiterated that he wished to rely on his submissions and had nothing to say in reply.
7. In his Petition the appellant only listed three grounds and I agree with Mr. Oluoch that those go to sentence only. By dint of **Section 350(2)** of the Criminal procedure Code the appellant cannot rely on grounds other than those set out in the Petition. His petition clearly does not fall under any of the provisos and although he has annexed supplementary grounds to his submissions he did not seek the leave of this court to amend the petition. Even when prompted by this court he only said he wished to rely on his submissions.
8. Having perused the record of the lower court my finding is that his appeal lacks merit. The trial magistrate did indicate the offence and section under which he was convicted. She stated as follows:-

**“The upshot of the judgment, I do find that the prosecution was able to prove the guilt of the accused beyond reasonable doubt. I do find him guilty of defilement Contrary to Section 8(1) (3) of the Sexual Offences Act and I proceed to convict him accordingly”**

The second ground of appeal cannot therefore stand. Neither can the second as the sentence meted is the minimum provided under Section 8(3) of the Sexual Offences Act which states:-

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

9. Accordingly I find no sufficient ground for interfering with the sentence and dismiss this appeal.

**E. N. MAINA**

**JUDGE**

Signed, dated and delivered at Homa Bay this 13<sup>th</sup> day of March, 2014

**In the presence of:**

Mr. Oluoch for State

Appellant in person

Risper – interpreter.