



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.44 OF 2017

BETWEEN

S O M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in the

PM's court at Mbita Sexual Offence Act No.5 of 2017 –

Hon. S.O. Ongeru, PM, dated 2nd October, 2017)

JUDGMENT

1. The appellant, **SOM**, appeared before the Principal Magistrate at Mbita charged with defilement contrary to **Section 8 (1)** read with **Section 8 (2)** of the **Sexual Offences Act**, in that on the 1st February 2015, at [particulars withheld] Beach in Mfangano East Location Mbita, Homa Bay County, he defiled LAA, a child aged seven (7) years.
2. There was an alternative charge of indecent act with the same child contrary to **Section 11(1)** of the **Sexual Offences Act**.
3. The appellant entered a plea of not guilty in both counts but at full trial, he was convicted and sentenced to life imprisonment on the main count.
4. Being dissatisfied with the conviction and sentence, he preferred the present appeal on the basis of the grounds in his petition of appeal filed herein on 10th October 2017.
5. At the hearing of the appeal, the appellant represented himself and filed written submissions which he fully relied on in support of the appeal.
6. The learned Prosecution Counsel, **MR. OLUOCH**, appeared for the State//Respondent and opposed the appeal by orally

submitting that the evidence by the complainant, (PW1) showed that she was defiled by the appellant, a person previously known to her and that the evidence of the complainant's mother (PW1) together with that of the Clinical Officer (PW6) corroborated that of the complainant, even though **Section 124** of the **Evidence Act** did not require corroboration of the victim's evidence.

7. The learned prosecution counsel submitted that the appellant's allegation that he was not known to the complainant was an afterthought as was confirmed by his cross-examination of the complainant's mother (PW2) and his own statement that the complainant was his daughter.

8. It was therefore the contention of the learned prosecution counsel that this appeal is not merited and ought to be dismissed.

9. Due consideration having been given by this court to the appeal, its supporting grounds and those in opposition thereto as well as the submissions by both sides, it became its obligation as the first appellate court to re-consider the evidence adduced at the trial and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **OKENO –VS- REPUBLIC (1972) EA 32**).

10. In that regard, the case for the prosecution was that the complainant, child, **L A (PW1)**, was at the material time a primary school pupil aged nine (9) years. On the material day she met the appellant while she was on her way home from a posho mill. She was in possession of a cloth material which the appellant wanted to have or obtain from her for seemingly a price of Kshs.50/=. He handed to her the money but she did not want it. She decided to return it to him and therefor followed him upto his house.

11. At the house, the appellant declined to take back his money. The complainant then dropped it down and that is when he parted with her cloth material but led her into a sleeping room ordered her lie on a mattress on the floor. He then removed her underpants and proceeded to defile her. When he was finished, he warned her not to tell her mother. She proceeded to her home but could not proceed to school on the following day. Her mother, **PA (PW2)**, was later to take her to a health centre after which she reported the matter to the complainant's teacher, **D O O (PW3)** and the [particulars withheld] Beach Management Unit (BMU) chairman, **NAFTALI ONYANGO RAO (PW5)** who helped in tracing the appellant.

12. The complainant's mother also reported the matter to the police leading to the arrest of the appellant by **APC PETER OWINO (PW4)**.

13. A Clinical Officer, **DAVID KIHARA MATHERI (PW6)**, examined the complainant completed the necessary medical examination report (P3 form) (P. Exhibit 4) showing that the complainant was indeed defiled.

14. PC MOHAMED WARIO (PW7), investigated the matter and preferred the present charge against the appellant.

15. In his defence, the appellant denied that he was responsible for the offence. He acknowledged that the complainant was his daughter but contended that the charge was maliciously preferred against him due to a quarrel or disagreement with the complainant's mother who was his wife over her visit to a hospital to collect ARV drugs. He was not aware of the visit and so he demanded for answers from the complainant's mother who responded by threatening to poison him or lock him in prison.

16. After the complainant's mother reported to the police following their disagreement the appellant was arrested and charged in court.

17. The trial court considered all the evidence and concluded that the case against the appellant had been proved beyond reasonable doubt. He was then convicted and sentenced accordingly.

18. This court, re-considered the evidence and formed the opinion that the basic issue for determination was whether the complainant was defiled and if so, whether the appellant was the person responsible for the offence.

19. As to the act of defilement, no dispute arose that the complainant was indeed sexually assaulted at the material time. She was then aged nine (9) years and a primary school pupil, the prosecution in any event, credibly and corroboratively established the fact of defilement through the complainant's own evidence as well as that of the clinical officer (PW6) and to some extent that of the

complainant's mother (PW2).

20. The appellant raised the issue that he was found to be HIV positive but the complainant was not subjected to a medical test to determine her HIV status and therefore it cannot be said that she was defiled. This was not a substantial dispute to the fact that the complainant was defiled. It did not disprove the fact. In any event, the failure for such a test to be undertaken was immaterial as penetration was clearly established by medical evidence.

21. The crucial issue was the alleged criminal culpability of the appellant in the whole episode. He was positively identified by the complainant (PW1) and her mother (PW2). He was previously known to them as he referred to the complainant's mother as his wife and the complainant as his daughter. The credibility of the complainant was never in doubt and therefore the identification of the appellant by recognition was cogently established. It would not be farfetched for this court to opine that the appellant may have sexually assaulted the complainant, as a payback for the "sins" of her mother.

22. From all the foregoing, it is this court's finding that the appellant's conviction by the trial court was safe and proper.

23. With regard to the sentence, **Section 8 (2)** of the **Sexual Offences Act** provides for life imprisonment for a person who commits an offence of defilement with a child aged eleven years and below. Herein, the complainant's age as per the charge sheet and medical report was seven (7) years but as per her mother's evidence she was aged nine (9) years. In any event, she was less than eleven (11) years at the material time of the offence. Therefore, the sentence of life imprisonment imposed on the appellant was lawful.

24. In sum, this appeal is devoid of merit and is hereby dismissed in its entirety.

J.R. KARANJAH

JUDGE

26.06.2018

[Delivered and signed this 26th day of June, 2018]



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