REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 21 OF 2019

DUNCAN ODONGO OWINO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, **DUNCAN ODONGO OWINO**, was convicted for the offence of **Defilement**, contrary to **Section 8 (1) (4)** of the **Sexual Offences Act**. He was then sentenced to 20 years imprisonment.

1. In the Amended Grounds of Appeal, he raised four (4) issues, which can be summarized as follows;

(i) The Charge Sheet was defective as the Charge and the Particulars were at variance.

(ii) The Evidence of the 2 Expert witnesses were inconsistent.

(iii) The 1st Report did not support the charges.

(iv) The Judgement was fatally defective.

Ground 1

2. The Appellant submitted that whilst the particulars indicated that the victim was a child aged 14 years, the charges pointed at a child who was between 16 and 18 years old.

3. He submitted that in the circumstances, the charge sheet could have been amended; and thereafter, he could have been called upon to take a new plea.

Ground 2

4. The Appellant submitted that the Doctor and the Clinical Officer who testified at the trial, gave inconsistent evidence about the question as to whether or not penetration had been proved.

5. In the said circumstances, the Appellant submitted that he should have been given the benefit of doubt.

Ground 3

6. The Appellant submitted that the first report relating to this case was not about defilement.

7. The said first report was about a lost child.

8. In the circumstances, the Appellant believes that when he was tried and convicted for defilement, his rights to a fair trial had been violated.

Ground 4

9. It was the Appellant's contention that the judgment of the trial court was based upon a charge which was not disclosed in the Charge-Sheet.

10. He pointed out that whilst the offence he was tried for was under **Section 8 (1) (4)** of the **Sexual Offences Act**, the conviction was under **Section 8 (1) (3)** of the **Sexual Offences Act**.

11. When the trial court held that the Appellant was not prejudiced by the conviction pursuant to **Section 8 (1) (3)**, the Appellant submitted that the court erred, because it convicted him for an offence that he had not been called upon to offer any Defence.

12. I have given due consideration to the submissions by both the Appellant and the Respondent.

13. I have also re-evaluated all the evidence on record.

14. PW1, **DR. CHARLES SUNDAY OTIENO**, testified that he examined the Complainant. She had vaginal watts that were normal. The cervix was also normal. However, the hymen was not intact; and there was a whitish vaginal discharge.

15. The doctor specifically said;

> ***"There was no evidence of penetration.There are other conditions which can cause absence of hymen, for instance infection or trauma and also penetration sexually.***
>
> ***In this case, penetration might have Occurred since hymen is absent."***

16. PW2 was the Complainant. She testified that on 1st January 2018, the Appellant persuaded her to follow him to his house, which was at Mamboleo.

17. PW2 stayed in that house for 3 weeks. During that period, she had sex twice, with the Appellant.

18. PW3 is the Complainant's mother. At the material time, **PW3** lived in Molo, whilst the Complainant lived with her aunt, in Kisumu.

19. On 1st January 2018 **PW3** received a phone-call from **PW4**, who is the aunt who lived with the Complainant.

20. PW4 inquired from **PW3** if the Complainant had gone home. That inquiry was prompted by the fact that the Complainant had disappeared from her aunt's house.

21. The first report at the Kondele Police Station was made by **PW4**; and it was the report concerning the disappearance of the Complainant.

22. It was not until 23rd of January 2018 when the Complainant was found living with the Appellant, in his one-roomed house, at Mamboleo.

23. PW4 corroborated the evidence of **PW3.**

24. PW5, **AUSTIN OUMA**, is a Clinical Officer who was working at the Jaramogi Oginga Odinga Teaching & Referral Hospital, Kisumu.

25. He testified that he conducted medical examination on the Complainant. He said;

> ***"On genital examination, the outer genitalia was normal. There was foul smelling per vaginal discharge. The hymen was not intact.The anus was normal.***
>
> ***Laboratory investigation was with high vaginal swab, which showed hypethelial cells, which shows sexual penetration. There was no STD infections noted. I concluded that there was indication of penetration."***

26. PW6, PC VERONICA KANILA, was the Investigating Officer.

27. She testified that the first report at the Police Station was about the missing child, who was 14 years old.

28. Whilst the report was made on 4th January 2018, a second report was made on 23rd January 2018, when **PW3** had traced the Complainant to the Appellant's house in Mamboleo.

29. When the Appellant was put to his defence, he confirmed that he was arrested at his house in Mamboleo.

30. However, the Appellant denied any knowledge of the Complainant.

31. He said that when he was arrested, he was only interrogated about the money which he owed to **PW3**.

32. Having re-evaluated the evidence, I find that the Complainant was 14 years old as at the date when the incident occurred.

33. I also find that the Complainant and the Appellant were not strangers. Therefore, this was a case of recognition.

34. Secondly, I find that both the doctor and the clinical officer testified that there was evidence of penetration.

35. Of course, the doctor explained that the absence of the hymen, of itself, is not necessarily proof of penetration. He said that the hymen could be absent due to other factors, such as infection or trauma.

36. But he concluded by saying that in this case, penetration might have occurred.

37. I understand that to mean that a doctor cannot simply conclude that there had been penetration, when a complainant does not have a hymen which is intact.

38. Therefore, it is only when the evidence of the absence of the hymen is placed within the context of the circumstances prevailing in a case, that the doctor or other medical worker could tell whether or not that situation was attributable to sexual penetration.

39. In this case the doctor concluded that penetration might have occurred since the hymen was absent. Meanwhile, the Clinical Officer was more emphatic, that there was indication of penetration.

40. Ultimately, therefore, I find that the evidence tendered on the issue of penetration was not inconsistent, as the Appellant had asserted.

41. However, there is one issue which has caused me serious anxiety: that is the question regarding the applicable provisions of the law.

42. The charge sheet indicated that the Appellant was charged under **Section 8 (1) (4)** of the **Sexual Offences Act**.

43. However, the learned trial magistrate convicted the Appellant pursuant to **Section 8 (1) (3)** of the **Sexual Offences Act**.

44. Under **Section 8 (1) (3)** of the Act, the victim of the offence of defilement is between the age of 12 and 15 years. And when an offender is convicted under that Section, he is liable to a sentence of not less than 20 years.

45. Meanwhile, under **Section 8 (1) (4)**, the age of the complainant would be between 16 and 18 years. Upon conviction under that Section, the offender is liable to a sentence of not less than 15 years.

46. The evidence in this case showed that the Complainant was 14 years old. Therefore, the Appellant ought to have been charged under **Section 8 (1) (3)**.

47. As the Appellant was charged under **Section 8 (1) (4)**, the evidence tendered about the age of the Complainant did not support the charge under **Section 8 (1) (4)**.

48. More significantly, the conviction was under **Section 8 (1) (3)**, whereas the Appellant was neither charged nor tried under that statutory provision.

49. I find that the trial court erred when it convicted the Appellant under a provision of law that the Appellant had neither been charged under nor was the Appellant tried under.

50. In the case of **DAVID MWANGI NJOROGE Vs REPUBLIC HIGH COURT CRIMINAL APPEAL NO. 193 OF 2013**, the Hon. Lady Justice G. W. Ngenye – Macharia expressed herself thus;

> ***"I will first address myself on whether the charge sheet was defective. There is concession by both the appellant and the respondent that the applicable section under which the appellant ought to have been charged under was Section 8 (4) of the Sexual Offences Act, given that the charge sheet indicated that the complainant was aged 17 years. In an attempt to cure this defect, the learned trial magistrate applied Section 186 of the Criminal Procedure Code in order to substitute Section 8 (2) with Section 8 (4), for purposes of sentencing. My reading of Section 186 of the Criminal Procedure Code is that it is applicable where the offence in question is defilement of a girl under the age of 14 years."***

51. In this case, the Complainant was not under the age of 14 years. Therefore, **Section 186** of the **Criminal Procedure Code** could not be invoked, so as to have the Appellant convicted for another offence under the **Sexual Offences Act**, even if he had not been charged with such other offence.

52. As Justice Ngenye – Macharia noted in the case of **DAVID MWANGI NJOROGE** (above-cited);

> ***"The defect could only have been cured by the application of Section 179 of the Criminal Procedure Code. But again, Section 179 applies when the evidence on record establishes a minor offence than the one the accused was charged with."***

53. As the learned Judge noted, the offence that is substituted for that which the accused had been charged with, must be cognate and minor

to the offence that the accused had been charged with.

54. A cognate offence is one which shares several elements of the greater offence, and which is of the same class or category as the greater offence.

55. For example, **Robbery** under **Section 296 (1)** of the **Penal Code** is cognate to **Capital Robbery** under **Section 296 (2)** of the **Penal Code**.

56. Similarly, the offence of **Manslaughter** is a minor and cognate offence, to that of **Murder**.

57. In the case before me, the offence under **Section 8 (1) (3)** of the **Sexual Offences Act** is **defilement**; and so also is the offence under **Section 8 (1) (4)**.

58. I therefore hold that an offence under **Section 8 (1) (3)** is not a minor one compared to the offence of **defilement** under **Section 8 (1) (3)**.

59. Indeed, if the sentence prescribed was the yardstick for measuring the two offences, it could be arguable that the offence under **Section 8 (1) (3)** of the **Sexual Offences Act** was more serious, because it attracts a higher sentence.

60. I am alive to the provisions of **Section 382** of the **Criminal Procedure Code** which provides as follows;

> ***"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, judgement 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."***

61. In this case the Appellant was charged with the offence of defilement. The evidence adduced was in relation to the offence of defilement, save only that the age of the victim was 14 whilst the charge was drawn up under a section which was in relation to complainants who were older.

62. In respect to complainants who were older, the sentence was lighter, compared to the sentences to be meted out for those convicted for defiling younger complainants.

63. It is thus arguable that the Appellant would, upon conviction under **Section 8 (1) (4)**, be liable to a sentence that was lighter than if the conviction would have been under **Section 8 (1) (3)**.

64. The conviction in the case was founded upon solid evidence.

65. It was only the sentence which was not in line with the statutory provision under which the Appellant had been charged and tried.

66. The conviction was not prejudicial, in itself. It is only the sentence which, in my considered opinion, could be deemed prejudicial.

67. Pursuant to **Section 8 (1) (4)** the sentence shall not be less than 15 years imprisonment. That implies that the court has a discretion of handing down a sentence of imprisonment for a period ranging from 15 years, upwards.

68. In effect, a sentence of 20 years imprisonment is not, of itself wrongful when a person is convicted under **Section 8 (1) (4)**.

69. I have given consideration to the circumstances under which the offence herein was committed. The Complainant was persuaded by the Appellant, to live with him at his house, for a period of 3 weeks.

70. The agony and anguish of the Complainant's mother, whose daughter had gone *"missing"* was palpable.

71. The fact that the offender was not a stranger to the Complainant and her mother, smacks of stinging betrayal. When a trusted business-partner defiles your daughter, it must be very painful.

72. In the circumstances, I find that the sentence of 20 years imprisonment was appropriate punishment.

73. In the result, I find no merit in the appeal before me: it is therefore dismissed in its totality. I uphold both the conviction and the sentence.

DATED, SIGNED and **DELIVERED** at **KISUMU** This **17th** day of **December** 2020

FRED A. OCHIENG

JUDGE