REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 39 OF 2018

BRIAN OCHIENG ODUNGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Chief Magistrate's

Court at Kisumu (Hon. R. M. Ndombi RM) dated the 4th April 2018

in Kisumu CMCRC No. 466 of 2015)

JUDGMENT

The Appellant, **BRIAN OCHIENG ODUNGI**, was convicted for the offence of **Defilement** Contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.**

1. He was then sentenced to Life Imprisonment.

2. In his appeal he has faulted the learned trial magistrate for failing to make a finding on the authenticity of the **DNA** sampling and results.

3. His view was that the trial court failed to establish the full chain of custody of the samples, from the point of extraction to the point of analysis.

4. The appellant also expressed the view that the trial court had erred by handing down the maximum sentence, when the said sentence was inappropriate in the circumstances.

5. The appellant believes that there was a likelihood of falsification of evidence by the father of the victim and also by the other witnesses who testified.

6. The appellant described the evidence which had been tendered as being *"biased investigative evidence"*. Therefore, he was of the view that the trial court ought not to have relied upon such evidence.

7. Finally, the appellant said that the trial court failed to critically evaluate the evidence. His view was that if the evidence was properly evaluated, it would be found to have numerous discrepancies.

8. When canvassing the appeal, Mr. Achura, the learned advocate for the appellant, noted that the Government Chemist had found the **DNA** of the Complainant and that of the appellant to be matching.

9. Nevertheless, he said that no tests had been done on the accused, although blood-stains were found on the victim's skirt.

10. Noting that some stool was also recovered at the scene of crime, the appellant submitted that a confirmatory test ought to have been done, or a semen-detection test, or a forensic **DNA** test.

11. In his considered opinion, those 3 tests were indispensable tools to prove cases of rape or of defilement.

12. The appellant also pointed out that because the samples were carried in a brown envelope, which was escorted by a police officer, there could have been some falsehood or interference with the said samples.

13. Another issue that was raised by the appellant was in relation to the finding recorded in the Medical Form, to the effect that the victim did not have obvious bleeding or any foul-smelling discharge.

14. As far as the appellant was concerned, injuries that were 6 hours old cannot have started emitting any foul smell.

15. Finally, the appellant submitted that the trial court failed to give consideration to his defence. He pointed out that he had an alibi, as he was not at the scene of crime.

16. He said that he had been carrying out an Mpesa transaction, at the place where he worked as a foreman, and that he had provided evidence to that effect.

17. In the circumstances, the appellant called upon this court to set aside the conviction, and set him free.

18. In answer to the appeal Miss Barasa, learned State Counsel, submitted that the prosecution had produced evidence which proved all the ingredients of the offence of defilement.

19. In the Respondent's considered opinion, **DNA** tests were just an added advantage to the case.

20. The Respondent noted that the buccal swab which was taken from the appellant's mouth, was analysed by the Government Chemist, and it generated a **DNA** profile which matched that of the appellant, as found on the Complainant's pink skirt and white T-Shirt.

21. Those 2 items of clothing also had the Complainant's **DNA** profile.

22. Secondly, the Respondent pointed out that this was a case of recognition, as the Complainant had known the appellant prior to the material day.

23. Thirdly, the Respondent submitted that there was no reason why the Complainant could have framed the appellant, when there had been no bad blood between them.

24. I have re-evaluated all the evidence on the record.

25. PW1 was the Complainant. She testified that she had known the appellant prior to the date when the incident took place. She said that she used to see him at the place where chips are sold.

26. According to the Complainant, the appellant used to sit near the said place.

27. I also note that the Complainant did not just know the appellant by his physical appearance: she also knew him by name.

28. On the material day, the appellant went with the Complainant into a maize plantation. They went there on a motorbike.

29. Once they were in the maize plantation, the appellant is said to have taken out his *"dudu"*, which he used to hurt the Complainant in her private parts.

30. The record of the proceedings shows that the Complainant touched her private parts when specifying the part of her body which the appellant hurt.

31. After the act, the appellant is said to have abandoned the Complainant in the maize plantation.

32. PW2, **GAUDENCIA OWUOR**, was walking along a foot-path when she heard the voice of a baby crying.

33. When **PW2** called out to the baby, the said baby was unable to walk, causing **PW2** to get to where she was.

34. The baby told **PW2** that it is the appellant who had taken her to the maize plantation.

35,. At the place where the child had slept, there were blood stains and faeces.

36. When **PW2** noticed the blood stains on the skirt which the Complainant was wearing, she became suspicious and raised up the skirt.

37. PW2 saw blood stains all over the Complainant's thighs.

38. The witness then carried the baby and went with her to make a report to the Village Elder, Samson Okure Obaso **(PW3).**

39. PW2 and **PW3** went with the Complainant to Nyamasaria Police Station, where they reported the incident.

40. From the police station, the Complainant was taken to the Kisumu District Hospital.

41. The Village Elder corroborated the evidence of **PW2.**

42. PW4, T N O, is the Complainant's father.

43. He produced the Birth Certificate for the Complainant, which showed that she was 4 years and 6 months old at the material time.

44. PW4 also testified that the appellant used to buy chips which was being prepared by **PW4's** daughter in-law, behind **PW4's** house.

45. Therefore, the appellant was not a stranger to the witness. Indeed, the Complainant used to refer to the appellant as a father, although the two of them were not blood relatives.

46. PW5, RICHARD KIMTAI LANGAT, is a Government Analyst, working at the Government Chemist, Kisumu.

47. He testified having carried out analysis on the following:

1. Vaginal swabs from the Complainant;

2. Pink skirt belonging to the Complainant;

3. White T-shirt belonging to the Complainant;

4. Soil with blood spots;

5. Dried stool; and

6. Buccal swabs (mouth) from the appellant.

48. The **DNA** profile generated from the analysis showed;

a. The pink skirt had the profiles of both the*victim and the appellant.*

b. The blood and stool samples had only the *Complainant's profile;*

c. The white T-shirt had the profiles of both *the Complainant and the appellant.*

49. The Government Analyst explained that each sample was delivered in separate khaki envelopes. The person who delivered the envelopes to the Government Chemist was a police officer.

50. The said police officer **PC JACK OTURI,** testified as **PW8.**

51. If the appellant wished to disparage the analysis carried out by the Government Analyst, he had every opportunity to cross-examine him.

52. Similarly, if the appellant wished to cast any doubts on the authenticity of the samples which were analysed, he had the opportunity to do so whilst cross-examining the relevant witnesses.

53. When an appellant raises issues such as the possible interference with samples, such an issue remains purely speculative at the appellate stage, unless it had been first raised at the trial.

54. In this case the appellant had suggested that the exhibits may have been contaminated, but the Government Analyst expressly ruled out any possibility of contamination, considering that each sample was carried in a separate envelope.

55. He further explained that once a sample had been taken and had been dried, the same can last for a year.

57. In the circumstances, the Government Analyst told the appellant that even if the samples were analysed on the day when the witness testified (which was on 17th November 2016), the results would be the same.

59. Considering that the offence was committed on 9th July 2015, I hold the considered view that if the appellant had any genuine concerns about the authenticity of the samples, he was given a window of opportunity to address the said concerns during the trial.

58. As the appellant did not utilize the opportunity, it is now simply speculative to suggest a possible interference with the samples.

59. On matters of factual evidence, this appellate court refuses to be drawn into the realm of speculation.

60. PW6, DR. ROBERT OTIENO OMOLLO, testified that the Complainant was brought to the Jaramogi Oginga Odinga Teaching and Referral Hospital **(JOOTRH)** by a good samaritan who had picked her up from a maize plantation.

61. It was his evidence that the Complainant reported that she had been picked up from their house in Nyalenda by a person known to her.

62. Upon examination, the Complainant was found to have cuts on the area around the vagina and anus. Her hymen was perforated/penetrated.

63. Considering that the Complainant was a baby, who was less than 5 years old, the results of the medical examination conducted upon her proved that she had been defiled.

64. PW7, APC PILDAS ODIDI, was the arresting officer. He arrested the appellant at the office of the Kisumu Governor.

65. At the time of arrest, the appellant was identified by the Complainant's father.

66. The appellant has suggested that the Complainant's father may have falsified the evidence.

67. However, there is absolutely no reason which was advanced by the appellant for the assertion concerning the alleged falsification of the evidence.

68. If anything, the father of the Complainant was not the first person to whom the Complainant had disclosed the identity of her molester. The Complainant had already told **PW2** and **PW3** that it is the appellant who had defiled her. By the time, the Complainant's father had not even become aware that the daughter had been defiled.

69. I have found no basis for the contention that the Complainant's father or any other witness had falsified the evidence which was tendered by the prosecution.

70. I have also found no basis in law or in fact for the assertion that the trial court did not establish the full chain of the custody of the samples.

71. The high vaginal swab and the **HIV** test were conducted at the Kisumu County Hospital. There is no suggestion at all that the samples got into any wrong hands prior to their analysis.

72. The Investigating Officer picked the Complainant's clothing from the hospital, and had them delivered to the Government Chemist. Again, there is no suggestion by the appellant about any stage when the clothing may have got into the wrong hands prior to their being analysed.

73. As regards the blood stains and stool samples which were collected from the scene of crime, the same were handled by the Investigating Officer **(PW8).**

74. The Government Analyst **(PW5)** is the person who took the Complainant's buccal swab.

75. In conclusion, I find no substance in the appellant's contention that some of exhibits were mis-handled.

76. I also hold that the absence of any foul-smell from the Complainant's private parts is consistent with the fact that the incident giving rise to the case, had taken place about six hours before the Complainant was rescued and was then taken through a medical examination.

77. As regards the question whether or not **DNA** testing was mandatory in a case of defilement or of rape, I can do no better than cite the following words of the Court of Appeal in **EVANS WAMALWA SIMIYU Vs REPUBLIC [2016] eKLR;**

> **"……Section 36 of the Sexual Offences Act which gives the trial court powers to order an Accused Person to undergo DNA testing, uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case."**

78. In that case, the Complainant had identified the appellant as the person who had sexually violated her. The Court of Appeal said that in those circumstances, **DNA** testing was not necessary.

79. Similarly, in the case before me, the Complainant had recognized the appellant as the person who had sexually molested her. Therefore, I hold that **DNA** testing was not necessary to connect the appellant to the Complainant.

80. The evidence of the Complainant, who was a minor, was corroborated by the medical evidence.

81. In the result, I find no merit in the appeal. It is therefore dismissed, on the issue of conviction.

82. Similarly, I find that the learned trial magistrate handed down a sentence which was in accordance with the law. Therefore, there is no reason to warrant any interference with the sentence.

83. Accordingly, the appeal is dismissed in its entirety. I uphold both the conviction and the sentence.

DATED, SIGNED and **DELIVERED** at **KISUMU** this **22nd** day of **January** 2019

FRED A. OCHIENG

JUDGE