



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 4 OF 2014

GIDEON CLAIN KARAKACHA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment, conviction and sentence of the Chief Magistrate's Court at Eldoret (Hon. C.G. Mbogo) delivered on the 17th day of January 2014 in Eldoret Chief Magistrate's Court Criminal Case No.4 of 2014)

JUDGMENT

[1] The Appellant herein, **Gideon Clain Karakacha**, was arraigned before the Court of the Chief Magistrate, Eldoret on **12 October 2012**, charged with the offence of **Defilement of a Child**, contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act, No. 3 of 2006**. In the alternative, he was charged with the offence of **Indecent Act with a Child**, contrary to **Section 11(1)** of the **Sexual Offences Act**. The Appellant denied the charges, which were subsequently replaced with a fresh Charge Sheet on **4 February 2013** listing 27 Counts of **Defilement of a Child** under **Section 8(1) and (4)** of the **Sexual Offences Act**. Each charge had a corresponding alternative charge of **Indecent Act with a Child**, contrary to **Section 11(1)** of the **Sexual Offences Act**. The offences were allegedly committed between **14 September 2012** and **10 October 2012**.

[2] The Appellant denied the charges and upon trial, a determination was made thereon by the Learned Trial Magistrate in the Judgment dated **17 January 2014**. He was found guilty of the offence of Defilement, was convicted of each of the 27 Counts laid and was sentenced to serve 15 years imprisonment on each count. The terms were to run concurrently. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **29 January 2014** on the following grounds:

- [a] The Learned Magistrate erred in law and fact in convicting the Appellant on insufficient evidence;
- [b] The Learned Magistrate erred in law and in relying on the contradictory evidence of the Prosecution witnesses;
- [c] The Learned Magistrate erred in law and fact in failing to consider the evidence adduced by the Defence witnesses;
- [d] The Learned Magistrate erred in law and in fact in failing to give the benefit of doubt to the Appellant in view of the evidence offered by the Prosecution;
- [e] The Learned Magistrate erred in law and in fact in sentencing the Appellant to fifteen (15) years' imprisonment; and that
- [f] The Learned Magistrate erred in law and in fact in failing to give due regard to the mitigation offered by the Appellant

[3] Consequently, the Appellant prayed that the Learned Magistrate's Judgment, conviction and sentence be set aside and that he be acquitted. He amended his Grounds of Appeal by filing what he referred to as Amended Supplementary Grounds of Appeal. The Amended Grounds are:

- [a] That the Learned Trial Magistrate erred in law and in fact by convicting the Appellant and yet failed to appreciate that the Charge Sheet was defective;
- [b] That the Learned Magistrate erred in law and in fact by convicting the Appellant based on evidence which was otherwise contradictory and uncorroborated;

[c] That the Learned Magistrate erred in law and in fact by convicting the Appellant yet failed to appreciate that medical evidence did not point to the Appellant as the one who penetrated the vagina of the Complainant;

[d] That the Learned Magistrate erred in law and in fact to have convicted the Appellant yet failed to appreciate that some crucial witnesses were not summoned by the Prosecution to adduce evidence;

[e] That the Learned Magistrate erred in law and in fact not in not finding that the Appellant's defence created a reasonable doubt as to oust the Prosecution's case.

[4] It was on the basis of the Amended Grounds of Appeal that the Appellant argued his appeal vide his written submissions attached thereto; the specifics of which are that it was improper for the Charge Sheet to be amended to split the charges to 27 Counts as this exposed him to prejudice when giving his defence. He relied on **Section 135** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**, and the case of **George Njuguna Wamae vs. Republic, Criminal Appeal No. 417 of 2009.**

[5] The Appellant also argued that the evidence that formed the basis of his conviction was contradictory and uncorroborated. He set out specific aspects of the alleged contradictions in his written submissions and relied on the cases of **R vs. Cherop A. Kinei & Another; Rex vs. Ramadhan bin Mawingu; Manila Ridhri vs. Re [1943]; Wanjera vs Republic [1944]** and **Erick Onyango Ondeng vs. Republic** (the Appellant did not provide the full citation for some of the authorities he relied on) to support his arguments that uncorroborated and contradictory evidence ought to be rejected; and to show that his conviction is unsafe for having been premised on worthless evidence.

[6] On penetration, the Appellant argued that the same was not proved before the lower court to the requisite standard. He faulted the evidence of **Dr. Cynthia Jemtai Kibet (PW1)** whose evidence it was that she was unable to tell whether he had had sexual intercourse prior to the examination; and argued that as an expert, **PW1** caused more confusion and raised more questions than answers; and that it was unsafe for the Learned Trial Magistrate to rely on her evidence as a basis for his conclusion that there was penetration. He cited the case of **Philip Maingi Mueke vs. Republic [2015] eKLR** in submitting that failure by the Prosecution to prove penetration was fatal to their case, and therefore that he ought to have been acquitted of the charges.

[7] Finally, it was the submission of the Appellant that the failure by the Prosecution to call one **Millicent Odero Atieno**, a neighbour to **PW3** and **William Milimo**, who were mentioned by **PW3** in her evidence as having taken to her the Complainant's clothes, was in violation of the law and amounted to a breach of his constitutional right to fair hearing. He further relied on the case of **Bukenya & Others vs. Uganda [1972] EA 349** for the proposition that the Prosecution is obliged to call all witnesses necessary to establish the truth of their evidence and that failure to call some may lead to an inference that the evidence of those witnesses would have been adverse to the Prosecution.

[8] **Ms. Mokuu** for the State opposed the appeal contending that the Prosecution called 4 witnesses before the lower court whose evidence was corroborative in nature; and that the mother of the Complainant produced a Birth Certificate to prove the Complainant's date of birth, and to show that the child was 17 years old and 6 months at the time the offences were committed. She further submitted that penetration was proved beyond reasonable doubt by the Complainant's evidence, which was corroborated by the evidence of the Doctor, **PW1**; and that it was similarly demonstrated that the penetrative act was committed by the Appellant. It was therefore the submission of Learned Counsel for the State that the Trial Magistrate based his conviction of the Appellant on sound evidence; and that he analyzed and took into account the Appellant's defence and the evidence adduced by his witnesses and found them unbelievable. She prayed for the dismissal of the appeal contending that it is lacking in merit.

[9] The Court has given careful consideration to the appeal and taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. This was well explicated in **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

[10] The Appellant had been charged with 27 Counts of **Defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The various counts are specific to each of the dates falling between **14 September 2012** and **10 October 2012** (both dates inclusive); and therefore other than the dates, the particulars are the same; and are to the effect that in Eldoret West District within the Rift Valley Province, the Appellant unlawfully and intentionally caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of **A.N.W.**, a child aged 17 years.

[11] The evidence adduced before the lower court by the Prosecution was that the Complainant, **A.N.W.**, a 17 year old girl who testified before the lower court as **PW2**, left her home in Soy Location with the intention of going to borrow some books from a friend, one **E**; and that on her way, at about 4.00 p.m., she met the Appellant, a person she had known before. That the Appellant asked her where she was going and she told him; whereupon the Appellant asked her to join him and she agreed. It was her evidence that the Appellant took her to [particulars withheld] where they stayed for a while; and later proceeded to the home of his brother, one Benson where they stayed until 9.00 p.m. They then left for the home of one **Gideon** where they had supper and retired to bed. It was her evidence that they had sex throughout the night.

[12] It was the evidence of the Complainant that she did not return home the following morning but stayed with the Appellant for 3 days at

his brother's home; and that they had sex during those three days; and that the Appellant then rented a house in [particulars withheld] where they stayed up to **10 October 2012**. She testified that they had sex every night in the new house that the Appellant had rented; and that on **10 October 2012**, at about 6.00 a.m., she informed the Appellant that she wanted to go home; and that he let her go. However, upon her arrival, her mother demanded to know where she had been and she (the Complainant) took her to the Appellant's house. The matter was reported to the Police, the Appellant was arrested and both of them were taken to Moi Teaching and Referral Hospital for examination and the filling of the P3 Forms they had been issued with by the Police. She produced her Birth Certificate before the lower court as an exhibit in proof of her age.

[13] **PW2** before the lower court was the mother of the Complainant. She testified that the Complainant was born on **25 March 1995** and that she was aged 17 years at the material time. It was her testimony that on **14 September 2012**, she arrived home from **Moi's Bridge** at about 6.00 p.m. and realized that the Complainant was not at home. That the Complainant did not come back that night or make a phone call to inform her of her whereabouts. She further told the lower court that she looked for the Complainant in vain for the next days, whereupon she reported the matter to **Soy Police Station**. She added that it was not until **10 October 2012** that the Complainant returned home of her own volition and told her that he got married to the Appellant, the son of her neighbour. She accordingly informed the Police and the Appellant was arrested and charged; and that the Complainant's clothes were later brought by **William Milimo** and **Millicent Odera Atieno**, a neighbour of **Milimo's**.

[14] The evidence of **PW1, Dr. Cynthia Jemtai Kibet**, was that on **12 October 2012**, at the request of the Officer in Charge, **Soy Police Station**, she examined the Complainant who was then aged 17 years; and that she readily admitted that she had sexual intercourse with the alleged perpetrator of her defilement severally between **14 September 2012** when she left her parent's home and **10 October 2012** when she returned home. She testified that on examining the Complainant, she noted that she had healed hymenal tears at position six and eleven o'clock and a whitish vaginal discharge. HIV, UDRL and pregnancy tests were done; and that these returned negative results. Similarly tests conducted on the Complainant's urine did not reveal any spermatozoa; and that a high vaginal swab was taken and the tests conducted thereon revealed the presence of numerous epithelial cells, mobile bacteria and a few pus cells; but no spermatozoa was seen. She concluded, from the healed hymenal tears and epithelial cells that vaginal penetration had taken place. She produced the P3 Form that she filled and signed as **Exhibit No. 1** before the lower court.

[15] **PW1** further testified that on the same day she examined the Appellant and her findings were that he did not have any physical injury on any part of his body; and that his genitalia and anus were normal. Similarly, HIV and UDRL tests conducted on the Appellant were negative; and therefore that she could not tell whether the Appellant had sexual intercourse prior to the examination. She filled and signed a P3 Form in respect of the Appellant's examination which she produced as **Exhibit No. 2** before the lower court.

[16] **PW4, PC Dan Wafula**, was the Investigating Officer in the case. He confirmed that the Complainant's mother reported her disappearance to the Police at **Soy Police Station** on **14 September 2012**; and that the report was booked in the Station's Occurrence Book. He further confirmed that on **10 October 2012**, the Complainant was escorted to the Station by her mother and that she led them to the Appellant's house in Soy; that the Appellant was thereafter arrested and charged with Defilement on the basis of the statement of the Complainant that they were cohabiting as husband and wife and that they engaged in sexual intercourse during the period of their cohabitation, granted that the Complainant was a minor aged 17 years. He also confirmed that he issued P3 Forms to both the Complainant and the Appellant and escorted them to **Moi Teaching and Referral Hospital** for examination. The Appellant was then charged and arraigned before court.

[17] On his part the Appellant told the Court, in a sworn statement, that he was on his way from the shops on **10 October 2012** at about 8.00 p.m. when he met a Police Officer who was with a certain woman and a girl. That the Police Officer ordered him to stop. He was handcuffed and escorted to the Police Station where he was informed that he had been arrested for defiling the Complainant; which he denied. According to him, the Complainant lied when she told the lower court that she had cohabited with him from **14 September 2012** to **10 October 2012**.

[18] The Appellant called two Defence Witnesses, namely, **Luka Khasevere (DW1)** and **David Ondoro Isuza (DW2)**. **DW1** the Village Elder of Shieywe Village in Soy Sub-location told the lower court that he knew both the Complainant's mother and the Appellant; and that they both hail from his village. He confirmed having received a report from the Complainant's mother that she had disappeared from home in the month of **June 2012**; and that he assisted her to look for her daughter and found her in the home of **Jack**; but that, after some time, he got to learn that the girl had ran away from her parents home again; and that the Appellant had been arrested in connection with the second incident.

[19] **DW2**, an employee of **Namosi Development Community** as a Human Rights Officer, stated that he was on duty on **6 November 2012** when the **OCS, Soy Police Station** requested him to assist with the investigations of the complaint involving the Appellant, the Complainant and her parents. He conceded in cross-examination that his intervention was sought after the prosecution against the Appellant had commenced and the case, involving a charge of Defilement, was pending before the lower court.

[20] The foregoing being the evidence, can it be said that the 27 Counts of Defilement, as laid in the Substantive Counts before the lower court, were proved beyond reasonable doubt? **Section 8** of the **Sexual Offences Act** pursuant to which the charges were laid provides as follows:

(1) **A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

(2) **A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

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

(4) **A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon**

conviction to imprisonment for a term of not less than fifteen years.

[21] Accordingly, the Prosecution needed to prove the following essential ingredients:

[a] That the Complainant was, at the material time, a child aged 17 years;

[b] That there was penetration of the Complainant's vagina;

[c] That the penetration was perpetrated by the Appellant.

[a] On the age of the Complainant:

[22] From the foregoing summary, it is manifest that sufficient evidence was placed before the lower court, which evidence was entirely uncontroverted, that the Complainant was born on **25 March 1995**, and therefore was aged 17 years and 6 months as at **September 2012**. The Complainant's Birth Certificate No. [particulars withheld] was produced before the lower court and marked **Exhibit No. 3** to corroborate the evidence of both **PW2** and **PW3** as to the Complainant's age. Needless to say that the months following the last birthday, if any, do not count for purposes of determining the age of a child so long as they are less than one year. This was well explained by the Court of Appeal in **Hadson Ali Mwachongo vs. Republic [2016] eKLR** as hereunder:

"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year."

[23] Accordingly, credible evidence that was adduced before the lower court to prove beyond reasonable doubt that the Complainant was a child for purposes of **Sections 2** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**.

[b] On whether Penetration of the Complainant Occurred:

[24] In this regard, the evidence adduced before the lower court was principally that of the Complainant. She testified as to how she met the Appellant at Soy Trading Centre on **14 September 2012** and was persuaded by him to spend the night with him. It was further the evidence of the Complainant that she stayed with the Appellant for 27 days between **14 September 2012** and **10 October 2012** and that they engaged in sexual intercourse on each of those nights. Her mother, **PW3**, confirmed that the Complainant went missing from home between **14 September 2012** and **10 October 2012**; and that out of concern, she reported the matter to Soy Police Station. Both **PW4**, a Police Officer at Soy Police Station and the Appellant's own witness, the Village Elder, confirmed that a report had been filed by **PW3** about her missing daughter.

[25] More importantly, the doctor, **PW1** testified that she examined the Complainant on **10 October 2012** and noted that she had healed hymenal tears at position six and eleven o'clock, respectively; and that a high vaginal swab revealed the presence of numerous epithelial cells, which were indicative of vaginal penetration. She produced the P3 Form that she filled as **Exhibit No. 1** before the lower court. Again, the Prosecution evidence in this regard was entirely uncontroverted, and was therefore cogent and credible. Accordingly, the lower court correctly came to the conclusion that penetration had been proved.

[26] I note that the Appellant took issue with the fact that, though the Complainant admitted to having engaged in unprotected sex every day for 27 days, the pregnancy test conducted on her was negative. According to him that evidence defied logic given the age of the Complainant. However, not much turns on this argument in my view, as it is common knowledge that it is not always the case that every person of child bearing age who engages in sexual intercourse gets to procreate. The Court takes judicial notice that the reasons for this are varied, some attributable to barrenness on the part of the male involved. Hence, I find no merit in that argument by the Appellant.

[c] On whether the penetration of the Complainant was perpetrated by the Appellant:

[27] As to the pertinent question whether the penetration of the Complainant was committed by the Appellant, the evidence of the Complainant was straightforward enough; and she stated, in her evidence in chief that she knew the Appellant before their meeting of **14 September 2012**. He was no stranger to him and that must be why she was comfortable enough to stay with him for the 27 days. In cross-examination she said of the Appellant: **"...I know you as my husband..."** That mental posturing on the part of the Complainant was corroborated by the evidence of her mother, **PW3**, whom she told, upon returning home on **10 October 2012**, that during the period she was away from home, she got married to the Appellant. The Complainant gave this consistent account to the Police, to the Doctor and to the Court. She immediately led her mother to the Appellant's house at [particulars withheld] where they were cohabiting. The Appellant did concede that he had no dispute with the Complainant; and therefore there was no discernible reason why the Complainant would tell lies about the Appellant. I am consequently satisfied that Appellant's conviction was based on sound evidence.

[28] It is instructive that, when it comes to credibility, this Court, as an appellate court, would defer to and be guided by the impression formed on the trial court by the by the witnesses. Hence, in **Shantilal Maneklal Ruwala vs. Republic [1957] EA 570**, it was held, *inter alia*, that when the question arises which witness is to be believed rather than another and that question turns on demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses.

[29] Accordingly, having found that the Prosecution proved the three pertinent elements of the offence charged in the Main Count, of which the Appellant was convicted, I would be of the view that the contradictions referred to by the Appellant were not of the sort that would suffice to invalidate the conviction. This was well explicated by the Court of Appeal in **Joseph Maina Mwangi -Vs- Republic Criminal**

Appeal No. 73 of 1992 thus:

“An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence”

[30] Hence, contradictions and discrepancies are not entirely uncommon in criminal prosecutions; and therefore, the question the Court must bear in mind is whether their sum total is serious enough as to create reasonable doubt on the guilt of the person accused; and, from a review of the entirety of the case presented before the lower court, I am satisfied that that is not the case herein.

[31] The Appellant also raised the issue to do with the failure by the Prosecution to call two witnesses, namely **William Milimo** and **Millicent Odera Atieno** who were alleged by the Complainant's mother to have returned the Complainant's clothes after about 3 or so days of her return home. He urged the Court to draw an inference that, had they been called, their evidence would have been adverse to the Prosecution. Thus, I have perused the record of the lower court with a view of ascertaining what transpired in connection with the two witnesses. It is manifest therefrom that, indeed the two witnesses were never called to testify, though mentioned by the Complainant's mother as the people who returned the Complainant's clothes to her three days or so after she left Soy. Mention was also made of one **Hassan Amoli** as the person who informed PW3 that her daughter had been seen at **Maseno**. He too was not called to testify.

[32] It is however instructive that, in **Section 143** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, it is recognized that:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

Accordingly, in **Keter vs. Republic [2007] 1 EA 135**, it was held, *inter alia*, that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

[33] In the premises, the obligation of the Prosecution is to only avail such witnesses as are sufficient to establish the charge beyond reasonable doubt, as was underscored by the Court of Appeal in the case of **Daniel Muhia Gicheru vs. Republic Criminal Appeal No. 90 of 2007 (UR)** as hereunder:

“The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses. That Court, however, qualified that general principle by stating that:

“... There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

In the premises, not much turns on this ground of appeal, given the peripheral nature of the role that the persons in question played.

[34] Thus, having re-evaluated the evidence adduced before the lower court, I am satisfied that the essential ingredients of the principal charge of Defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act** were proved against the Appellant beyond reasonable doubt as laid in the 27 substantive counts that the Appellant was charged with before the lower court; and that the so called contradictions and inconsistencies singled out by the Appellant are not material enough to invalidate the sound findings arrived at by the lower court.

[35] As to whether the Appellant was prejudiced by the substitution of the Charge Sheet to include additional Counts, the record shows that the substitution was done on **4 February 2012**, after two witnesses had testified, namely, **Dr. Kibet (PW1)** and the Complainant (**PW2**). This was done following the order of the Learned Trial Magistrate, made on **13 December 2012**. The effect of the amendment was that the Appellant now stood charged with 27 Main Counts and 27 Alternative Counts.

[36] It is now trite that it does not aid the course of justice for the Prosecution to prefer too many counts in the same charge sheet. In the case of **Peter Ochieng vs Republic (1982-1988) 1 KAR 832**, for instance, it was held as follows:

“It is undesirable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of a trial as to the counts upon which it wishes to proceed. Usually, though not invariable, no more than 12 counts should be laid in one charge sheet...” (Per Hancox, J., as he then was)

[37] Nevertheless, whereas it is undesirable to lay more than 12 Counts, it is not fatal. It all depends on the circumstances of each case; and in particular, whether the accused would be prejudiced thereby. In the instant matter, the same set of evidence was relied on to support all the counts. Moreover, the Appellant was given the opportunity to have the witnesses recalled for further cross-examination after the amendment; and the sentences were ordered to run concurrently. Accordingly, no prejudice befell the Appellant.

[38] It must however be pointed out that, as an impartial arbiter in the matter, it was not the remit of the Learned Trial Magistrate to purport to give directions to the Prosecution "...to amend the charge sheet and prefer a separate count for each day that the accused and the complainant had sex..." as he did. That was the function of the Director of Public Prosecution or his officers pursuant to **Article 157** of the Constitution; which requires the DPP to exercise those powers, having regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Moreover, **Article 157(10)** of the Constitution stipulates that, in the exercise of his powers or functions, the DPP shall not be under the direction or control of any person or authority. Hence, the most that the Learned Trial Magistrate could do, in the circumstances, was to put the DPP to election. He is therefore to be faulted for overreaching his mandate; but as pointed out herein above, no prejudice was occasioned to the Appellant thereby.

[39] In the result therefore, I am satisfied that the conviction of the Appellant for the offence of Defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act** was based on sound evidence, and that the sentence of 15 years imposed by the lower court is not only lawful but was also deserved. I would accordingly confirm the Appellant's conviction and sentence and dismiss his appeal in its entirety, which I hereby do.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF JULY, 2018

OLGA SEWE

JUDGE