REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 48 OF 2014

BETWEEN

CALVINS OTIENO OCHOO ……..….. APPELLANT

AND

REPUBLIC …..…….. RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 16 of 2012 at Senior Principal Magistrates Court at Oyugis, Hon. G.M.A Ongondo, Ag CM dated on 11th December 2013)

JUDGMENT

1. In the subordinate court, the appellant was charged with the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act, 2006.*** The particulars were that on 9th July 2012 at Kokoth Kataa location within Rachuonyo North District of Homa Bay County, the appellant intentionally caused his penis to penetrate the vagina of MAO, a child aged 13 years. He also faces a second count of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act, 2006** based on the same facts.

2. After a full trial he was convicted on the first count and sentenced to 20 years imprisonment. He now appeals against the conviction and sentence. In the petition of appeal filed on 5th August 2014, he contends that the age of the child was not established, that the medical evidence did not prove penetration, that no material exhibits were produced to confirm the allegations against him and that the learned magistrate failed to consider his defence. In the supplementary petition ground filed by his advocate on 11th March 2015, the appellant contended that the charges against him were defective and that he was tried, convicted and sentenced under a non-existent law and that the sentence imposed on him was unconstitutional.

3. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic*** **[1973] EA 32**).

4. After a *voire dire*, the complaint (PW 1) testified on oath that she was 13 years old and in Standard 6. She stated that on 9th July 2012, while she was at home with her sister (PW2) the appellant, who is her uncle came home. He gave both of them some money. He sent PW 2 to buy *mandazi* and asked PW 1 to escort him. She described what happened to her in the following terms;

I did escort him for about 15 m. It was on a footpath through maize field. He then held my hand and I raised alarm. He pulled me into the maize plantation. He held me tightly. He threw me to the ground, squeezed my mouth and I held my skirt. He then removed my biker and threw it away. I had worn bickers as knickers. He unzipped his trouser. He inserted his penis in my vagina as I lay on the ground. I felt pain thereon. He held my mouth and I was unable to scream again. He lay on me for five minutes.

5. After the ordeal, she heard PW 2 calling her and asking why she had left her alone. The appellant ran away. PW 2, a child aged 3 years, testified on oath that the appellant came home and found her with PW 1. She was sent by the appellant to buy *mandazi* and when she came back, she found PW 1 and the appellant were absent. She started crying.

6. PW 1 further testified that after the incident she went home. A neighbour (PW 3) came home and she narrated to him the ordeal. PW 3 testified that he was a neighbour and that the parents of PW 1 and PW 2 were away and had asked him to look after the children. At about 8 pm he was alerted by dogs barking and he went to check what was happening. He found PW 1 crying and she told him that the appellant had defiled her in the maize plantation. He called the Assistant Chief (PW 4) and informed his about the incident.

7. On the following day, PW 4 took PW 1 to Kendu Bay Sub-District Hospital for examination and then proceeded with her to Kendu Bay Police Station to make a report. He confirmed that he received the report of the defilement of PW 1 by the appellant from PW 3 on 10th July 2012 at 6.00 am. PW 4 further testified that he arrested the appellant on 14th July 2012 at 4.00 am at his house after receiving an arrest order from the police. He testified that the appellant was a person known to him.

8. PW 5, the clinical officer at Kendu Bay Sub-District Hospital, examined PW 1 on 12th July 2012. He examined her and found that her hymen was broken. No spermatozoa were detected and all the tests were normal. He also conducted an age assessment and concluded that based on the baptisimal card she was 12 years and 11 months. PW 6, a police officer at Kendu Bay Police Station, confirmed that on 12th July 2012 at about 2 pm, PW 1 came to the police station with her parents and made the report concerning the incident of defilement. She issued the P3 form and alerted PW 4 who arrested the appellant.

9. After the close of the prosecution case, the appellant was put on his defence and elected to make an unsworn statement. He stated that on the 9th July 2012 he did not see PW 1 or PW 3 as he was at home with his mother and wife. On the following day, he went with his mother to his step mother's funeral in Ndhiwa and returned at 5 pm. He was in Homa Bay the day after when he learnt of the allegations made against him. He learnt that PW 1 was in hospital. He went to see PW 4 to confirm the allegations but he was informed that there were no allegations against him. He denied that he had anything to do with the allegations made against him.

10. Before considering the evidence, I will first deal with issue raised by Mr Odhiambo, counsel for the appellant, that the charge against the appellant was defective as it referred to '**section 8(1)(3)'** of the ***Sexual Offences Act***. He submitted that such an offence does not exist and that the trial was illegal. Mr Oluoch, counsel for the respondent, replied that even if the charge was defective, it did not prejudice the appellant as the charge sheet set out particulars which made clear the nature of the charges facing the appellant. He found support for in the provisions of **section 134** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which states as follows;

Every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." [Emphasis mine]

11. I find that the charge as framed was lucid, it disclosed the material facts constituting the offence which the appellant was charged with and it one of defilement contrary to **section 8** of the ***Sexual Offences Act***. Reference to **sub-section 3** merely alerted the appellant to the penalty applicable if he is found guilty. The particulars set out in the charge provide the necessary information and it meets the terms of **section 134** of the ***Penal Code***. Furthermore such an error is not fatal to the charge and the appellant was not thereby prejudiced nor was a failure of justice occasioned. Such an error is curable under **section 382** of the ***Criminal Procedure Code*** which provides;

> *382. 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, judgment 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.*

12. As similar issue arose in the case of ***Samuel Kilonzo Musau v Republic*** **Nai CA Crim. App. No. 153 of 2014 [2014]eKLR** where the Court of Appeal stated**;**

> *In this case, the statement of offence, though lumping **section 8(1)** and **(2)** together, contained the ingredients of the offence and the prescribed punishment. The irregularity was one that was, in our view, curable under **section 382 of the Criminal Procedure Code**. That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice.*

13. I now turn to consider the substance of the appeal. Under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must establish that the person has committed an act which causes penetration with a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

14. Mr Odhiambo argued that the penetration was not proved. He argued that the testimony of PW 5 undermined the prosecution case for penetration. In my view, the medical evidence merely corroborated the fact that PW 1 was defiled. PW 1 gave clear testimony of the sexual encounter which leaves no doubt that there was penetration. Her testimony was clear, consistent and remained unshaken on cross-examination. The learned magistrate was satisfied that the witness was truthful and I find no basis to depart from this finding. Though PW 2 did not witness the act, he confirmed that the appellant was at their home and that when he came back from buying *mandazi*, the appellant and PW 1 were absent. PW 1's testimony is also buttressed by that of PW 3 to whom she made the first report.

15. The proviso to **section 124** of the ***Evidence Act*** provides that no corroboration is required in cases where the court believes that the complainant it telling the truth. Such was the complainant's testimony that even if I exclude the testimony of PW 2 and PW 5, I find that the prosecution proved that there was penetration. I would also add what the Court of Appeal stated in ***Geoffrey Kioji v Republic***, **NYR Crim. App. No. 270 of 2010 (Nyeri)** where it stated that;

> *Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an*

accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

16. Contrary to Mr Odhiambo's contention that the court did not consider the appellant defence, the trial court considered it and dismissed it. The appellant raised the defence of alibi in that he was at home at the time the offence took place. The alibi having been raised after the prosecution case must be weighed against the evidence raised by the prosecution (see ***Wangombe v Republic*** **[1976 – 80] KLR 1683)**. The testimony of PW 1 and PW 2 is clear that the appellant was at their home. They knew him and as testimony was credible and truthful, the alibi could not stand scrutiny.

17. The final element of the offence of defilement is the proof of age. The proof of age is a matter of fact and as regards the offence of defilement it is necessary on two grounds. First, to establish the offence of defilement which is committed if the victim is below the age of 18 years and second, to establish the penalty applicable. PW 1 testified that she was 13 years old while PW 4 relied on the baptismal certificate to record her age as 12 years and 11 months. The appellant in his unsworn statement stated that the PW 1 was 14 years old. The learned magistrate was therefore correct to conclude that PW 1 was 13 years old.

18. As regard the sentence, Mr Odhiambo submitted that the mandatory sentence provided for in **section 8** of the ***Sexual Offences Act*** was unconstitutional as it contravened to **Article 2(1)** of the Constitution which states that the Constitution is the supreme law and **Article 160(1)** of the Constitution which states;

160. *(1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.*

19. The thrust of Mr Odhiambo's submission was that the mandatory provisions tie the hands of the judiciary in sentencing and it is a means of the legistature dictating to the courts the sentence that should be imposed. He submitted that this constitutes interference with the independence of the judiciary which renders the law unconstitutional. Counsel cited the decision of ***Godfrey Ngotho Mutiso v Republic*** **MSA CA Crim. App. No. 17 of 2008 [2010]eKLR** where the Court of Appeal declared that the mandatory death penalty for murder was unconstitutional. He urged the court to declare the mandatory sentence unconstitutional and free the court to impose sentences in accordance with facts and circumstances of each case.

20. In response to the argument, Mr Oluoch, cited the case of ***Joseph Njuguna Mwaura and Others v Republic*** **NBI CA Crim. App. No. 5 of 2008 [2013]eKLR** where the Court of Appeal held that the decision in ***Godfrey Ngotho Mutiso*** was *in per curiam* is so far at it purported to grant discretion in sentencing with regard to capital offences. He contended that the position of the law is that the legislature, as an expression of the public policy, makes a decision as to the penalty to be imposed for any offence and it was not for the judiciary to usurp that authority. He submitted that the court must apply the law and the issue of mandatory sentences is not an affront to the independence of the judiciary.

21. Mr Oluoch also submitted that the enactment of the ***Sexual Offences Act, 2006*** was a result of a participatory process inspired by the inadequacy of the previous law regarding sexual offence hence it was in response to a specific public need which the legislature required.

22. Minimum sentences under the ***Sexual Offences Act, 2006*** were a direct response to the perceived lenient sentences given to offenders under the previous law governing sexual offences. Whether such sentences achieve the stated purpose or efficacy is a question yet to be answered by empirical research. What I am required to decide is the constitutionality of the mandatory sentence as a violation of the independence of the judiciary.

23. In ***Joseph Njuguna Mwaura's Case*** the Court of Appeal dealt with whether the mandatory death

penalty for murder was constitutional. The court expressed the view that

> *In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do.*

24. In my view, the Court of Appeal decision in circumscribes such an inquiry as this court is bound by that decision. The issue in this case is not whether other mandatory sentences other than the death penalty violates other provisions of the bill of rights. That issue was not urged before me and may well come up for consideration in other circumstances. At this stage I have no option but to restate what the Court of Appeal has said and accordingly affirm the sentence.

25. Finally, I would Mr Odhiambo attacked the judgment on the ground that it was not clear when and by whom it was delivered and it was therefore defective. I have looked the original proceedings and they show that although the judgment was written and signed by Hon. G.M.O. Ongondo, it was delivered by Hon. Wesonga in presence of the appellant. This accords with **section 200** (1)(a) of the ***Criminal Procedure Code*** which reads:-

> *200(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –*

a. *deliver a judgment that has been written and signed but not delivered by his predecessor or.....*

26. On the whole therefore the prosecution proved all the elements of the offence of defilement. The conviction is affirmed. The sentence was legal and is also affirmed. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 30th day of April 2015

D.S. MAJANJA

JUDGE

Mr Odhiambo instructed by Odhiambo and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecution instructed by the Office of the Director of Public Prosecutions for the respondent.