REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.77 OF 2012

WILLIAM ODHIAMBO SIARA ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

[Being an appeal from Original Conviction and Sentence from Bondo SRM's Court by P.W. MUTUA P.M.

in Criminal Case No.57 of 2012].

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J U D G M E N T

The appellant was convicted by the Principal Magistrate at Bondo of defilement contrary to "section 8(1)(3) of the Sexual Offences Act No.3 of 2006" whose particulars were that on diverse dates between November 2011 and 17th January 2012 in Bondo Township of Bondo District within Siaya County he intentionally caused his penis to penetrate the vagina of S M O (PW3) a child aged 13. He was sentenced to a prison term of 20 years. He was aggrieved by the conviction and sentence and preferred this appeal. His complaint was that he had been convicted on the uncorroborated evidence of only PW3 and her family members; the age of PW3 had not been proved beyond doubt; he was 15 years of age at the time of the offence and had not been medically examined; and that the charge sheet on which he was convicted was defective. He prosecuted the appeal in person. Mr. Kiprop of the Office of the Director of Public Prosecution opposed the appeal.

This court is entitled to consider and evaluate afresh all the evidence that was tendered before the trial court and reach its independent decision on whether there were sufficient reasons on which to base the conviction **(OKENO .V. REPUBLIC [1972] E.A. 32)**. In doing so, the court has to bear in mind that it did not see or hear the witnesses as they testified.

I will first deal with the issue of the defective charge. I agree that the appellant ought to have been charged with defilement under section 8(1) as read with section 8(3) of the Sexual Offences Act No.3 of 2006. Section 8(1) defines the offence of defilement and section (3) provides the sentence. He was charged under "section 8(1)(3)." The section does not exist, although one can reasonably tell that the court had in mind both sections 8(1) and 8(3) of the Act. The general rule is that a defect in a charge does not lead to the quashing of a conviction unless the defect had occasioned a failure of justice or had prejudiced the appellant (**KILOME .V. REPUBLIC [1990] KLR 193).** The substantial question that the court will deal with where a defect is alleged is whether, by reason of that defect, the appellant did not sufficiently know or understand the charge he was facing to be able to prepare his defence. A mere technical defect in the charge or charge sheet that does not prejudice the accused is usually curable under

section 382 of the Criminal Procedure Code.

In the instant case, the appellant understood that he was being charged that he had used his male organ to penetrate the female organ of PW3 who was a girl aged 13. This is the allegation that he was defending.

What was the nature of the prosecution evidence? The prosecution called P A O (PW1), C O (PW2), complainant (PW3), Jared Otieno Opondo (PW4) and police constable Antony Munyoro (PW5) of Bondo Police Station. PW1 was the mother of PW3 and PW2 was the brother of the appellant. PW4 was the senior clinical officer at Siaya District Hospital. PW1 testified that her daughter was born on 2/3/99. She produced a baptismal card (Exhibit 1) to support the age. The girl was therefore 12 going to 13, and was in class 7. PW3 gave sworn testimony after *voire dire* inquiry. Her case was that on 17/1/12 she was going to the market when she met the appellant who invited her to his house. When she got there he told her that now that it was late she could not go as she risked being arrested by police They slept, her on a mattress and him on a seat. He asked to have sexual intercourse with her but she declined. He had had intercourse with her on a previous occasion. This night she came to where he was sleeping and touched her. He removed her clothes and had intercourse with her by force. She remained here until 5 a.m. When she went home. PW1 was there. She did not go to school. In the evening PW1 demanded to know where she had slept. She took her to the appellant's house. The appellant was there with PW2. PW2's evidence was that:

"complainant was girlfriend of my brother and the relationship had taken long."

When PW4 examined PW3 on 20/1/12 he found that she did not have any injury on her genitalia, but had swollen lip and cut wound on the occipital region of the head. She had a seminal vaginal discharge. She was not infected.

The appellant gave unsworn statement in defence and denied to have defiled PW3. He stated that he came from school and while in the house people, who included the police and PW1, came in to make the allegation and begun to beat him. He was arrested and later charged. Indeed a P3 was produced to show that he was cut on the left arm and on the ear.

The trial court considered this evidence and concluded that the charge had been proved beyond doubt.

The fact that PW3 had sexual fluid in her vagina shows that she had sexually interacted with a man. This would materially support her testimony that the appellant had slept with her. Further , PW2 is the appellant's brother and knew the two to be friends for a long time. The girl testified that this was not the first time she was sleeping with the appellant. In short, there was medical evidence and PW2's evidence that materially corroborated PW1's testimony. PW2 was not PW3's relative, but the appellant's brother. The medical evidence was by an independent witness. There was therefore no basis in the complaint by the appellant that he had been convicted on PW3's evidence which was not corroborated but only supported by that of her relatives. In any case, under section 124 of the Evidence Act (Cap.80) a complainant in a defilement case can be the sole basis for a conviction provided that the court believes her testimony **(JOHANA MUCHORI WANJIRU .V. REPUBLIC, H.C. Criminal Appeal No.57 of 2006 at Nakuru**).

Ideally, a DNA test ought to have been done to show that the seminal fluid, found lodged in PW2's genitalia belonged to the appellant. However, I am satisfied that the lodging of the fluid followed penetration which according to the girl was by the appellant. PW2's evidence confirmed that the two were in girlfriend relationship. I am unable to find that the failure to match clinical tests of PW3 and the appellant was, in the circumstances, fatal to the prosecution case **(DENNIS MUTHEE CHOKERA .V. REPUBLIC, CRIMINAL APPEAL NO.487 OF 2007 AT NYERI).**

In ground 4 of the petition of appeal it was contended that the age of PW3 was not proved beyond doubt. I agree that because of the fact that the various sentences under the Act are dictated by the age of the complainant, it is incumbent upon the prosecution to prove age beyond doubt. For PW3, her mother (PW1) gave her date of birth to be 2/3/99. That was not challenged. She also gave her baptismal card

which showed date of birth. It is notable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and, unless they are shown to have been made at the time when the prosecution was launched, are material corroborating evidence. An age assessment by a doctor would be useful, but it should be borne in mind that any such assessment is a medical approximation. I am satisfied that PW3 was 12 going to 13.

Lastly, the appellant complained that he was15 at the time of the commission of the offence. Under section 14(3) of the Penal Code, a male person who is aged twelve years is capable of having carnal knowledge. If he was 15 at the time he was legally capable of defiling PW3.

If, however, the appellant was 15 at the time and the sentence was six months later then he was under 18 and ought not to have been sent to jail. I note that the appellant did not, in his defence, indicate that he was under 18. He did not state his age. However, he indicated that he was in school. During mitigation, he stated that he as a student and wished to be left to continue in school. This caused the trial court to ask for his age assessment. The report came saying that he was above 18. It was dated 7/6/12. However, the record shows that on 24/1/12 the appellant's age had been assessed as 16. It was therefore not possible for the appellant to be above 18 six months later. The only conclusion is that he was under 18 at the time he was sent to jail. The sentence was consequently illegal.

Finally, the appeal against conviction is dismissed as the appellant was convicted on overwhelming evidence. However, owing to his age, the sentence is set aside. The appellant is remanded in custody to 27/3/14 when his probation report shall be availed.

Dated, signed and delivered this 18th day of March 2014.

A. O. MUCHELULE

J U D G E