**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 59 OF 2011**

**FRED OMAR OMONDO ..... APPELLANT**

**VERSUS**

**REPUBLIC …..... RESPONDENT**

**(Being an appeal from the original conviction and sentence contained in the Judgment of the Hon. H. M. Nyaga (Principal Magistrate) in Kabarnet Principal Magistrate's Criminal Case No. 592 of 2010 delivered on 24th March, 2011)**

**JUDGMENT**

The Appellant, Fred Omar Omondo was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. Particulars of the charge were that on the 25th June, 2010 in Marigat District within the Rift Valley, intentionally and unlawfully did cause his penis to penetrate the vagina of CS a girl aged twelve (12) years in violation of the said Act.

In the alternative, he was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. It was alleged that he intentionally and unlawfully caused his penis to come into contact with the buttocks of C S a girl aged twelve (12) years in contravention of the said Act.

The Appellant was convicted in the main count and was sentenced to twenty (20) years imprisonment.

The Appellant appealed against both the conviction and sentence. He was represented by learned counsel Mr. Mbalongo who held the brief of learned Counsel Mr. Wanyonyi. Mr. Mbalongo raised the following issues;

Firstly that although the Appellant was charged under, inter alia, Section 8 (2) of the Sexual Offences Act, the trial court convicted him under S. 8 (3) of the said Act.

Secondly, that the urinalysis tests were negative. PW1 stated that PW2's genitalia were intact thus contradicting other evidence that the hymen was perforated.

Thirdly, that the age of the complainant was not proved.

Fourthly, that the medical tests done could not produce results that would prove the offence of defilement. This was in view of the fact that so much time had lapsed between the time of the alleged defilement (25th June, 2010) and the medical examination (3rd July, 2010).

Fifthly, PW3 and 4 testified that PW2 was defiled on 30th June, 2010 thus contradicting the evidence of PW2 who said she was defiled on 25th June, 2010.

Learned state counsel Mr. Mulati opposed the appeal. He urged the court to find that a strong case was tendered by the prosecution as a result of which the appeal should be dismissed.

He submitted that although the Appellant was charged under S. 8 (1) as read with Section 8 (3) of the Sexual Offences Act, in its Judgment, the trial court found that the offence that was proved was defilement under S. 8 (3) of the Act. That is why the Appellant was convicted under that section pursuant to Section 186 of the Criminal Procedure Code. Moreover, Section 214 of the Criminal Procedure Code would only be applicable during the trial and before the close of the prosecution's case.

With respect to the medical examination, Mr. Mulati submitted that PW1, the medical officer who examined the complainant was clear that the complainant's (PW2) hymen was perforated and that it was the Appellant's genitalia that was intact.

Mr. Mulati denied that PW3 and 4 testified that the offence was committed on 30th June, 2014. Instead, the witnesses referred to this date as the date they received the information about the incident.

As regards the age of the complainant, Mr. mulati submitted that PW2 and her mother testified that she was then aged twelve (12) years, a fact that the Appellant did not rebut. He submitted that in the event that the court finds that the complainant's age was not proved, it should order a retrial.

In rejoinder, Mr. Mbalongo opposed the request for a retrial stating that it would take a long time for the trial to be concluded.

I will consider each of the issues raised by the Appellant as hereunder. I also bear in mind that this being the first appellate court, I must evaluate the evidence on record and come up with my own conclusion – See case of **PANDYA -V- REPUBLIC (1957) E.A., 336** and **KARIUKI KARANJA -V- REPUBLIC (1986) KLR 190**.

In making a finding on the conviction, the learned trial Magistrate noted as follows:-

***"The accused was charged under Section 8 (1) as read with Section 8 (2) of the Act. Section 8 (2) applies to a child aged eleven years or less. The complainant herein was aged twelve (12) years at the material time. The correct sub-section ought to have been 8 (3) and not 8 (2). This however is not fatal to the case, since the ingredients of the section that creates the offence i.e sub-section (1), have been brought out. The other sub-sections namely (2), (3) and (4) are the penal sections, that guide the court in sentencing, not in establishing the offence. The accused will thus be dealt with under Section 8 (3) of the Act."***

To the extent that the proper sub-section of the law was not cited in the charge, 'technically' rendered the charge defective. But this defect was properly addressed by the trial court as above. All through the trial, the Appellant was aware of the charge facing him which is spelt out under sub-section (1) of Section 8. The subsequent sub-sections only prescribe the penalties. The penalties under Section 8 of the Act are determined by the age of the complainant. The trial court did arrive at a finding that the age of the complainant was twelve (12) years. The penalty for defiling a child of twelve years is prescribed under Sub-section (3). Hence, the trial court could only convict the Appellant under sub-section (3) and not (2).

As rightly submitted by the learned state counsel Mr. Mulati Section 186 of the Criminal Procedure Code also cures that error. It provides as follows:-

"***When a person is charged with the defilement of a girl under the age of fourteen years***

***and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."***

Furthermore, Section 214 of the Criminal Procedure Code which provides for the amendment of a charge sheet is only applicable during the trial and before the close of the prosecution's case. The charge could not, as such, be amended after conclusion of the trial.

On the other hand, Section 191 of the foregoing Act states as follows;

***"The provisions of sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of section 179 ."***

It is essentially important to note that the provisions under Section 179 to 191 of the Criminal Procedure Code fall under a title '***Convictions for Offences other than those charged***'. Before I go further, by dint of the said title, it is quite clear that the courts may convict a person on an offence not charged with. ***This leads to the question, how and when does this happen?***

The provisions of the law cited above have explained the circumstances under which such a conviction may occur. However the case law discussed here below demonstrates how the courts have applied the said provisions of the law.

In **BWANA KOMBO MUHATI -VS- REPUBLIC [2000] e KLR, COURT OF APPEAL AT MOMBASA, CRIMINAL APPEAL NO. 83 OF 2000**, the learned Judges Omolo, Akiwumi and O'Kubasu, JJA, reiterated as follows;

***"This being a second appeal, only matters of law arise for our consideration. The Appellant was originally charged with attempted defilement of a girl contrary to Section 145 (2) of the Penal Code but in the end the Magistrate found him guilty of indecent assault of the girl under Section 144 (1) of the Penal Code. The Magistrate said he was doing so under Section 179 of the Criminal Procedure Code, but that was of course not correct because, as Mr. Ouma for the Appellant correctly points out, the two offences are not minor to each other. But the two offences are clearly cognate and Section 186 of the Criminal Procedure Code provides for the situation the Magistrate was dealing with. The facts put before him clearly proved the offence of indecent assault and he was right to convict the Appellant of that charge.***

***The superior court confirmed that conviction and there is really no point of law worth our consideration. The appeal is ordered to be and is hereby dismissed."***

Fundamentally therefore, the charge was not rendered defective by the mere omission of citing Section 8 (2) of the Sexual Offences Act.

The Appellant submitted that PW1 adduced contradicting evidence. Specifically that, at one time, he testified that PW2's hymen was perforated. He then changed the story that her genitalia was intact.

**PW1**, Leonard Chirchir, a Clinical Officer from Marigat District Hospital examined both the Appellant and the complainant (PW2). He testified as follows:-

***"On 3rd July, 2010 I filled a P3 form for one C S of apparent age of twelve (12) years. She came with her parents. She alleged that she had been defiled on 25th June, 2010.***

***On examination, I found some mild labial lacerations with tenderness. There was a***

***vagina secretion attached to the vaginal wall. The hymen was perforated.***

***Urinalysis did not show any abnormality. HIV test was negative VDRL was negative. Pregnancy test was negative.***

***I concluded that there was penetration. I produce the P3 form as Exhibit 1."***

He went on to testify as follows:-

***"I also examined one Fred Omar Omondo who was brought under police escort.***

***On examination, the genitalia was intact. Laboratory tests were done. Urinalysis was normal. HIV test was negative. VDRL test was negative. I produce the P3 as Exhibit 2."***

The above testimony attests that PW1 conducted two examinations, one on PW2 and another on the Appellant. It is against that of PW2 he noted that the "***the hymen was perforated***". And on the Appellant that "***the genitalia was intact***". As such, PW1 did not give any contradictory testimony on the medical examinations he conducted.

Then there is the issue of prove of the age of the complainant.

In the case of **RUA NGAO MWATUMA -VS- REPUBLIC [2014] e KLR, H.C. AT MALINDI CRIMINAL APPEAL NO. 21 OF 2012**, the learned Honourable Justice Angote while relying on the decision in the case of **KAINGU ELIAS KASOMO -V- R MALINDI CR. APP. NO. 504 OF 2010** observed as follows;

***"The date of birth was not given and it would seem that the only medical evidence tendered was the P3 form which gives the estimated age as 15 years. In the case of KAINGU ELIAS KASOMO -V- R MALINDI CR. APP. NO. 504 OF 2010 the Court of Appeal stated that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.***

***Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victim is carried out by dentists.***

***The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth."***

In the case of **GILBERT MIRITI KANAMPIUS -V- REPUBLIC (2013) e KLR, H.C. AT MERU, CRIMINAL APPEAL NO. 97 OF 2009**, Gikonyo J. while relying on the case of **FAPPYTON MUTUKU NGUI -VS- REPUBLIC, H.C. AT MACHAKOS CR. APPEAL NO. 296 OF 2010**, noted as follows;

***"Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof. Ngugi J. in MACHAKOS HC. CR. APPEAL NO. 296 OF 2010 FAPPYTON MUTUKU NGUI -VS- REPUBLIC: "... that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."***

In the case of **LAMECK OKEYO ONYANGO -V- REPUBLIC [2014] e KLR, H.C. AT KISII CRIMINAL APPEAL NO. 2 OF 2010**, the learned Nekoye Sitati, J. while relying on **JOHN**

**OTIENO OBWAR -VS- REPUBLIC HIGH COURT CRIMINAL APPEAL NO. 34 'B' OF 2010** reiterated as follows;

***"In JOHN OTIENO OBWAR -VS- REPUBLIC HIGH COURTCRIMINAL APPEAL NO. 34 'B' OF 2010 Makhandia J (as he then was) held:-***

***"Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim be proved by credible evidence. In the circumstances of the case, the charge sheet talks of the complainant being 14 years. Other than that allegation, there was no other proof. The clinical officer who examined her never assessed her age. It would have been easy for the prosecution to tender in evidence like the complainant's birth certificate to prove her age. This was not done with the consequence that the age of the complainant was not proved as required."***

In the case of **WILLIAM ODHIAMBO SIARA -VS- REPUBLIC [2014] e KLR H.C AT KISUMU, CRIMINAL APPEAL NO. 77 OF 2012,** the learned Muchelule, J. delivered himself as follows;

***"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."***

In the case of **JOSEPH KIETI SEET -VS- REPUBLIC [2014] e KLR, H.C. AT MACHAKOS, CRIMINAL APPEAL NO. 91 OF 2011**, the learned Mutende, J. held as follows;

***It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:***

*"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …."*

The foregoing holdings are applicable in the instant case in various ways. At the trial, PW2, the complainant herein stated that she was 12 years old. Both PW3 and PW4 who were the complainant's biological parents stated that the complainant was aged 12. On the other hand the charge sheet indicated that the complainant was aged 12 as well the P3 form that was produced in court as P. Exhibit 1.

Furthermore, the trial court which had the opportunity of seeing PW2 did not doubt her age. PW2's age was also not set on a borderline. I would have no reason to doubt that that was her age.

I now determine whether the offence of defilement was proved. This calls for a brief summary of the prosecution's case.

The complainant testified as **PW2**. Her testimony was that on 25th June, 2010 she was sent by her mother, PW3 to Baba N (the Appellant) to ask for firewood at his workshop. The Appellant then

took her in a room behind the workshop and defiled her. She was sent a second time and the same ordeal befell her.

**PW3** on the other testified that she learnt from one E that her daughter was misbehaving behind the workshop. On asking PW2, she disclosed that the Appellant had defiled her on various occasions as she went to fetch firewood from the workshop.

**PW4**, the complainant's father testified that he learnt about the incident from PW3. He made inquiries from one Geoffrey who worked at the Appellant's workshop who confirmed seeing PW2 in the workshop.

**PW5**, a police officer from Marigat Police Station investigated the case. She testified that the matter was reported to her on 3rd July, 2010. She then sent two police officers to arrest the Appellant while she referred PW2 to hospital for treatment.

**PW1** is the Clinical Officer who examined PW2 whose evidence I have already summarized elsewhere in this Judgment.

The Appellant gave an unsworn statement of defence. He stated that the charges were trumped up against him. He stated that there existed business rivalry between himself and PW2's mother. He denied ever defiling PW2.

The Appellant called one witness to buttress his defence namely Lilian Rotich who testified as DW2. She stated that she was Appellant's sister-in-law. Her evidence was that she was only alerted of the arrest of the Appellant. At that time her sister who is the Appellant's wife was at their rural home. She inquired from PW2's parents what was happening. She said that she could not confirm if the allegations against the Appellant were true or not.

Suffice it to say, the Appellant was not caught in the act. And so the only evidence, other than that of PW1 the court relied on was that of the complainant. She testified that the Appellant defiled her on 25th June, 2010 and on other occasions. She however did not disclose the other occasions on which she was defiled.

In upholding the prosecution's case, the trial court concluded that it was satisfied that the complainant was truthful. He invoked the provisions of Section 124 of the Evidence Act which reads as follows:-

***"Notwithstanding the provision of S. 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

This section entitled the trial court to rely on the evidence of the complainant entirely if it was satisfied she was telling the truth. The trial court did not misapply the law and I find no reason to interfere with its finding. I am also convinced that she told the truth and in any case, the defence did not dislodge her testimony. Moreso, the medical evidence presented by PW1 proved that PW2 had been defiled. This piece of evidence was also not challenged. I am satisfied beyond any doubts that the Appellant was the culprit.

Having upheld that the case was proved beyond any doubts, I see no need to address myself on the

issue of a retrial.

On sentence, the same was meted out within the law and I would also not interfere with it.

In the upshot, having evaluated all the evidence on record, it is my finding that the main charge was proved beyond any doubts. I uphold both the conviction and the sentence. The Appellant shall continue to serve the sentence unless he is otherwise lawfully set free.

**DATED** and **DELIVERED** at **ELDORET** this 18th day of September, 2014.

**G. W. NGENYE - MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Momanyi for the Appellant

Mr. Mulati for the Respondent