



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 176 of 2007

D.W.APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Senior Resident Magistrate's Court Criminal Case No. 1744 of 2007 by Hon. R.A Oganyo, SRM on 27/8/2007)

JUDGMENT

The Appellant, **D. W.** was charged with defilement of a child aged twelve years contrary to section 8(3) of the Sexual Offences Act before the Senior Resident Magistrate's Court at Kajiado. The particulars of the charge were that on 8th October, 2006 at *{particulars withheld}* within the Rift Valley Province he had carnal knowledge of **A. N.** a girl of twelve years old. The appellant denied the charge and was soon thereafter tried.

The complainant, **A.N.** was aged 12 years and was in class six at the time of trial. She knew the appellant as her uncle because he was a husband to her aunt who resided at *{particulars withheld}*. She was an orphan living with her grandparents. On Sunday 8th October, 2006 at about 7.00am, she had gone to visit the appellant's family and when she left at 5.00pm to go back to her grandmother's place in *{particulars withheld}*, the appellant elected to escort her. As they walked along the appellant suggested showing her a short cut to her place. He asked her to bend and check if there was a path in the bushes. When she did so the appellant pushed her down, removed her pants and then defiled her. He covered her mouth so that she could not shout and he defiled her for about ten minutes. The appellant then took his sweater and wiped her on the vagina which was bleeding. Thereafter she left for her grandmother's place. The appellant showed her the usual route and she started crying. The appellant asked her to pardon him because he did not intend to do so but because of the devil's influence he did it. The appellant followed her upto an Anglican Church pleading and pestering her to forgive him or else he would take poison and die but she told him that she would not forgive him. Eventually she reached home in the evening and slept without going to hospital until the following day when she went to school and told her teacher about what had happened to her the previous evening. She was then taken to hospital on a day that the school had been closed. The next day after going to hospital, she reported the matter to the police and later the appellant was arrested.

PW2, **N.W.** is the maternal grandmother of the complainant and a mother in law to the appellant. She confirmed that on the material date the complainant had gone to visit her aunt who is the wife of the appellant. When PW1 arrived home at about 6.00pm she told her that she would never go back to her aunt's place again and when she inquired, why, she replied that she had been defiled by the appellant. That the appellant had offered to escort her and whilst on the way he suggested to show her a shortcut and in the process, in the bushes the appellant defiled her. PW2 reacted to the information by

confronting the father of the appellant. When they did so the latter advised her to take action because he had forewarned his son several time over his unbecoming conduct and that he was fed up with him.

M.N.K. was the teacher, to whom the complainant reported the incident as she was in school on the 9th October, 2006. She confirmed that she reported the matter to the head teacher and his deputy and they decided that the complainant be taken to hospital.

J.W. was the complainant's aunt who took her to hospital after her teachers gave her the money. **John Oloo Ogotu** was the clinical officer who examined the complainant and filled a P3 form. He confirmed that the complainant had been defiled and that she contracted a venereal disease as a result. He had seen the complainant three days after the date when the alleged offence occurred. However, he did not examine the appellant because he may have already obtained treatment. When the appellant suggested to him whether he knew why an antibiotic drug was prescribed to him, he answered that it was a broad antibiotic that would also treat gonorrhoea which he found present in the complainant and treated.

APC Muikia arrested the appellant on 14th October, 2006 at {*particulars withheld*} when the case of the complainant was reported to him from {*particulars withheld*} for action.

PC Michael Mwela received the complainant's report on 13th October, 2006 and issued her with a P3 form. He investigated this case.

PW8, **PC Evelyn Anyango** escorted PW1 to hospital on 13th October, 2006.

At the close of the prosecution's case the appellant was put on his defence. The appellant elected to give a sworn statement of defence and denied the charge. He accredited the case to differences between him and his wife which began in February, 2006. His defence was basically on issues relating to his differences with his wife. He said that his mother in law, PW2 had caused a lot of rifts in their marriage.

The trial court did not find the defence of the appellant convincing. It treated it as an afterthought and dismissed it. Accordingly the court convicted the appellant and sentenced him to 18 years imprisonment.

The conviction and sentence triggered this appeal on grounds that the charge sheet was defective, prosecution evidence was contradictory and inconsistent, the prosecution case was far from being proved and finally his defence was not duly considered.

When the appeal came up for plenary hearing before me on 8th June, 2012, the State through **Mr. Mukofu**, learned State Counsel, conceded to the appeal on the ground that the appellant was tried, convicted and sentenced under the penalty section as opposed to the section creating the offence. He also did not seek retrial in view of the fact that the offence was committed in 2006.

On his part, the appellant wished to argue the appeal through written submissions. With the permission of the court he tendered the same for my consideration.

Having carefully considered the record of the lower court, the submissions of the State Counsel and the Appellant, I am satisfied that the State was right in conceding to the appeal. It is obvious that the charge sheet was defective. The appellant was charged with defilement of a child aged 12 years contrary to section 8(3) of the Sexual Offences Act. That section does not create the offence of defilement. Rather it is a penalty section for it states:-

“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”

A person cannot be charged, tried and convicted under a penalty section. For a charge to be proper and valid in law it must be anchored on the section creating the offence as well as the penalty section. For instance in this case the charge should have been drafted in this manner:- *“Defilement of a child aged*

twelve years contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act”.

In the instant case, the appellant having been charged with the penalty section only, he was therefore called upon to plead to a non-existent offence. He was therefore tried and convicted for an offence not known to him. The trial was therefore a nullity.

The appeal is accordingly allowed, conviction quashed and sentence imposed set aside. As the State did not seek for a retrial the appellant shall forthwith be set at liberty unless otherwise lawfully held.

JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER 2012.

**ASIKE-MAKHANDIA
JUDGE**