



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 34 of 2008

DAVE ODHIAMBO OONGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT:

The appellant was charged with abduction of a girl W.A. who is under the age of 16 years contrary to **Section 143** of the **Penal Code**. He also faced a second count of defilement of the girl contrary to **Section 8 (3)** of the **Sexual Offences Act 2006**.

In the first count, it was alleged that on the 10th day of March, 2008 at XY sub-location in Rachuonyo District, the appellant unlawfully took a girl known as W.A. from the custody of her mother, E.A., against the will of the said mother.

In drafting the second count, it was stated that on the same day as above, the appellant had carnal knowledge of a girl under the age of 16 years but in the particulars, the name of the girl's mother was cited as the one who was defiled instead of the girl.

The appellant pleaded guilty to the two counts and was convicted and sentenced to one year imprisonment on the first count and twenty years' imprisonment on the second count. The appellant was arrested on 13th March, 2008 but was not arraigned in court until 18th March, 2008.

Being aggrieved by the said sentence, the appellant preferred an appeal to this court. In respect of count one, it was rightly conceded by Mr. Kemo, Principal State Counsel, that the offence of abduction was repealed. Consequently, the conviction in respect thereof must be quashed and the sentence set aside.

As regards the second count, the appellant pleaded guilty to a faulty count since it referred to the name of the mother as the one who was defiled. Mr. Kemo submitted that there was no miscarriage of justice and in any event the error was curable by the provision of **Section 382** of the **Criminal Procedure Code**.

While it is arguable whether the said error occasioned any miscarriage of justice, considering the fact that the appellant's constitutional right was violated in that he was held in custody for 5 days instead of 24 hours before he was arraigned in court, the entire appeal must be allowed. Consequently, I quash the appellant's conviction in count two and set aside the sentence that was pronounced by the trial court. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 31ST DAY OF MARCH, 2009.

D. MUSINGA

JUDGE.

31/3/2009

Before D. Musinga, J.

Court: Judgment delivered in open court in the presence of:

Mobisa – cc

Mr. Nyakundi for Mr. Reuben Masese

Mr. Mutai for the State.

D. MUSINGA

JUDGE.