IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 19 OF 2014

BETWEEN

DAVID OPEDHI OIMA ……..……. APPELLANT

AND

REPUBLIC …….……. RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 516 of 2012 at Chief Magistrate's Court at Homa Bay, Hon. S. Ongeri, SRM dated on 21st September 2012)

JUDGMENT

1. In the subordinate court, the following charges were preferred against the appellant;

1. ***Gang defilement contrary to section 10 of the Sexual Offences Act, Act No. 3 of 2006***

   On the 6th day of April 2012 at [Particulars Withheld] in Homa Bay District of the Nyanza Province, having a common intention to penetrate the vagina of SAA a child aged 15 years was in the company of another not before court who intentionally caused his penis to penetrate the vagina of the said SAA.

2. ***Committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, Act No. 3 of 2006***

   On the 6th April 2012 in [Particulars Withheld] in Homa Bay District of the Nyanza Province, intentionally touched the buttocks and breasts of SAA a child of 15 years.

2. The prosecution called five witnesses to prove its case. The complainant, PW 1, recalled that the night of 6th April 2012 at about 9.00 pm while she going to the toilet she was confronted by a man who blindfolded her. She was dragged to the nearby field, beaten, forced to remove her clothes and defiled by some men. She recognised the appellant as one of the men. She knew him as he was a neighbour. Although he did not have intercourse with her, she stated that he held her legs apart while another man had sex with her. After the ordeal she was left to go home. She informed her sister, PW2, bathed and slept. The next morning she informed her father, PW 3, who took her to the Nyangol Health Centre for treatment where they were referred to Homa Bay District Hospital.

3. PW 2 confirmed that PW 1 went to the toilet at about 9 pm and came back at about midnight crying and limping. Her clothes were full of mud and blood. PW 1 told her that the appellant as

one of the people who assaulted her. PW 3, the father to PW 1 and PW 2, was a night watchman. When he came home in the morning he was informed of PW 1's ordeal. He took PW 1 to the Health Centre and the Hospital. He also reported the matter as Homa Bay Police Station where he was issued with a P3 form. He testified that he knew the appellant as his neighbour.

4. PW4, a medical doctor at Homa Bay District, examined PW 1 on 7th April 2012 after she had been referred from Nyangol Health Centre. She noticed that PW 1 had changed her clothes. PW 1's head, face and neck were swollen. She had bruises on the back, both upper limbs which were also slightly swollen. She opined that the injuries could have been caused by blunt injuries. She examined the vagina and found bruises on the left and right labia majora and lacerations on the vaginal wall and there was presence of blood from the vagina.

5. PW5, the police investigating officer, confirmed that he received the complaint and interrogated PW 1 and PW 2. He noted that PW 1 identified the appellant as the person who had stopped her and cut here under pant using a panga. He thereafter arrested the appellant whereupon he was charged.

6. After the close of the prosecution case, the parties submitted that there was no case to answer. In a ruling dated 19th July 2014, the learned magistrate discharged the accused from the main charge of gang defilement. He found that the prosecution has proved a *prima facie* case in respect of the alternative charge of indecent assault.

7. The appellant opted to give unsworn evidence. The tenor of his defence was that on the material night he slept home and did not go anywhere that night. He testified that PW 3 was his neighbour and that they had differed after his goats and sheep damaged his crops. DW 2, the mother to the appellant, also testified that PW 2 and the appellant had quarrelled over trespass by the goats and the matter was reported to the local chief. DW 3, the appellant's wife, confirmed that he was at home the material night was alleged to have defiled the PW 1.

8. In his judgment, the Learned Magistrate concluded as follows, *"From the above I proceed to discharge the accused on the charge of indecent assault but do reduce the charge of gang defilement to that of attempted defilement under section 9(1) as read together with section 9(2) of the Sexual Offences Act. I proceed to convict him of the charge of attempted defilement under section 216 of the CPC."* He proceeded to sentence the appellant to 10 years imprisonment.

9. In the petition of appeal dated 25th September 2014, counsel for the appellant, Mr Okoth, set out the following grounds of appeal;

1. *The Honourable Trial Magistrate misdirected himself on several matter of law and fact.*
2. *The learned Trial Magistrate erred in law in failing to note that all the ingredients of the offence of committing an indecent act as defined by section 2 of the Sexual Offences Act were not proved by the complainant.*
3. *The Learned Trial Magistrate erred in law of evidence in deciding the case against the weight of evidence in that:*

a. *he failed to note that no proper or thorough investigation was carried out by the investigating officer (PW5)*
b. *he failed to note that no age assessment report was ever filed or any birth certificate presented before court to determine the exact age of the complainant.*
c. *he failed to take into account the motive for frame up which emanated from a long standing dispute between the complainant and the accused.*
d. *the learned trial magistrate erred in law in failing to conduct a voire dire in light of the absence of medical evidence as to age assessment.*

4. *The learned Trial magistrate erred in law and in the interpretation of section 179 of the Criminal Procedure Code in convicting for the offence which was not charged and which was as well not*

proved by the evidence and which was not a lesser offence than that charged.

5. *The Learned Trial Magistrate erred in law in relying on the uncorroborated evidence of a single witness of events which occurred in darkness and in circumstances where all corroborative evidence of alleged defilement was erased or interfered with and where medical evidence also contradicted the evidence of prosecution witnesses.*
6. *The Learned trial Magistrate erred in law in convicting for a more serious offence than the offence charged which was not proved by the evidence.*
7. *The Learned Trial Magistrate erred in law in passing a sentence which was excessive in the circumstances.*

10. The State, through it learned counsel, Mr Oluoch, filed a cross-appeal dated 26th June 2014 in which raised the following ground;

1. *The learned magistrate erred in law in holding that the offence of gang defilement had not been proved beyond reasonable doubt.*
2. *The learned trial magistrate failed to appreciate the law with regard to common intention.*

11. The grounds outlined in the petition of appeal call upon the court to independently review the evidence and reach its own conclusion allowance being made for the fact that it never saw or heard the witnesses testify **(*Okeno v Republic* [1972] EA 32)**. The parties have made arguments on the entire appeal, however, for reasons that will become apparent, I will consider only 4 and 6 of the Petition of Appeal and the Cross-appeal as these are sufficient to dispose of this appeal.

12. I will deal with the issue raised in the Cross-petition first as it is connected with ruling made under **section 210** of the ***Criminal Procedure Code***. The prosecution set out to prove its case of gang defilement contrary to **section 10** of the ***Sexual Offences Act*** by proving that the appellant with others not before the court had the common intention to penetrate the vagina of SAA, a child of 15 years. Common intention is defined in **section 21** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** as follows;

> *Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such persons an offence is committed of such nature that its commission was a probable consequence of such purpose, each of them is deemed to have committed the offence.*

13. This provision has been the subject of application in several cases. In ***Rex v Mokaeri Kyeyune and 4 Others* 8 EACA 84**, the Court for Appeal for Eastern Africa observed that, *"Any person identified as having taken part in the beating must be regarded as linked by a common intention."* In ***Rex v Tabulayenka s/o Kirya and 3 Others* [1943] 10 EACA 51**, the same Court held that, *"To constitute a common intention to prosecute an unlawful purpose …. It is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault."* In ***Njoroge v Republic* [1983] KLR 197**, the Court of Appeal stated that, *"If several person combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endevours to effect the common assault of the assembly …… Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociated himself from the assault."*

14. PW 1 testified that the appellant was in the company of other persons when the act of defilement was committed and that he held her legs apart while another person defiled her. I find that there was ample evidence for the learned magistrate to consider whether the common intention was established. In addressing the issue of common intention, the learned magistrate did not consider whether the ingredients of establishing common intention were satisfied. In the ruling, he stated that, *"The medical evidence produced in court was challenged and the clinical officer admitted*

that the evidence was inconclusive and as such that evidence cannot be relied upon. Given that admission the charge of gang rape fails." The medical evidence would only go to confirm that there was indeed penetration but it is not the only evidence to prove penetration. In this respect the learned magistrate erred by not only failing to consider the issue of common intention as defined by **section 21** of the ***Penal Code*** in light of all the evidence but also concluding that medical evidence was insufficient to prove the common intention.

15. After calling upon the appellant to defend himself on the second charge of indecent assault of a child, the learned magistrate convicted the appellant of the offence of attempted defilement contrary to **section 9(2)** of the ***Sexual Offence Act***. Although the learned magistrate did not cite it, he appears to have invoked the provisions of **section 179** of the ***Criminal Procedure Code*** which provides as follows;

1. *Where a person is charged with an offence consisting of several particulars, a combination of some only which constitute a complete minor offence and the combination is proved by the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*
2. *When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.*

16. The crux of the argument by Mr Okoth is that learned magistrate erred in in the interpretation of **section 179** of the ***Criminal Procedure Code*** in convicting the appellant for the offence which he was not charged and which was as well not proved and which was not a lesser offence than that charged.

17. Asike-Makhandia J., in ***Kyalo Mwendwa v Republic*** **[2012]eKLR**, observed, in reference to **section 179** of the ***Criminal Procedure Act***, as follows, *"As it can be readily seen, the trial court has jurisdiction to impose a substituted conviction for a minor cognate offence only. In other words, for the trial court to invoke this section, the substituted conviction must be for an offence which is both minor and cognate to the offence charged …..… Section 179 of the Criminal Procedure Code, as it appears operates downwards as opposed to upwards…."*

18. The offence for which the appellant was called upon to defend himself was that of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act***. The offence attracts a sentence of not less than 10 years imprisonment. The offence of attempted defilement under **section 9(2)** of the ***Sexual Offences Act*** attracts a sentence of not less than 10 years imprisonment. Both offences attract the same penalty and it therefore clear that the offence for which the appellant was convicted was neither minor nor cognate to the offence for which he was called upon to defend himself. I therefore find and hold that the learned magistrate erred in convicting the appellant of the offence of attempted defilement. Furthermore, having acquitted the appellant on the charge of gang defilement, he could not proceed to convict the appellant of attempted defilement.

19. I note that even though there was evidence upon which the Court could find that the prosecution had proved the charge of gang rape, the appellant was not called upon to defend himself of the principal charge. In such circumstances, it would be prejudicial to convict the appellant even if, upon evaluation of the evidence, I concluded that the prosecution proved its case. It is for this reason that I have therefore exercised great circumspection in commenting on the facts and evidence.

20. The issue that remains is to be considered is whether the appeal should be allowed in its entirety or a retrial ordered. The principles governing whether or not a retrial should be ordered were enunciated in ***Fatehali Manji v Republic*** **[1966] EA 343** East Africa Court of Appeal stated, *"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a*

conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person." In ***Mwangi v Republic*** **[1983] KLR 522** the Court of Appeal held that, *"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."*

21. I find and hold that there is evidence on record which may support a conviction of the appellant. A retrial is appropriate in view of the errors committed by the trial court.

22. The appeal and cross-appeal are allowed to the extent I have outlined and the conviction is quashed. The appellant shall however be re-tried. He shall remain in custody until such time as he is taken before the Homa Bay Chief Magistrates Court to plead to the charges on **18th July 2014**.

DATED and DELIVERED at HOMA BAY this 17th day of July 2014

D.S. MAJANJA

JUDGE

Mr Okoth, instructed by G. S. Okoth and Company Advocates for the appellant.

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