IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 29 OF 2013

BETWEEN

JARSON ONDUSO OYUKO …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisumu (Chemitei, J.)

dated 16th July, 2012

in

H.C.CR.A. NO. 190 OF 2011)

****

JUDGMENT OF THE COURT

The appellant in this appeal ***Jarson Onduso Oyuko*** was charged before the Senior Resident Magistrate's Court at Bondo with the offence of defilement of a child contrary to ***Section 8 (4)*** of the Sexual Offences Act No. 3 of 2006 in that:

> *"On the 13th day of February 2009, at [particulars withheld] sub-location in Rarieda District within Nyanza Province, unlawfully and intentionally committed an act, which caused penetration with M M a child of the age of 8 years."*

There was also alternative count of Indecent Act with a child contrary to ***Section 11 (1)*** of the Sexual Offences Act Number 3 of 2006 in which the date and the place of the offence and the complainant were the same. He denied both the main charge and the alternative and the trial proceeded with the prosecution availing four witnesses whereas the appellant apparently gave unsworn statement in his defence. We say *"apparently"* because when the court, in compliance with the provisions of ***Section 211*** of the Criminal Procedure Code asked him the type of defence he would offer, he is recorded as having said:-

> *"I will give an unsworn statement. I have no witness,"*

but when he gave his statement, it was recorded as *"Male Adult sworn statement in Dholuo"* and at the end of that statement there was no record of his having been cross-examined or of any chance given to the prosecution to cross-examine him. This entire scenario suggests that the statement was unsworn.

Be that as it may, after the full hearing, the learned Senior Resident Magistrate *(E.S. Olwande)* found the appellant guilty of a lesser offence of attempted defilement of the child and convicted him under ***Section 9 (2)*** of the Sexual Offences Act as she found that the offence of defilement was not proved. After mitigating factors were offered to the court and duly considered, the appellant was sentenced to serve ten years imprisonment. He felt dissatisfied and appealed to the High Court vide *Criminal Appeal No. 190 of 2011*. That appeal was dismissed by *Chemitei, J.* in a judgment dated and delivered on 16th July, 2012. In dismissing the appeal, the learned Judge addressed himself thus:-

> ***"For the foregoing reason I hold that the charge of attempted defilement was rightly proved by the trial court. Although the charge sheet does not have this offences as a count, the court nevertheless was right in finding that the ingredients had been rightly established by the prosecution. There was no prejudice suffered at all by the appellant since he had the opportunity to cross-examine on all the issues raised. I do therefore dismiss the appeal."***

The appellant is still dissatisfied with that judgment and hence this appeal premised on three grounds in a handwritten home-made Memorandum of Appeal filed by the appellant on 15th July 2014, the date the appeal was heard. These grounds are:

> *"1. That the appellate Judge gravely erred in law in failing to find that my conviction and sentence was entered on a defective charge since there was no time I was asked to plead to the offence of attempted defilement.*
>
> *2. That the High Court Judge erred in law in failing to observe that the case was not properly investigated as required by law hence occasioning a miscarriage of justice.*
>
> *3. That the appellate Judge erred in law and fact in fail (sic) to observe that the alleged torn clothes were not recovered at the alleged scene of crime by the police raising more doubts as to whether their admissibility as the exhibits was safe."*

Before us, the appellant who conducted his appeal in person submitted written submissions in which he mainly stated that it was wrong to convict him of attempted defilement, a charge against which he never pleaded and thus had no opportunity to advance any defence against. In his oral submissions before us, the appellant stated that he never committed the offence alleged and that the entire saga was fabricated against him because of land disputes. He did not state who were in dispute with him on land matters but he sought assistance from the Court as in any event he was sick as well and he had backache.

In opposing the appeal, Mr. Abele, the learned Assistant Director of Public Prosecutions, agreed that the original charge was defective as the appellant was charged under ***Section 8 (4)*** of the Sexual Offences Act which could not apply to the facts that were adduced as the complainant was a girl far below the age of sixteen years whereas the provision was for children between the age of 16 and 18. But, he submitted that that defect did not affect the case as in this case the appellant was convicted pursuant to ***Section 9 (2)*** of the Sexual Offences Act which provided for attempted defilement and thus the defect was cured. He submitted further that it was proper to convict an accused person as was done here in respect of a lesser offence if the same was proved at the time of hearing. It was not necessary for an accused to plead to such a lesser offence in law. He also submitted that the case was properly investigated and that complaint had no merit. Lastly, Mr. Abele was of the view that the clothes that were relevant to the case were properly admitted as exhibits as there is no law that requires that only the clothes found at the scene be admitted.

We have considered all the above anxiously but first the brief facts giving rise to the entire case. The complainant ***"M.M."*** *(PW2)*, who was then aged eight (8) years, is an orphan and was as on 13th February living with her grandmother ***"M.O."*** *(PW1)*. On that date M.O. went to the lake leaving M.M. at home with her baby brother. M.M. said in evidence that the appellant whom she knew very well, went

to their house. He found M.M. standing at the door to her grandmother's house. He held her and took her to a sofa inside the house, tore her clothes and then the appellant removed or lowered his trouser and pant, and according to M.M., the appellant inserted his *"thing"* in her and she felt pain and cried out. At that juncture, by some sheer luck, M.O., who was approaching the house heard her scream, approached the house and found the door to her house shut, but not locked. She pushed the door and entered. On entering, she found the appellant holding M.M. on a chair. The appellant appeared slightly drunk. He had unfastened his fly and his trouser was slipped to the knees whereas M.M. was on the chair, sweating and screaming. M screamed particularly as she knew the appellant was H.I.V. positive. M.O.'s screams attracted village elder to the scene. The appellant attempted to escape but was arrested by the members of the public. M.O. noted that the child's throat was swollen, her clothes torn, her panty was torn and some fluids were on her thighs. The child was taken by M.O. to Bondo District Hospital while the appellant was handed over to **Samwel Onyango Bwege** *(PW3)* who was the Assistant Chief of [particulars withheld] sub-location where the incident took place by one ***Lawi Ongonga***. Samwel handed over the appellant to ***PC Morris Kimotho*** *(PW5)* of Aram Police Station. The complainant was later examined by ***Joel Olilo*** *(PW4)*, a clinical officer at Bondo District Hospital who found that her labia was normal, but she had discharge from her vagina and there were pus and yeast cells as revealed by High Vaginal Swab but no spermatozoa was seen. That is the evidence that formed the prosecution's case.

On being put to his defence, the appellant stated that he used to work for the complainant's grandmother as a herdsman. On the relevant date he went to untie the cows, he did not find M.O. but found M.M. whom he asked for water and gave him water. He drunk that water and then sat down. After ten minutes M.O. came home and apologised for having not made tea for him. He then went on looking after cattle in the nearby area for about 30 minutes. After that he went back home for breakfast but found village elder. M.M. then made a report to the village elder who then confronted him, arrested him and started beating him. All this, according to the appellant was as a result of grudges between M.O. and himself. He was taken to Aram Police Station and was charged with the offence.

As we have said, we have considered the record, the submissions by the appellant and by Mr. Abele. On the main complaint that the appellant was convicted of an offence in respect of which he did not plead, our view is that nothing turns on that complainant. The offence for which the appellant was charged was that of defilement of a child and much as the provision under which he was charged was not the correct one in that he was charged with defilement under ***Section 8 (4)*** of Sexual Offences Act No. 3 of 2006 which is to be invoked in case of defilement of a child between the age of sixteen and eighteen years whereas the child in this case was aged eight years and therefore the proper charge should have been under ***Section 8*** **(1)** as read with ***8 (2),*** nonetheless, ***Section 9 (1)*** and ***(2)*** of the same Sexual Offences Act states as follows:

> ***"9 (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.***
>
> ***9 (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."***

This is a lesser offence than defilement under ***Section 8 (1)*** as read with ***8 (2)*** of the same Act which attracts a sentence of life imprisonment. ***Section 180*** of the Criminal Procedure Code states:-

> ***"Where a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."***

Thus even if ***Section 9 (1)*** and ***(2)*** of the Sexual Offences Act No. 3 of 2006 had not existed, the court would have still perfectly convicted the appellant of the offence of attempting to defile the child going by the provision of ***Section 180*** of the Criminal Procedure Code. In any case and to add to the above, in law, the court in hearing a main charge, is entitled, if it finds that the main offence has not been proved but a lesser offence has been proved to proceed to convict the accused for the lesser offence within the same category of offences proved by the evidence before the court. It is upon that principle that a person charged with murder can eventually, after full hearing be convicted of manslaughter which is a lesser

offence than murder. All that the court cannot do is to find a person charged with a lesser offence guilty of a more serious offence that carries a more serious sentence. In short that complaint by the appellant, as we have stated lacks merit.

As to complaint that the plea was not properly taken, we think that complaint was based on the submission that the charge of attempted defilement was not put to the appellant and his plea taken on it. In our view, that was not necessary as we have explained because that decision whether to convict on the main charge or on the lesser offence can only be reached after the entire evidence and defence case is heard. It would thus have been impractical at that stage to frame up the charge for the lesser offence, take a plea on it and start the case afresh. That would not be done and is not done. In any case the appellant had the opportunity during the hearing of the entire case to cross examine witnesses on all aspects of the case and so was not prejudiced in any way. He for example heard M.O. say that she arrived in the nick of time and found when he had just unzipped his trouser and lowered it to his knees with M.M. in-front of him on a sofa with her pants and clothes torn. What could that scenario portray and what was he next going to do or what could he have done already as the child was screaming and said she felt pain? In our view, the appellant was lucky that medical report did not go to the extent required and like Mr. Abele, we too feel Joel Olilo's evidence fell far short of what was required. However these are matters of fact and we abide by the findings on that report by the Resident Magistrate and the first appellate court and so we would not impose our own view, but we think the two courts were plainly right in reaching the conclusions they reached in convicting the appellant of a lesser charge of attempted defilement pursuant to ***Section 9 (2)*** of the Sexual Offences Act.

Lastly as to the help sought by the appellant, we in law have no jurisdiction to consider severity of sentence as that is a matter of fact - see ***Section 361 (1) (a)*** of the Criminal Procedure Code. In any event, as we have said he was lucky that he was not charged under ***Section 8 (1)*** as read with ***8 (2)*** of the Sexual Offences Act which would have earned him the appropriate sentence of life imprisonment as what he was proved to have done deserved nothing less than that as he sought to destroy a young innocent life.

To conclude, this appeal lacks merit. It is dismissed.

Dated and Delivered at Kisumu this 19th day of September, 2014.

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR