REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 255 OF 2009

LESIIT, J

CHARLES BUNDI BAIBURI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(An appeal from the Judgment and sentence in Marimanti Criminal Case Number 2319 of 2013)

JUDGMENT

1. The Appellant **CHARLES BUNDI BAIBURI** was convicted of Defilement of a girl contrary to section 145(1) of the Penal Code. He was sentenced to serve 25 years imprisonment, on 10th December 2004.
2. Being aggrieved by the conviction and sentence he filed this appeal. The Appellant's counsel, Mr. Muriithi relied on supplementary petition of appeal dated 24th May, 2001 in which the following five grounds are cited.

i. **That the learned trial magistrate erred in law and in facts in making presumptions which had no basis in evidence before him which presumption led him to misdirect himself and make a wrongful conviction.**

ii. **That the learned trial magistrate misdirected himself on the effect of contradiction and inconsistency and the probative value of evidence tendered before him.**

iii. **That the learned trial magistrate erred in law in relying upon the evidence of the clinical officer without his qualification proffered therein.**

iv. **That the sentence meted was harsh, excessive in the circumstance and bad in law.**

v. **That the learned trial magistrate further erred in law in failing to consider and indeed in dismissing the defense put forth by the Appellant which defenses were credible and disproved the prosecution.**

vi. **Since I cannot recall all what transpired in court during my conviction, I request the court to avail me the court proceedings and judgment to enable me raise more grounds to be adduced during the hearing of my appeal.**

3. Mr. Muriithi urged that the trial before the lower court was conducted largely in a language the Appellant did not understand; contravening S.77 (2) of Constitution applicable then, and section 198(1) of the Criminal Procedure Code, and that same rendered the trial a nullity.
4. Counsel urged that the charge was defective as in the particulars the word **"unlawful"** was not included. Finally counsel urged that the sentence was excessive being 25 years while the maximum sentence the offence of defilement under the Penal Code was 14 years imprisonment.
5. On the issue of a retrial Mr. Muriithi urged that Appellant had served 9 1/2 years of the sentence and that due to passage of time, the order for retrial should not be made.
6. Mr. Moses Mungai, Senior Prosecution Counsel represented the Respondent in this appeal. Counsel urged that the State was not opposing the appeal. Learned Prosecution Counsel urged that the language used during plea at the trial was not indicated; that the maximum sentence for the offence was 14 years; and on retrial, the State was not requiring same as it would not be possible to get witnesses.
7. I have carefully considered this appeal, together with the submissions by Mr. Muriithi for the Appellant and Mr. Mungai for the Respondent. I have subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation and have drawn my own conclusions. I have borne in mind that I neither saw nor heard any of the witnesses and have given due allowance.
8. I am guided by the court of Appeal decision in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic** Criminal Appeal No. 272 of 2005 as follows:-

"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs . Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for ht fact that the trial court has had the advantage of hearing and seeing the witnesses."

9. Regarding language in which the plea was taken, it is correct that it was not indicated. However the language in which the trial was held was clearly indicated. Since the Appellant pleaded not guilty to the charge, any prejudice he may have suffered at the plea stage was taken care of at the trial. I do not see what prejudice he suffered since he pleaded not guilty to the charge and the case was heard fully and his defence taken as well. Any prejudice he may have suffered at the plea stage was compensated for at the trial. The error committed by the learned trial magistrate at the plea stage was therefore not fatal, and the same did not render the trial a nullity. Nothing turns on this ground.
10. Mr. Muriithi urged that the particulars of the charged should have indicated that the offence was unlawful. For that proposition counsel relied on the case of **Jonathan Kinuthia Vs Republic Nyeri High Court Criminal Appeal No. 373 of 2003** and one of my own **Leteyu Ole Pala Kesu vs Republic**, Nakuru High Court Criminal Case No. 382 of 2000.
11. I have considered both cases and the decisions reached by both judges. In both cases the courts held that Section 145(1) of the Penal Code made it clear that the offence is committed if the act of carnal knowledge of a girl under the age of sixteen is unlawful. That it was possible to have carnal knowledge of a girl under sixteen years which is not unlawful.
12. The Court of Appeal settled the issue when it ruled that there is no time that carnal knowledge of a girl under the age of sixteen years can be lawful. The submission by counsel that the word "unlawful" must be stated in the charge in order not to be defective was made *per incurium*. Nothing turns on this point.

13. Regarding the sentence the Appellant was charged and convicted under section 145(1) of the Penal Code. The trial was concluded in 2004, long before the Sexual Offences Act came into force. A person convicted under S.145 (1) of the Penal Code was liable to be sentenced to a maximum of 14 years imprisonment.
14. The sentence of 25 years imprisonment was absolutely illegal and bad in law. Clearly the sentence did not have statutory under pinning. The same cannot be allowed to stand. Accordingly I allow the Appellant's appeal against sentence and set aside the sentence of 25 years imprisonment.
15. The Appellant has served 9 years and 7 months of the illegal sentence imposed against him. This is more than 2/3rds of the sentence he should have faced was he sentenced to the maximum sentence he was liable to face at the time. In the circumstances I find that the Appellant has served sufficient sentence.
16. In the result the sentence of 25 years imprisonment is substituted with a sentence for the period the Appellant has already served.The Appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED THIS 24th DAY OF JULY, 2014

LESIIT J.

JUDGE