REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HIGH COURT CRIMINAL APPEAL NO. 58 OF 2013

SHEM VILORY OCHIENG…….APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(An Appeal arising out of the judgment in Busia CMC.No.2213 of 2012 delivered by J. N. MARAGIA R.M on 5/7/ 2013)

J U D G M E N T

1. In convicting Shem Vilory Ochieng (the Appellant) for the offence of Defilement contrary to section 8(1) (3) of the Sexual Offences Act (Act No. 3 of 2006), the Trial Court substantially relied on the evidence of the Complainant which it found it to be **"credible, consistent and unchallenged**". During the course of arguing this Appeal, the Appellant complained that the Trial Court never gave him an opportunity of Cross-examining the Complainant.
2. On this alone, Mr. Owiti appearing for the State conceded to the Appeal. This Court has looked at both the typed and handwritten (just to be sure) proceedings of the Trial Court. There is no record that the Appellant Cross-examined the Complainant or was invited to do so. The record shows that upon considering the Complainant to be a minor, the Trial Learned Magistrate conducted a *Voire Dire* examination and then held;

   "**The child understands the difference of truth and lies. She possessed with sufficient knowledge to tell the truth however, she does not know the nature and meaning of an oath. She will give an unsworn statement".**

3. The Complainant's evidence was the only direct evidence and although the Trial court found that it had been corroborated by other evidence, a conviction would not have been possible without her direct evidence. As it has turned out, there is no record or evidence that the Accused person was given an opportunity to Cross-examine this important witness. At the Trial, the Appellant was unrepresented so observance of The provisions of Section 208 (B) of The Criminal Procedure Code was vital. That Section provides:-

   "If the Accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the Accused person <u>whether he wishes to put any questions to that witness and shall record his answer</u>" (my emphasis)

These provisions are intended to safeguard the right of an Accused to Cross-examine a Prosecution witness.

4. The evidence of the Complainant, though unsworn, was admitted after the Court satisfied itself that she possessed sufficient knowledge to tell the truth. Her evidence was not exempt from Cross-examination. The right to Cross-examine a Prosecution witness is not only guaranteed by statute (section 208(3) above) but by The Constitution 2010. Article 50(2)(k) includes the right of an Accused person to challenge evidence as a tenet of fair Trial. The denial of that right vitiates any resultant conviction. For that reason alone, this Court does hereby sets aside the conviction entered against the Appellant on 26/06/2013 and the sentence imposed on him on 5/07/2013.
5. This Court was urged by the State Counsel to order a retrial. Of course, the Appellant would hear nothing of that. The principles upon which a retrial can be ordered were restated in **Fatehali Manji v. The Republic [1966]343** at page 344 as follows;

   "They are the following: 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 purpose 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 an injustice to the accused person". (my emphasis)

6. This Court without going into much detail of the evidence before the Trial Court has formed the opinion that on a proper consideration of the admissible or potentially admissible evidence, a Trial Court may return a conviction. The opinion is borne out of the evidence of PW1 as to how she was defiled by a person she referred to as 'Shem' and thereby sustained injuries to her anus. That this happened in a bush near the home of PW2 and PW3. There was evidence by her Aunt (PW2) and PW3 that "Shem" (who they identified as the Appellant) was around their home at about the time PW1 is said to have been defiled. Then there is evidence of PW7, a Clinical Officer at Port Victoria Hospital who medically examined PW1 a day after the incident. His findings were that the victims' vagina was broken with tears and her anus swollen. That suggested some forceful penetration.
7. This Court must nevertheless consider whether a retrial is likely to cause an injustice to the Appellant. The Appellants first appearance was on 17/12/2012, on which day he was granted bond. For whatever reason, the Appellant remained in custody until the end of his Trial on 5/7/2013. This would be about 7 months later. At the time of delivering this Judgment the Appellant would have served prison for 17 months. This should be added to the period that he was in remand of 5 months. He has therefore suffered incarceration for about 24 months on proceedings that are vitiated. Would it be fair to subject him to retrial?
8. The period he has suffered incarceration must be weighed against the possible sentence that the offence carries and the nature of the offence. The offence carries a minimum sentence of 20 years and the Appellant was indeed sentenced to this minimum. Considering that the Appellants sentence may be eligible for remission, service of 24 months cannot be minimized. Yet one must not lose sight of the plight of the victim. If true (an issue to be determined on evidence) the assailant defiled the victim, a 12 year old girl, by forcing his penis into vagina and thereafter into her anus. She sustained injuries from these forceful penetrations. In its wake the incident must have left the victim in physical pain and psychologically trauma. Weighing the need for the victim to find just vis-à-vis the hardship that a re-trial will certainly cause the Accused, this Court has reached a decision that the Appellant should stand re-trial. An anxiety that this Court was too hard on the Appellant was removed when I read the decision of the Court of Appeal in **Samuel Wahihi Ngugi –vs- Republic** [2012] e K LR. In somewhat similar circumstances, the Court of Appeal set aside the conviction of the Appellant on the offence of having carnal knowledge of a person against the order of nature contrary to Section 162 (a) of The Penal Code. There the victim was a boy aged 12 years. Although the Appellant had served close to 8 years of the 21 year prison sentence, the Court ordered a retrial after remarking,

   "The appellant has been in prison for close to eight years. He was sentenced to 21

years imprisonment. On the other hand the offence that was allegedly committed was beastly and the victim will suffer traumatic butts for the rest of his life."

The same can be said of the matter before Court.

9. So as to lessen the suffering that a delayed Trial can cause, this Court directs that the retrial be commenced and finalized without any delay. The subsequent Trial shall be conducted before a Magistrate other than the Magistrate who heard and determined the first Trial. The Appellant will be released into Police custody and be produced before Court for retrial within 24 hours of the date of this judgment.

F. TUIYOTT

JUDGE

DATED, DELIVERED AND SIGNED AT BUSIA THIS 17TH DAY OF DECEMBER, 2014.

IN THE PRESENCE OF;

KADENYI……..COURT CLERK

OBIRI……FOR STATE

APPELLANT PRESENT IN PERSON