



No.300
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 124 OF 2011

BETWEEN

EZEKIEL ORAMAT SONKOYO APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(Appeal arising from the original conviction and sentence in Kilgoris SRM's
Criminal Case No. 795 of 2011 by B.O. Ochieng, SRM on 24th June, 2011)**

JUDGMENT

1. The appellant herein, Ezekiel Oramat Sonkoyo was arraigned before the Senior Resident Magistrate's Court at Kilgoris on one count of defilement of a girl contrary to **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act, No.3 of 2006**. It was alleged that he committed the said offence on the 17th day of August 2010 in Transmara District within Narok County when he intentionally and unlawfully caused his penis to penetrate the vagina of one L.S, a girl aged 14 years without her consent.
2. In count II, he was charged with child trafficking contrary to **section 13 (a), (b)** of the **Sexual Offences Act No. 3 of 2006**, namely that on the 17th day of August 2010 in Transmara District within Narok County jointly with others not before court, knowingly and intentionally made travel arrangements and transportation within Kenya for the purpose of commission of sexual offences against L.S a girl aged 14 years.
3. The appellant denied both counts when he was called upon to plead. The case went to full trial during which the prosecution called five (5) witnesses.
4. From the testimonies of the five (5) prosecution witnesses, the facts of the case are as follows: The appellant and the complainant in this case are neighbours and became lovers around the year 2009. In 2010, the complainant joined S[...]High School as a Form I student. The complainant had been staying with her maternal uncle, one W.L, PW2 (L) since the year 2000. W.L was a teacher at S[...]Primary School.
5. On the 17th August 2010, the complainant was at L's home for the August holidays when the appellant went there and asked the complainant to accompany him to his home. The complainant readily

agreed to do so and the two left, arriving at the appellant's home at about 9.00 p.m. that night. The complainant left L's two children aged 6 years and 5 months respectively unattended when she took off with the appellant.

6. At the appellant's home, the pair slept together on the night of 17th August 2010 and had sex. The appellant expressed his desire to marry the complainant. To actualize his desire, to which the complainant had no objection, they left for Eldoret on the 18th August 2010 arriving there at the appellant's mother's house at about 11.00 p.m. The two slept together that night and had sex. On the 19th August 2010, the two left for the appellant's grandmother's house in one of the villages around Eldoret. On arrival, the two were welcomed by their grandmother. They pitched tent at the grandmother's house for two (2) months until about 30th September 2010 when they were discovered by L who had mounted a search for the complainant immediately she went missing. He also reported the disappearance of the complainant to the police station on 23rd August 2010. The report at the police station was received by No. 88807 police constable David Murai, PW4, who was also the investigating officer of this case.

7. On the 30th September 2010, L and D.K, PW3, the complainant's father, found both the appellant and the complainant at the home of one J.A. They were both arrested and escorted to the police post from where they were escorted to Kilgoris police station much later on 21st February 2011 because the complainant was taken back to school to continue with her studies. After further investigations, including a medical examination carried out on the complainant by Dr. Dickson Nengusu, PW5, of Transmara District Hospital, the appellant was charged with the 2 offences.

8. According to Dr. Nengusu, the complainant's hymen was found to be perforated and not intact, an indication that there had been penile penetration of the complainant's vagina. The fact of that recent penile penetration was also confirmed by presence of epithelial cells in the complainant's urine at the time of examination. The complainant's HIV status was found to be negative but Dr. Nengusu was unable to ascertain when the most recent penile penetration was though he said it appeared it had taken place two or three days before the examination which he carried out on 3rd October 2010. Dr. Nengusu filled the P3 form which he produced as **P. Exhibit 4**. The doctor approximated the child's age to be 14 years.

9. In his sworn statement, the appellant freely admitted that he had taken the complainant to his home on the 17th August 2010 by mutual consent and later to Eldoret to the grandmother's home where they stayed until they were found out on 30th September 2010. He said that the complainant became confused about the whole arrangement because her parents did not approve of it. The appellant also freely admitted that throughout the two months, the two of them were "**married**" and that even before this particular incident, he had had sex with the complainant whom he described as his lover.

10. Upon completion of the evidence by both sides, the trial court carefully considered the same and was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court also found that the complainant was aged about 14 years. Upon conviction, the appellant who told the court that he was 21 years old at the time of the hearing of the case in mid 2010, was sentenced to 20 years' imprisonment as by law provided.

11. The appellant was aggrieved by both the conviction and the sentence. He has appealed to this court for redress. The Petition of Appeal drawn on the appellant's behalf by the firm of Oguttu-Mboya & Co. Advocates raises the following twelve (12) grounds of appeal:-

1. *The Learned Trial Magistrate erred in law in proceeding with, entertaining and/or convicting the Appellant of the offence charged, when the Appellant's Constitutional Rights had been violated and/or infringed upon, contrary to the provisions of Article 49 (1) (f) of the Constitution, 2010.*

2. *The Trial, conviction and sentence of the Appellant was Unconstitutional and thereby null and void.*

3. *The Learned Trial Magistrate erred in law in finding and holding that the offence of Defilement as defined and captured vide Section 8 (3) of the sexual Offences Act, No. 3 of 2006, had been proved as against the Appellant, as by law required.*

4. *The Learned Trial Magistrate failed to appreciate and/or consider the essential ingredients, necessary in proving the offence charged, including, proof of the age of the complainant, which was material before determining, whether the acts complained of constituted and/or amounted to the offence charged.*
5. *The Learned Trial Magistrate erred in law in failing to take into account, consider and/or heed the evidence of the complainant, including the concession by the complainant that she volunteered into the acts complained of, thus creating an Impression that the complaint was of age and hence capable of granting the requisite consent.*
6. *The Learned Trial Magistrate failed to consider and/or take into account the provisions of Sections 8 (5) of the Sexual Offences Act, No.3 of 2006 and thereby denied and/or deprived the Appellant of a Statutory Defence, which was available to and/or in favour of the Appellant.*
7. *The Learned Trial Magistrate failed to address his Judicial mind to the totality of the circumstances obtaining and/or underlining (sic) the commission of the offence complained of. Consequently, the Learned Trial Magistrate arrived at a conclusion, which was/is contrary to the evidence on record.*
8. *The Learned Trial Magistrate failed to appreciate and/or discern the material contradictions and/or discrepancies apparent in the prosecution's case and more particularly, on the age of the complainant. Consequently, the conviction rendered by the trial court is erroneous.*
9. *The Learned Trial Magistrate misconceived, misapprehended and misapplied the evidence of the Appellant and thereby failed to discern the salient and pertinent features of the Defence, including the impression that the complainant, was of age.*
10. *The Learned Trial Magistrate erred in law in disregarding, ignoring and/or failing to appropriately consider the appellant's defence. Consequently, the Learned Trial Magistrate has occasioned a miscarriage of justice.*
11. *The Learned Trial Magistrate erred in fact and in law in failing to properly and/or at all, evaluate and/or analyze the evidence on record and consequently arrived at an erroneous decision contrary to the weight of evidence on record.*
12. *The judgment of the trial learned trial magistrate is wrought and/or fraught with illegalities.*

12. This matter is before me as a first appeal. On a first appeal, the appellate court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own decision in the matter. The only difference between this appellate court rehearing of the case and the hearing before the subordinate court is that this court has no benefit of seeing and hearing the witnesses as did the trial court. Because of this difficulty, this court must exercise caution when looking at the judgment of the trial court, to see whether indeed the findings of that court should be supported or interfered with. This was indeed the holding in a number of prominent decisions that set out the duty of the first appellate court. See such cases as **Okeno –vs- Republic [1972] EA 32; Pandya –vs- R[1957] EA 336 and Mwangi –vs- Republic [2004] 2 KLR 28.**

13. I have now reconsidered and evaluated the whole of the evidence that was placed before the trial court. I have also heard submissions by counsel at the hearing of this appeal. In arguing the appeal, counsel for the appellant compressed the first 11 grounds into three blocks as follows:- grounds 1 and 2 into block one; grounds 3,4,5 and 6 into block two and grounds 7-11 into block three. Ground 12 was abandoned.

14. On grounds 1 and 2 of the appeal counsel submitted that since the appellant was not arraigned before court within the statutory 24 hours his constitutional rights as captured by **Article 49 (1)**

(f) of the **Constitution of Kenya, 2010** were thereby infringed and that accordingly the appellant was entitled to an acquittal. It was also submitted that **Article 20 (3) (b)** of the Constitution places a duty upon this court to adopt a criminal practice approach that favours the observance of fundamental freedoms. It was contended that in light of the violation of the appellant's constitutional rights, the whole trial before the trial court was flawed, and a nullity and that this should form the basis of an acquittal.

15. Regarding grounds 3 through to 6, counsel submitted that the evidence adduced by the prosecution, and in particular the testimony of PW1 did not show that the appellant committed the offence of which he was charged. It was further submitted that the ingredients of the charge of defilement as defined by the Sexual Offences Act were not proved by the prosecution. It was pointed out that what may have happened between the appellant and the complainant, if it happened at all, was a voluntary affair and therefore neither intentional nor unlawful. Further, counsel submitted that the age of the complainant in this case was not proved to the required standard. That in any event, there was evidence showing that the complainant was a person of mature age and that if the trial court had carefully addressed itself to the evidence on record, it would have found that no offence was disclosed by the evidence on record.

16. Finally, counsel submitted that the prosecution evidence was so contradictory that it should not have formed the basis of a conviction. Counsel singled out the evidence of PW5, Dr. Dickson Nengusu which showed that it was not him who carried out age assessment on the complainant and that the date of the alleged assessment was not properly given by PW5. Counsel also faulted the trial court's judgment for failure to comply with **section 169** of the **Criminal Procedure Code**.

17. The learned state counsel did not oppose the appeal, on the main ground that the age of the complainant was not proven. That giving the complainant's age as being about 14 years was not good enough, given the strict provisions of **section 8** of the **Sexual Offences Act**.

18. On the issue of the alleged violation of the appellant's constitutional rights, the learned state counsel submitted that the alleged violation of **Article 49 (1) (f)** of the **Constitution of Kenya** does not and cannot form the basis of an automatic acquittal as the appellant can be adequately compensated in a civil suit for such compensation. **Article 49 (1) (f)** of the **Constitution of Kenya, 2010** reads:-

“49 (1) An arrested person has the right –

- (a) ---
- (b) ---
- (c) ---
- (d) ---
- (e) ---
- (f) **to be brought before a court as soon as reasonably possible, but not later than –**
- (i) **twenty four hours after being arrested; or**
- (ii) **if the twenty-four hours ends outside ordinary court hours, or**
- on a day that is not an ordinary court day, the end of the next court day;**
- (g) ---
- (h) ---“

19. In the recent case of **Julius Kamau Mbugua –vs- Republic – Criminal Appeal No. 50 of 2008 [2010] e KLR**, the appellant alleged before the Superior court that the state was in contravention of the appellant's right to personal liberty under **section 72 (1) and (3)**, violation of his right of protection against inhuman treatment under **section 74 (1)** and violation of his right of freedom of movement under **section 81 (1)** of the repealed Constitution of Kenya. The appellant in particular complained that after his arrest on 7th November 2005 on allegations of having murdered his wife, he was kept in police custody for an unreasonably long period of 107 days until 8th February 2006 when he was charged in court. The appellant had sought, inter alia a declaration that the unlawful detention for a period of 107 days and the subsequent charge amounted to a gross violation of the appellant's constitutional rights guaranteed by **sections 72 (1) and (3); 77(1) and 81(1)**. The Appellant therefore sought to “be discharged and the state be forever enjoined from arresting, prosecuting or charging the petitioner for any offence or charge of a similar nature

20. After full hearing of the petition by the Superior court, the petition was dismissed on the ground that the issue of breach had been brought too late in the day and a mere afterthought. The appellant appealed to the Court of Appeal. Reliance for the appeal had been placed on the cases of **Albanus Mwasia Mutua –vs- Republic – Criminal Appeal No.120 of 2004** (unreported) and **Ndede – vs- Republic [1991] KLR 567**. In dismissing the issues raised in the case before them, the Court of Appeal noted that the **Mutua** and **Ndede** decisions had had immediate ramifications on the criminal justice system. The court made other decisions such as **Paul Mwangi Murunga –vs- Republic – Criminal Appeal No.35 of 2006** (unreported). In the case, the appellant had been convicted and sentenced to death for the offence of capital robbery. During the hearing of the appeal before the Court of Appeal, the advocate appearing for him raised the issue of unlawful detention for 10 days under **section 72 (3) (b)** before he was taken to court. The appeal was allowed on this ground.

Also see **Gerald Macharia Githuku –vs- Republic, Criminal Appeal No.119 of 2004** (unreported) and **Samuel Ndungu Kamau & another –vs- Republic – Criminal Appeal No.223 of 2006** (Nairobi) for the earlier liberal view held by the Court of Appeal on issues of violations of Constitutional rights of accused persons.

21. However, starting with the case of **Dominic Musie Mwalimu –vs- Republic – Criminal Appeal No.217 of 2005**, (unreported) the Court of Appeal has taken a paradigm shift in its jurisprudence by declining to entertain grounds of breach of **section 72** of the repealed **Constitution** when such issues are raised for the first time on appeal, holding that where an appellant who was represented by counsel, **“failed to raise such complaint in the trial court, --- the appellant must be treated as having waived his right to complain about the alleged violations of his constitutional rights before he was brought to court. (see James Githui Waithaka & another –vs- Republic, Nyeri Criminal Appeal No.115 of 2007 (unreported) and Protus Madakwa alias Collins & two others –vs- Republic, Criminal Appeal No.118 of 2007 (Nairobi) (unreported).”**

22. In the case of **Republic –vs- David Geoffrey Gitonga, Criminal Case No.79 of 2006** (Meru), Anyara Emukule J., refused to acquit the accused on alleged violations of his constitutional rights and gave the following reasons for his refusal to acquit the accused:-

“I am aware that contrary opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such a trial is not a nullity at all. These are my reasons. First, the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order, and indeed, nullity is non-curable. Secondly, for a trial to be void in law, it must be shown either that the offence for which the accused is being tried is non-existent, or that the authority or court seized of the matter has no authority to do so. It is a public policy of all civilized states that offenders be subjected to due process in respect of defined offences, and by duly competent courts or tribunals.”

23. I entirely and respectfully agree with the considered view of Emukule, J.

24. The Court of Appeal has since consistently strengthened the paradigm shift, and has drawn liberally from other jurisdictions such as the commonwealth, in which it has been held that the rights of an accused person should be considered separately from the overriding question as to whether or not there has been a fair trial.

25. In the **Julius Kamau Mbugua case** (above) the Court of Appeal held inter alia, that though an accused person had a right to trial without delay, it was not a right not to be tried after undue delay save in some jurisdictions such as Scotland and that it is not designed to avoid trials on the merits. The court concluded by saying that:-

“if it had been found that the extra judicial detention was unlawful and that it related to the trial, nevertheless we would still consider the acquittal or discharge as a disproportionate, and draconian remedy seeing that public security would be compromised. If by the time an accused person makes an

application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then the only appropriate remedy under **section 84(1)** would be an order for compensation for such breach. The rationale for prescribing monetary compensation in **section 72 (6)** was that the person having already been unlawfully arrested or detained, such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damages.” See **Kihoro –vs- Attorney General of Kenya [1993] 3 LRC 390.**

26. Applying the above principle to the instant case, I hold the considered view that the breach complained of by the appellant at this stage cannot be undone, and accordingly the appellant can only be compensated for that breach by way of damages. The appellant’s block of grounds of appeal based on the issue of breach must therefore fail.

27. I now move on to consider whether the prosecution proved its case against the appellant beyond any reasonable doubt. Counsel for the appellant has raised two concerns: (a) uncertainty about the age of the complainant and (b) inconsistencies in the prosecution evidence. The appellant’s complaint about the uncertainty of the complainant’s age is informed by the fact that the prescribed sentence upon one found guilty of defilement under **section 8** of the **Sexual Offences Act** is determined by the age of the victim.

28. These two concerns are anchored in grounds 3, 4, 5 and 6 of the appeal. It was submitted that the testimony of the victim did not support the allegation that the appellant defiled her, for at page 7 of the Record of Appeal, the victim states in part:-

“We reached his home at 9.00 p.m. He told me he wanted to marry me. I never told him anything. We slept in the house. We never did anything. We never slept we sat in the house upto morning.”

Later in her testimony however, the victim states:-

“In the morning we went to the grandmothers. --- we stayed for two months there. I used to sleep in a house. We slept in the same house. That is when we started to sleep in the same house. We slept in the same house. We made love. We slept on the bed with him ----. We made love severally.”

29. The interpretation by counsel of what the victim meant when she said **“we never did anything”** was that the appellant and the respondent did not have any sexual intercourse. I have considered those submissions in light of the entire testimony by the victim and that of the appellant and have taken the considered view that that statement by the victim should not be taken in isolation. The whole testimony taken together clearly shows that even on that first night, the appellant had intercourse with the victim and because of her age, she was defiled. I therefore refuse to buy into counsels’ contention that there was no evidence of intercourse. Moreover, for the two months that the appellant and the victim were in an Eldoret home, they freely engaged in sex. It has been argued on behalf of the appellant that even if he had sex with the victim, the victim willingly gave herself to the appellant and that in the circumstances, it cannot be said that the appellant intentionally and unlawfully defiled the victim.

30. Under **section 42** of the **Sexual Offences Act, No. 3 of 2006**, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. I think it is necessary to consider the provisions of **section 45** of the **Sexual Offences Act** in order to determine whether indeed the victim in this case consented to the acts of defilement committed over a 2-month period. First of all, there is evidence to show that despite the victim’s age (an issue to be addressed shortly hereafter) the appellant made the victim to believe that she was of marriageable age, when he was aware that the victim was infact a Form I student at S[...] Secondary School. In effect, the appellant induced the victim into **“consenting”** to the act of defilement with that false promise that he would marry her. In my considered

view therefore, the victim cannot be said, to have consented to the act of defilement.

31. It is also instructive to note that the appellant did not take any steps to establish whether indeed the victim in this case was over the age of 18 years. The court also notes that the appellant and the victim lived in the same locality, and it would have been quite easy for the appellant to carry out such a research. Instead, he chose to flee with her to Eldoret where he perhaps hoped nobody from the victim's family would find them out. For the reasons above given, that ground of appeal must therefore fail.

32. The appellant has also vehemently challenged the findings of the trial court on the ground that the age of the victim was never established. The relevant evidence on the age of the victim is that of PW5, Dickson Nengusu who, through examination of the victim found that she was 14 years old – **P. Exhibit 4**. PW3, D.K, the father of the victim also stated that she was 14 years. PW4, No.88807 PC David Murai also confirmed the victim's age after the P3 form which he had issued to her was filled by PW5.

33. In brief, I find that the appellant's concerns that the age of the victim was uncertain has no basis and that ground of appeal fails as even the victim herself stated that she was 14 years.

34. There is also the contention by appellant that the prosecution case was based on inconsistent evidence. I have reconsidered and evaluated the whole evidence afresh as is required of me, but I am unable to see where those inconsistencies are. It would appear that counsel for the appellant had his eyes on the victim's own testimony where she stated in one breath that **"we did nothing"** and in the next breath that **"we made love"**. I have already considered these apparent inconsistencies and reached the conclusion that the totality of the evidence shows that those apparent inconsistencies were erased by the victim's later testimony when she told the court that for the two months they were in Eldoret with the appellant, they slept in the same bed and made love.

35. The other apparent inconsistencies pointed out by the appellant's counsel are in respect of the date of examination of the victim and whether it was PW5 who carried out the examination or whether it was somebody else. I have considered all these and my humble view is that they are inconsequential and do not go to the root of the prosecution's case against the appellant. That complaint and the ground of appeal therefore fall together.

36. The appellant has also complained that the trial court did not comply with the provisions of **section 169** of the **Criminal Procedure Code**. I have myself weighed and considered the judgment by the trial court, and though the judgment does not clearly set out the issues for determination, I find that that omission does not go to the root of the prosecution's case against the appellant. The trial court did, in my view, analyze the evidence and also gave its finding. In any event, I have myself reconsidered the evidence on record and set out the issues for determination so that the alleged failures by the trial court have now been adequately addressed.

37. In summary, I find that there is no sufficient reason why this court should interfere with the findings of the trial court, though counsel for the respondent wanted me to do so.

Accordingly, this appeal lacks merit and the same is dismissed on both conviction and sentence.

38. It is so ordered.

Dated and delivered at Kisii this 20th day of January, 2012

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Mr. Ochwangi (present) for Appellant

Mr. Gitonga (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.