REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 141 OF 2010

(From original conviction and in criminal case no. 122 of 2010 sentence of the Resident Magistrate's Court at Hola before Hon. M. O. Obiero – RM)

CHARLES KARANJA SOMBA …..…….....……..APPELLANT

VERSUS

REPUBLIC ……...…….....…..……RESPONDENT

JUDGMENT

1. Charles Karanja Somba the appellant herein was charged in the lower court with the offence of defilement of a girl under the age of 11 years contrary to section 8(1) (2) (sic) of the Sexual Offences Act particulars thereof being that on diverse dates between 7th May 2010 and 14th June 2010, in Tana River District he defiled M.A. a girl aged 8 years. In the alternative he was charged with indecent act with a girl under the age of 11 years contrary to Section 11(I) of the Sexual Offences Act. He pleaded not guilty. After a full trial, he was found guilty, convicted and sentenced to life imprisonment, on 8th November 2010. He has now appealed to this court against both conviction and sentence. He relies on six amended grounds of appeal, as more particularly elaborated in his written submissions.

2. The grounds of appeal are numbered (1)a to (1)f and can be summarized as follows;

a. The charge sheet was defective.
b. The appellant was arraigned in court well after the mandatory period stipulated in Article 49(1) f and g of the Constitution and sections 36 and 37 of the Criminal Procedure Code.
c. The trial magistrate erred in basing the conviction on the uncorroborated evidence of the complainant.
d. The trial court erred in its failure to order that forensic tests be conducted on the appellant pursuant to Section 36(1) and (2) of the Sexual Offences Act.
e. The trial court erred by failing to summon 'credible' witnesses as provided for in Section 144 and 150 of the Criminal Procedure Code.
f. The trial magistrate erred in rejecting the appellant's defence in favor of the "shoddy" prosecution case.

3. Through Mr. Kemo, the State opposed the appeal by a restatement of the prosecution's evidence but did not specifically address grounds 1a and b, which do not deal with evidential matters per se. Be that as it may, this court is obligated on a first appeal to reconsider and re-evaluate the evidence tendered in the lower court.

4. In the case of **Okeno vs Republic (1972) EA 32,** the court stated inter alia, that:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ***(Pandya Vs Republic [1957] EA 336)*** *and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.* ***(Shantilal Rulwala Vs. Republic [1957] EA 570).*** *It is not the function of the 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 the fact that the trial court has had the advantage of hearing and seeing the witnesses"*

5. The prosecution called four witnesses during the trial. The complainant M. A. is a nursery school going girl aged five years. In the material period she resided with her father A.W.A. who is a casual laborer at Timboni. On an unknown date prior to 12th June 2010, she was at Timboni. The appellant whom she knew approached and greeted her. He gave her kshs. 20.00 to buy bread. When she returned the appellant took her to his house and did "bad manners" to her.

6. She apparently did not report the incident to anyone until 12th June 2010 when her father asked her why one M was calling her a 'prostitute'. That is when she told her father that the appellant who had "a lot of money" had been buying her treats and that on one occasion he had taken her to his house and had sexual intercourse with her. On the next day she led her father to the appellant's house but he was out. The matter was reported to police who arrested the appellant, while the complainant was treated at Hola District Hospital. A P3 form was completed on 15th June 2010 and was tendered in court as an exhibit.

7. Upon being placed on his defence, the appellant gave an unsworn statement and did not call any witness. His defence was that between the months of May and June, 2010 he was in Hola. On 13th June 2010 he was arrested. The police who were accompanied by the complainant's father demanded money from him to release him. But he had none. He was escorted to Hola police station where he was informed that he was to be charged with the offence of defilement, but he denied knowledge of the "allegation". Eventually he was arraigned before the court.

8. Having carefully read the evidence on record, I have concluded that there can be no dispute as to whether there was penetration.
The medical evidence of Dr. Meme was that though there was vaginal discharge, the complainant had bruises on the labia minora and labia majora. There were bruises on the vaginal wall and the hymen was torn. The doctor estimated the injuries to be weeks old – between 7th May 2010 and 14th June 2010, and occasioned by a blunt object. This evidence confirms what the complainant referred to as "bad manners" done to her, also understood by her father (PW2) as sexual intercourse. It is not unusual, and indeed the court takes judicial notice of the fact that *"bad manners* or *tabia mbaya"* among local children has gained notoriety as a polite term referring to sexual or sexually related activity.

9. It is evident from the complainant's testimony that she could not state the exact date when the sexual activity occurred. The trial magistrate attributed this to the state of shock and the part of the complainant. The record of the proceedings of the first hearing on 24th June 2010 indicates that the prosecutor applied to have the complainant stood down after she started her testimony because she appeared "frightened".

10. The doctor estimated the possible age of the injuries as weeks between 7th May 2010 and 14th June 2010, a period slightly over one month. This naturally raises the question why the complainant had not reported the defilement to her father. In his judgment, the trial magistrate correctly concluded that the complainant had been defiled but failed to inform her father immediately "……since the accused used to buy her goodies such as bread and potatoes"

Her father testified that he questioned the complainant after hearing one M refer to her as a "prostitute". The fact that M did not testify does not detract from the prosecution's evidence on the question of defilement as adduced through other credible witnesses.

11. To my mind the real sticking point in this appeal was whether the appellant is the person who defiled the complainant. The appellant has complained that the evidence of the complainant was not corroborated. That assertion is inaccurate. The complainant's evidence was materially corroborated by the medical evidence and further reinforced by the testimony of her father, PW2.

12. Granted, the complainant herein is a child of tender years whose evidence was received in accordance with Section 19 of the Oaths and statutory Declarations Act. However, under the proviso to section 124 of the Evidence Act the trial court was entitled to base a conviction even on her evidence alone if persuaded that the victim told the truth. The said court obviously believed the evidence of the complainant who, according to PW2 also led him to the house of the appellant on the next day.

13. That the appellant, the complainant and her father were known to each other is confirmed by the appellant's statement in his defence that "…I was arrested by a police officer. They were with the complainant's father". The OCS, and not the officers who allegedly demanded money from the appellant, made the decision to charge him.

14. Having closely considered the defence statement, the same appears to amount to no more than an indirect denial of the offence and the fact that the trial magistrate did not expressly dismiss it did not occasion any prejudice to the appellant. The trial magistrate appears to have appreciated the legal principle that the burden of proof lay with the prosecution. And contrary to the appellant's assertions in the appeal, there existed no legal burden on the part of the convict to order forensic tests as anticipated under Section 36 of the Sexual Offences Act. Moreover, no application was made to the court in the course of the trial. The grounds challenging the quality of the prosecution evidence in the lower court therefore have no basis. And the learned trial magistrate did a commendable job of carefully analyzing it before convicting the appellant.

15. Regarding ground 1(b) of the appeal, it is true that the charge in the main count was not properly drawn. But I would not go as far as describing it as defective. The charge correctly included Section 8(1) and (2) of the Sexual Offences Act, but omitted the words "as read with" in between the two sub-sections. The inclusion of the two subsections discloses not only the offence (subsection 1) but also the penalty (subsection 2) where the victim of defilement is aged below eleven years.

16. As such the appellant cannot genuinely complain that he did not understand the nature of charges facing him. The framing of the main charge in this case was far from ideal, but it was sufficient, in addition to particulars thereto, for purposes of "giving reasonable information as to the nature of the offence charged" (see Section 134 of the Criminal Procedure Code) no prejudice has thereby been occasioned on the appellant therefore.

17. The complaint in ground 1b that the appellant's constitutional rights under Article 49(1) of the Constitution were violated through delayed arraignment have no merit as these charges came before the promulgation of the new constitution in August 2010. Besides, any violation of the nature alleged is a matter for redress through a suit for damages (see **Julius Kamau Mbugua vs R [2010]e KLR).**

The final issue which warrants attention is the sentence meted out on the appellant. In his grounds he has variously described it as "unlawful, degrading, inhuman, unconstitutional and arbitrary." The complainant was eight years old Section 8(2) of the Sexual Offences Act provides that:

"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life"

The sentence handed down was therefore lawful being the mandatory one prescribed by the law.

In the circumstances, the appellant's appeal has no merit and is dismissed in its entirety. The conviction is upheld and sentence confirmed.

Delivered and signed this **8th** day of **February 2012** at Malindi.

C. W. Meoli
JUDGE
In the presence of: