(From original conviction and sentence in Criminal Case No. 10 of 2010 of the Senior Resident Magistrate's Court

at Eldama Ravine – D. M. MACHAGE, RSM)

LEONARD CHEPKWONY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This is an appeal from the decision of D. M. Machage, Senior Resident Magistrate, Eldama Ravine in Criminal Case No. 10 of 2010. The appellant, Leonard Chepkwony was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No.3 of 2006**. It was alleged that on 18/11/2009 in Koibatek District, committed an act that caused the penetration of his genital organ (penis) into the genital organ of A.A, a child aged 14 years. In the alternative, he faced a charge of indecent act with a child contrary to **Section 11(1**) of the **Sexual Offences Act No. 3 of 2006**. It was alleged that on 18/11/2009 in Koibatek District, intentionally and unlawfully committed an indecent act with a child, by name A. A by touching her genital organ, vagina, a girl aged 14 years. He was found guilty of the main charge and was sentenced to serve 15 years imprisonment. He appeals against that conviction and sentence.

The brief facts of this case are as follows; on 18/11/04 A.A, PW2, a girl aged 14 years went to S Primary School and at about 10.00 a.m., she went back home, changed into civilian clothes and went to accused's sawmill. She went to see the accused on her own volition because he was her lover for many years. She said that they had had sex once therefore. She said that he did not invite her but she called him on phone and he came about 11.30 a.m. They were alone in the house till 1.00 p.m. They did not have sex on that day but he kissed and hugged her then escorted her. She ran away to S to another man's shop from 2.00 p.m. where she stayed till she was found at 9.00 p.m. She was taken to the police station where she slept for two days and was taken to the priest next morning. Later, she said that she was taken to hospital on some day 18th.

The mother of PW2, J.M, PW3, works at a salon in E.R On 18/11/09, she was at the salon about 1.00 p.m. when she was informed that the complainant was not in school. The class teacher confirmed that PW2 had left at 10.00 a.m. PW3 reported to E.R Police Station, was given police officers to go to accused's house but he was not home. PW3 called accused's cell phone which the complainant picked and she said she was at Simotwet. PW3 proceeded there and found PW2, took her to the police Station about 9.00 p.m. PW3 took PW2 to hospital on the next day at about 9.00 a.m. to 10.00 a.m. where she was treated. PW3 said she knew accused as Justus and that he disappeared from that time till he was arrested in December and was charged.

PW1, Dr. Joram Kipsang Marachi, recalled that on 29/12/09, he filled a P3 form in a history of sexual intercourse with consent of the lover. He found the genitalia to be normal but with bruises on the labia manora and majora and sperms on her vagina and therefore evidence of sexual intercourse. PW1 used the

chit (PWx.2) from E.R District Hospital to fill the P3 form (PEx.1).

PW4, Cpl Julia Morop of E.R Police Station recalled that the Officer Commanding Station minuted this case to her. She found the complainant in the cells, took her to the hospital on 19/11/2009 and later accused was arrested.

When called upon to defend himself, the appellant denied knowing the complainant or the allegations leveled against him. He said that he went to Bomet on 10th upto 20th when he returned. He was arrested on 28/12/2010 for an offence he does not know of. He denied knowing whether PW1 went to his house as he may have been away.

The grounds of appeal are contained in the memorandum of appeal filed in court on 22/6/2011 and further grounds are in the appellant's submissions. They can be condensed into the following:-

1. That the appellant's constitutional rights have been breached because he was detained in police custody for more than 24 hours;

2. That the charge is defective;

3. That essential witnesses were not called;

4. That the prosecution evidence was not corroborated;

5. That the offence was not proved to the required standard;

6. That the medical evidence was contradictory.

The appeal was opposed. Mr. Nyakundi, counsel for the State submitted that the complainant was the appellant's girl friend and the issue of identification did not arise; that the Doctor confirmed that the complainant had been defiled. On the issue of the appellant's constitutional rights being infringed, counsel urged that the Court of Appeal has settled the issue so that who alleges breach of fundamental rights can sue for damages; that he should have raised the issue at the earliest opportunity so that the Investigating Officer could be called upon to explain the delay. As to whether essential witnesses were called, counsel submitted that **Section 129** of the **Evidence Act** where the victim is a minor the court can still enter a conviction even without corroboration.

As regards the number of witnesses to be called, counsel urged that **Section 143** of the **Evidence Act** does not require any particular number of witnesses to be called unless a particular law requires that a particular number of witnesses be called.

I have considered the submissions by the appellant and the learned State Counsel. As the first appellate court, it is required of me to evaluate and analyse the evidence afresh and make my own findings on fact and law, bearing in mind that I did not have the advantage of seeing the demeanour of the witnesses who testified.

On the first issue of whether the charge that the appellant was charged with was defective, the appellant complained that the words '**unlawfully** and **intentionally'**, without consent were not included in the charge sheet. That is not a requirement that the said words be included in the charge sheet. Those are phrases that were included in the charge in the law that was repealed. The most important ingredient in the charge is that there was penetration of the child in any case a child has no capacity to consent to such an act.

Whether the appellant's constitutional rights were violated:

The appellant submitted that he was arrested on 28/12/2009 and was arraigned in court on 4/1/2010; that no reason was given for that delay. There is no evidence that the appellant ever complained to the trial

court that his rights had been violated. Constitutional issues are supposed to be raised at the earliest opportunity possible. This would enable the prosecution to call upon the Investigating Officer to respond to the allegation of delay. Besides, it is now settled law that breach of a constitutional rights cannot be a bar to prosecution for an offence. This is because the appellant can sue the person who detained him beyond the time allowed for damages. The appellant was arrested when the old **Constitution** was still in force. **Section 72(6)** of the said **Constitution** provided that an aggrieved party could sue for damages for violation by o'f fundamental rights.

The appellant also alleged that he was not allowed to call his witnesses namely Leonard Korir and Weldon Langat. In his defence at page 17 of the proceedings, the appellant said on oath that he was with Leonard Korir and Weldon Langat and that he would call them as witnesses. However, after he finished testifying, the court adjourned for the judgment date. The court never enquired from the appellant whether he would call the witnesses or whether he wanted the court to summon them. **Section 211** of the **Criminal Procedure Code** requires that the rights of an accused person be explained to him before he enters his defence. The rights are:-

"(1) The right to remain silent and say nothing at all;

(2) The right to make unsworn statement from the dock and will not be liable to cross examination;

(3) The right to give sworn evidence from the witness box in which event the accused is liable to cross examination;

(4) The right to call witnesses if accused so wishes."

These are fundamental rights of an accused person in a trial meant to ensure that the trial is fair. (see **Njoka v Rep [2001] 175**). Failure to allow the appellant to call his witnesses was prejudicial to the appellant's case and a denial of his right to a fair hearing which were also guaranteed under **Section 77** of the **Old Constitution**. The prosecution had called its witnesses and the appellant should have been allowed to call his witnesses.

The appellant complained that he did not understand the language of the court. On a perusal of the court record, the appellant was not asked what language he understands before plea was taken. On 4/1/2010, the charge was read to him in English and he denied the charge. PW1, PW3 and PW4 all testified in Kiswahili. It is not indicated what language PW2 used. It is, however, evident that the appellant cross examined the witnesses and went on to testify in Kiswahili. I am satisfied that he understood the language of the court otherwise he would have raised the issue with he court.

Section 143 of the **Evidence Act** does not require the calling of any particular number of witnesses unless a specific law provides so. See **Abdalla Bin Wendoh v R. [1953] EACA 146.** The appellant contends that the prosecution failed to call as a witness, PW2's teacher who reported that she was not in school and also the person at whose shop PW2 was found. In my humble view, the said witnesses' evidence could not add any value to the prosecuiton case because they did not witness the offence nor was the appellant found together with PW2. It was unnecessary to call the said witnesses. If the prosecution had failed to avail a material witness, the court would have drawn on inference that the said evidence may have been adverse to the prosecution's case but that scenario does not arise in this case.

PW2 and PW3 deponed that PW2 was 14 years at the time of the offence. PW3 specifically said that the complainant was 14 years old. Dr. Marachi (PW1) also said that the complainant was 14 years old. The appellant complains that no birth certificate was produced to confirm the complainant's age. Even without production of the birth certificate, PW3, the mother of the complainant was best placed to testify to the age of PW2. There is no requirement that only a birth certificate can prove the age of a person because not all Kenyans have birth certificates. PW3's evidence was corroborated by the evidence of PW1. The evidence on the age of the complainant cannot therefore be faulted.

The appellant alleges that there were material contradictions between the evidence of PW2 and PW3 as to which doctor treated PW2. Whether PW3 knew the doctor who treated PW2 or not is not material to this case and that would not in any way weaken the prosecution evidence.

I find that the evidence of PW1 contradicts the other prosecution evidence. PW1 testified that he filled the P3 form in respect of PW2 on 29/12/09 and that upon examination of the complainant he found her to have bruises in her labia minora and majora and sperms in her vagina. He therefore formed the opinion that there was evidence of sexual activity. The charge indicates that the complainant was defiled on 18/11/2009. If indeed PW1 found PW2's genitalia to be bruised and with spermatozoa on 29/12/2009, it means that PW2 had taken part in another sexual activity not linked to what the appellant was charged with.

The medical report from E.R is be questionable. Both PW2 and PW3 recalled that the complainant was taken to the Police Station on 18/11/2009 and then to hospital the next day. The Investigating Officer, PW4, confirmed that the case was minuted to her on 19/11/2009 and it is the date she took the complainant to hospital. However, the treatment chit and the P3 form indicated that the report was made on 18/11/2009 and the complainant was taken to hospital the same day. The inconsistency in the date of reporting to police and visit to hospital is not explained. The court noted these discrepancies during the hearing but did not bother to have the said evidence reconciled.

Having found that the appellant's right to fair hearing was breached by the failure of the trial magistrate to allow him call his witnesses and the contradictory medical evidence on when the complainant was defiled, these inconsistencies in the prosecution case raise doubts that should have been resolved in favour of the appellant. I find the conviction to be unsafe, it is hereby quashed, and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 26th day of July, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:
Appellant in person
Ms Idagwa for the State
Kennedy – Court Clerk