DENIS OCHIENG TILA ..... APPELLANT

-VERSUS-

REPUBLIC ..... RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Oyugis Hon. R. Ngetich in Criminal Case No. 268 of 2004 dated 25th May, 2007)

The appellant, **Dennis Ochieng Tila** was charged with the offence of defilement contrary to section 145 (i) (now repealed) of the **Penal Code,** Cap 63 Laws of Kenya. The particulars of the offence were that on 11th February, 2001 at [particulars withheld] in Rachuonyo District within Nyanza province he had carnal knowledge of **M. A. O**, a girl under the age of 14 years. The appellant was tried and convicted by the SRM's court at Oyugis. He was sentenced to serve 20 years imprisonment on 25th May, 2007 by **Hon. R. Ngetich**.

On 27th November 2008, the appellant filed his petition of appeal before this court, having obtained leave to appeal out of time. He has appealed against both conviction and sentence. His grounds are that the witnesses gave contradictory evidence; the investigating officer was not called to testify; the medical examination was not properly conducted; and, that there were differences between him and PW4 which motivated the charges. He has also stated that the sentence imposed was harsh and excessive.

The appeal came before me for hearing on 31st October, 2011. During the hearing the appellant faulted the evidence of each prosecution witnesses as follows: that PW1 did not know him; that PW2 relied on hearsay evidence of PW1; that PW3 stated that he only found people at the scene standing; that PW5 the arresting officer did not seek any report from him but only took him to the police station; and that PW6 the doctor, did not examine him.

He urged the court to re-evaluate the evidence and either order a retrial or set him free.

Mr. Mutai learned counsel for the respondent opposed the appeal. He submitted that the conviction was safe having been based on the sound evidence of the prosecution witnesses. He also submitted that the sentence was proper as the court applied the transitional provisions of the **Sexual Offences Act**. The appellant though charged under the **Penal Code** was sentenced under the **Act** whose transitional clauses provided for such sentencing.

As a first appellate court, I am under duty to reconsider and evaluate the evidence afresh and weigh the judgment of the trial court. See **Okeno –vs- Republic (1972) EA 32 and Pandya –vs- Republic (1957) E A 336**. I have in this appeal reconsidered the evidence on the basis of the grounds of appeal raised by the appellant.

Briefly the evidence before the trial court was that on the material day the accused lured the

complainant away from the company of other young children at a river to a bushy pathway and into a bush where he defiled her. He had asked her to accompany him to go and collect a letter for her older sister named **A**. The accused was all the while having a panga and he threatened her.

PW2, one **Elijah Ouma** who was herding cattle nearby heard the complainant's screams and on rushing to the scene caught the accused in the act. He rescued the girl and took her to her home while the accused escaped. PW2 knew the accused as he was a neighbour who was popularly known as Bobby. The complainant's mother **M.O.** testified as PW3 and told the court that when she arrived home in the evening of the material day and learnt what had happened, she made a report to the school deputy head teacher and the chief before going to the police station from where she was referred to the hospital to seek medical treatment.

PW5 **PC Benson Otieno** of Oyugis Police Station testified that he received the complainant and recorded the witness statements. He also issued an arrest order to the local chief who effected arrest about two months later. He produced an investigation diary which had been filled by his colleague one **Precila Akinyi**. **Dr. Peter Ogola** a registered medical officer at Rachuonyo District Hospital testified as PW6. He produced the P3 form in respect of the complainant which showed that she had been defiled. According to the report there was a tear of the perineum skin, a torn hymen and multiple bruises on the genitalia and a discharge. The patient was also treated and put on HIV post exposure drugs.

The appellant was put on his defence. He gave an unsworn statement and did not call any witnesses. His statement was a denial of the offence. After an evaluation of the evidence the court convicted him.

Turning now to the grounds of appeal, the same can be summarised into three. The first ground relates to the testimony of the prosecution witnesses which the appellant states was not sound. From my perusal of the record and evaluation of the evidence as summarised above, I find the testimony of the prosecution witnesses was cogent and consistent. The complainant testified that she did not know the appellant before. However PW2 who answered her distress call knew him though by the popular name Bobby. He caught him in the act and they even conversed before he ran away. The medical evidence presented to the court showed that the complainant had been defiled. Taken in totality, the evidence left no doubt that the complainant had been defiled and that the appellant was the one who defiled her.

On the second ground, the appellant has complained that the prosecution did not call all the witnesses to shed light on the case. I find this ground baseless. All that the prosecution was required to do was to discharge its burden of proof. The number of witnesses is immaterial.

On the third ground, the appellant has stated that there were differences between him and the complainant's mother which motivated the charges against him. This ground is not convincing as no such complaint was raised by the appellant before the trial court. The appellant was at liberty to bring that to the attention of the court and to call defence witnesses if necessary to attest to such ill motive.

On the fourth ground, the appellant has stated that the medical examination conducted on the complainant did not amount to a medical check up. Again this is a baseless ground. A P3 report was produced in court showing comprehensive medical examination of the complainant.

In submissions before court, the appellant raised other issues not grounded on the petition of appeal. He complained that he was not subjected to a medical examination. I find his complaint to be without basis. The record shows that after committing the offence on 11th February, 2004, the appellant disappeared and was only arrested on 21st April 2004 by the assistant chief of [particulars withheld] pursuant to an order earlier issued by the police. A medical examination at that time would have been of no probative value.

Having re-evaluated the evidence in totality, I find that the appellant was convicted on sound evidence. I therefore uphold the conviction.

Finally, I now turn to the issue of sentence. The appellant was charged under the **Penal Code**. Subsequently the **Penal Code** provisions on sexual offences were repealed by the **Sexual Offences Act 2006**. As submitted by the learned state counsel, trial of offences commenced under section 145 (i) of the **Penal Code** were to be continued under the **Sexual Offences Act 2006**. The first schedule of the **Sexual Offences Act** provides:-

1. Notwithstanding the provisions of any other Act, the provisions of this Act shall apply with necessary modifications upon the commencement of this Act to all sexual offences.

2. For greater certainty, the provisions of this Act shall supersede any existing provisions of any other law with respect to sexual offences.

3. Any proceedings commenced under any written law or part thereof repealed by this Act ***shall continue to their logical conclusion*** *under those written laws.*

So was the trial court right in invoking the transitional clauses aforestated? I find that the court properly invoked clauses 1 and 2 of the transitional clauses to the extent that it continued the trial of the appellant under the procedural provisions of the **Sexual Offences Act**, **2006**.

With regard to sentencing however, it is trite law that a person cannot be convicted of an offence which was not one at the time of commission and neither can he be given a greater sentence than was provided at the time of the commission of an offence. **Section 77 (4) of the Constitution** (now repealed) which was operational at the time the appellant was charged states:-

"No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time it was committed".

My interpretation of clause 3 of the transitional clauses of the **Sexual Offences Act** cited above, and in the light of the constitutional provision herein stated, is that an accused person who was charged and prosecuted under the **Penal Code** would be sentenced under the **Penal Code**. Indeed clause 3 of the transitional clause of the **Sexual Offences Act** states that the proceedings *"shall continue to their logical conclusion under the repealed law"*. In sentencing the appellant therefore, the trial court ought to have imposed the sentence provided for under Section 145 (i) of the **Penal Code** (now repealed).

In the result, I move to correct the sentence by quashing the 20 year jail term and substituting therefore 14 years' imprisonment as provided by law.

The appeal against sentence succeeds to that extent only. The appellant shall serve 14 years imprisonment.

Judgment dated, signed and **delivered** at **Kisii** this **27th** day of **September**, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

Denis Ochieng Tila :appellant (present/absent)

..... :counsel for respondent (present/absent)

Edwin Mongare :court clerk

R. LAGAT-KORIR
JUDGE