REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO 34B OF 2010

JOHN OTIENO OBWAR………………………………APPELLANT

-VERSUS-

REPUBLIC……………………………………………RESPONDENT

JUDGMENT

(**Appeal from the original judgment and conviction in the Senior Resident magistrate's court at Rongo in Criminal case No. 34B by D.KEMEI (SRM)**

The appellant was arraigned before the Senior Resident Magistrate's court at Rongo on one count of Defilement contrary to section 8(1) as read with section 8(4) of the **Sexual Offences Act**. It was alleged that on 16th June, 2008 in Rongo district within Nyanza province, the appellant did an act that caused penetration to the genital organs of one**, J.A.O**, a girl aged 14 years. The appellant pleaded not guilty to the charge and he was tried.

In brief the case for the prosecution was that on 16th June, 2008 at night, **J.O.O**, the complainant was asleep in the kitchen, when the appellant who is a son of her uncle came claiming he wanted to pick some item. Immediately he gained entry, into the kitchen, he grabbed the complainant, removed her skirt, biker, pant and proceeded to sexually assaulted her. When she screamed, the appellant went to his house and came back with a whip and assault her. He again forcefully had sexual intercourse with her. When done, he went back to his house. The following day, the complainant mentioned her ordeal to **Joseph Obole Ogosi** (PW2), the chairman of the local community policing who in turn took her to the District officer's office. The district officer called a human rights activist who later took her to Awendo sub district hospital and was examined by a **Mr**. **Kiptum** a clinical officer. His report was produced in court by **P.C. Patroba Kegicha** (PW3). With the assistance of PW2, the appellant was traced, arrested and subsequently charged.

Put on his defence, the appellant elected to give sworn statement of defence and called no witnesses. He testified that on 16th June, 2008 at about 9 p.m, PW2 came in the company of **Opele** and **Samja** and requested him to accompany them to see a person he had allegedly assaulted. It was then that they took him to Awendo police station. He maintained that he did not know the complainant and that he was never related to her at all. Infact it was in court that he first saw the complainant.

The learned magistrate having carefully analysed the evidence on record was convinced that the prosecution had proved its case. Accordingly, he convicted the appellant and sentenced him to 10 years imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal claiming that the sentence imposed was harsh and excessive, that the P3 form was tendered in evidence by an incompetent witness, the evidence of an eyewitness was lacking, the case was not proved beyond reasonable doubt and finally that the learned magistrate erred in law and fact when he failed to evaluate the appellant's defence.

When the appeal came up for hearing before me on 23rd November, 2010, the appellant submitted

that he never committed the offence and that he was framed with the case. Infact he had been arrested on the allegation that he had assaulted somebody.

Mr. Mutuku, learned Senior Principal state counsel opposed the appeal. He submitted that the evidence on record was sufficient to prove the charge. The appellant's conviction was thus safe.

I have analysed the evidence that was adduced in the trial court and evaluated it independently as I must do, this being a first appeal –See the case of **Okeno .v. Republic (1972) EA 32.** I do find contrary to the finding by the learned magistrate that the offence of defilement contrary to section 8(1) as read with section 8(4) of the **Sexual Offences Act** was not proved beyond reasonable doubt. I say so because according to the evidence of the complainant, the offence was committed at night. That being the case it was expected that the complainant would shade light as to how she was able to identify and or recognise the appellant. Nowhere in her testimony does she allude to the presence of any source of light in the kitchen that would have assisted her to identify or recognise the appellant. Secondly, nowhere in her testimony does she state that she recognized the appellant by his voice. It may well be that though the complainant was defiled she was so defiled by another person and not necessarily the appellant.

Thirdly, and as correctly observed by the appellant, the P3 form of the complainant was not produced by the maker as required by law. It was produced by a police officer and not the clinical officer under section 77 of the **Evidence Act.** Much as section 77 allows for such production, certain precautions have to be met before any other person other than the maker can produce such document in evidence. First the court, must seek the consent of the accused person. If the accused objects to such production, his decision must be respected. Secondly, the court must inform the accused of his right to insist on the presence of the maker. It is only after the accused has intimated to the trial court that he has no objection to the production of the document by another person other than the maker and or does not insist on the presence of the maker, that such document can then be admitted in evidence. In this case the record does not show that the prosecution applied that the P3 form be produced in evidence by **P.C. Patroba** in lieu of the clinical officer, **Kiptum**. No basis was therefore laid for **P.C.Patroba** to produce the document in evidence in lieu of the maker. The record also does not show that the opinion or consent of the accused was sought before **P.C. Patroba** was allowed to tender in evidence the document. The appellant is thus justified in complaining that ***"…….the trial court erred when it convicted me on an invalid exhibit by the prosecution. The P3 form which was regarded as an exhibit was tendered in court by an incompetent person i.e. a police constable, rather than a medical officer…..".*** Had the evidence of **Patroba** been deemed inadmissible as it should have been then there was no credible evidence upon which the court would have proceeded to convict the appellant. The foregoing notwithstanding, the P3 form itself and indeed the evidence of **Patroba** had some failings. The P3 form and the evidence of **Patroba** is silent as to whether from the examination an opinion was formed as to whether the complainant had indeed been sexually assaulted.

Defilement is a strict offence, whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim be proved by credible evidence. In the circumstances of this case, the charge sheet talks of the complainant being aged 14 years. Other than that allegation, there was no other proof. The clinical officer who examined her never assessed his age. It would have been easy for the prosecution to tender in evidence the complainant's birth certificate to prove her age. This was not done with the consequence that the age of the complainant was not proved as required.

The upshot of all the foregoing is that I find the appeal merited. It is allowed, with the consequence that the conviction is quashed and sentence imposed set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, **signed** and **delivered** at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA
JUDGE