REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 113 OF 2006.

AGGREY SIMIYU BARASA.....APPELLANT.

VERSUS

REPUBLIC .....RESPONDENT.

(Being an appeal from conviction and sentence by the PM – P.N. Gichohi in Criminal Case No. 1586 of 2003

delivered on 1st December, 2006 at Kitale)

J U D G M E N T.

1. **Aggrey Simiyu Barasa** was charged with a principal charge of defilement of a girl contrary to section 145 (1) of the Penal Code. The particulars of the charge stated that on 7th day of April, 2003 in West Pokot District within Rift Valley Province, the appellant had unlawful carnal knowledge of **F.A** a girl under the age of 14 years. The appellant also faced an alternative count of indecent assault of a female contrary to section 144 (1) of the Penal Code. The particulars stated that on the 7th day of April, 2003 in West Pokot District within the Rift Valley Province, unlawful and indecently assaulted **F.A**, a girl under the age of fourteen years by touching her private parts. He also faced an alternative charge of assault and causing actual bodily harm contrary to section 251 of the penal code. The particulars stated that on the 7th day of April, 2003 in West Pokot District within Rift Valley province, unlawfully assaulted **F.A** thereby occasioning her bodily harm.

2. The appellant pleaded not guilty and after trial he was convicted and sentenced to eight (8) years imprisonment in the main count, and 6 months imprisonment in respect of the second alternative count. Both sentences are to run concurrently. Being aggrieved by the conviction and sentence the appellant appealed and raised the following grounds in the petition of appeal.

(i) The lower court erred in law and fact not to have dismissed the case against the appellant on the ground that the charge sheet was defective and there was no offence disclosed.

(ii) The lower court erred in law and fact to have convicted the appellant on the evidence of the complainant whose evidence was not collaborated.

(iii) The lower court erred in law and fact to have convicted the appellant on medical evidence which was not produced by the clinical officer, who examine the appellant and wrote the opinion.

(iv) The lower court erred in law and fact to have convinced the appellant on the evidence of a clinical officer who was not a medical officer/practitioner and therefore the P3 form produced in court was forgery as it was not signed by a medical officer of health (MOH)/ practitioner.

(v) The lower court erred in law and fact not to have dismissed the case because the prosecution was done by people who are not qualified.

(vi) The lower court erred in law and fact as the conclusion by the clinical officer was biased and speculative as the injuries were capable of being caused by other factors and/or through other means.

(vii) The lower court erred in law and fact as the appellant was not given a fair hearing as the case was not properly handled by the trial magistrate.

3. In further arguments to support the above grounds **Mr. Wasike** learned counsel for the appellant submitted that the decision by the learned trial magistrate to convict the appellant with the offence of rape when he was charged with the offence of defilement. The sentence for a different offence was prejudicial to the appellant. There was no compliance with the provisions of section 214 (1) of the Criminal Procedure Code so as to notify the appellant that he was facing a charge of rape. Counsel also faulted the evidence by the clinical officer who filled the P3 form notwithstanding the form is required to be completed by the medical officer of health. Thus the P3 form which was signed by a non-qualified person was inadmissible in evidence.

4. Counsel put forward the decision in the case of **JON CARDON WAGNER VS. REPUBLIC in CR. APPEAL NO. 404 OF 2009** where it was held that in a case of defilement the age of the complainant should be proved by way of medical evidence or through other evidence. The appellant was charged with defilement of a girl of 13 years. The complainant testified that she was 16 years while the arresting officer says that she was 17 years. According to counsel for the appellant the conflicting age given to the complainant could only have been solved by medical evidence or birth certificate. He urged the court to allow the appeal.

5. The state conceded to this appeal on the grounds that the proceedings by the learned trial magistrate were fatal because the learned trial magistrate took over this proceedings from **Mrs. H.M. Wandere** but did not follow the provisions of section 200 (3) by demonstratively showing compliance by indicating that the accused person was given an opportunity to say whether he would have wished to have any witness re summoned. The State Counsel relied on Court of Appeal decision in the case of **ERICK OMONDI alias GOR VS. REPUBLIC in CR. APPEAL NO. 15 OF 2007** where their Lordships held that:-

"While we agree that the succeeding magistrate in the case before us was aware and did to some degree comply with the provisions of section 200, above, the wording of sub-section (3) thereof demands of the succeeding magistrate that he scrupulously observe and comply with its requirements. The highlighted part of that sub-section is couched in mandatory terms. It states "shall inform the accused person of that right". Which right? The right to resummon and examine witnesses who had previously testified. There is wisdom in that provision as he succeeding magistrate neither heard nor saw those witnesses testify. If the accused person is informed of this right, he might wish the succeeding magistrate to form his own impression about their demeanor. Subsection (4) of that section is instructive."

6. However, **Mr. Onderi**, took a different view regarding the conviction of the appellant for the offence of rape. He contended that there were no legal requirements to amend the charge under section 179 of the CPC. A court can convict for a lesser offence if the evidence so discloses. Mr. Onderi submitted that the matter should be referred for retrial. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **NJOROGE VS. REPUBLIC [1987] KLR 19**. I now wish to set out, albeit briefly the evidence before the trial court which led to the conviction and sentence of the appellant.

7. **F.A,** PW1 testified that she was aged 16 ½ years at the material time, and she was living with her aunt together with the accused person from the year 2000. She testified that on 11th July, 2003 she had gone to visit another friend but the appellant came for her and made allegations that the complainant had stolen clothes from a neighbor. The appellant insisted on taking the complainant to the police, but upon going to M police post, the officers advised the appellant to first produce his mother at the police station. While on their way home, the appellant accosted the complainant knocked her to the ground, tore her under pants and had sexual intercourse with her while pinning her on the ground.

8. The appellant freed from the scene, the complainant picked her torn under pants and the torn skirt and took them to M police station where the matter was reported to **P.C. Victor Kimeli** who investigated the matter and arrested the appellant. The complainant was examined by a clinical officer by the name **Kiplimo** but the P3 form was produced by **Dr. Kiprono of Kapenguria** of Lodwar District hospital. The clinical officer who filed the P3 Form had been transferred to another hospital but as at the time of this matter, his whereabouts were unknown. The P3 form indicated that the complainant had physical injuries. She also had a freshly perforated hymen and there were fresh spermatozoa in her vagina. There was evidence that the complainant had intercourse and the age was indicated as 14 years.

9. The appellant was placed on his defence; he admitted that the complainant was his cousin and they had gone to M police post over an alleged theft of a neighbors' clothes. He however denied having committed the offence. The learned trial magistrate after evaluating the above evidence found the offence of rape was proved as the court believed the complainant was within the age bracket of 16 years when the offence was committed. The evidence by the P3 form corroborated the evidence of the complainant. The defence by the appellant was disregarded as mere denial.

10. On the part of this court, I have subjected the above evidence to my own evaluation. I agree with the State Counsel that the provisions of section of 200 (3) of the CPC ought to have been followed in order to safeguard the rights of the appellant to a fair trial. The learned trial magistrate did not demonstrate through the proceedings that the appellant's views were sought before she proceeded with the trial from where the previous magistrate had left it. This is the only anomaly I find with the proceedings. However I find the other grounds of appeal are without merit. The appellant was convicted

based on evidence by the complainant who was the victim of rape.

11. The learned trial magistrate found the evidence of the complainant consistent and truthful. That evidence of the complainant is sufficient according to the provisions of section 124 of the Evidence Act. I would also disregard the argument put forth by counsel for the appellant that a clinical officer's medical report is inadmissible. If the clinical officer is qualified to treat a patient, he is also qualified to produce a medical report of his/ her finding. After all it is a matter of judicial notice that there are very few Medical Officers of Health in Kenya and very few victims of violence would access their services, this is also not to mention the challenges of an MOH who would probably find it difficult to find time to attend courts to give evidence when their scarce services are in so much demand.

12. The issue to determine is whether this matter should be referred for retrial. The principles to be considered by this court in determining whether or not to order a retrial were restated in the case of **Ekimat vs. Republic CA Criminal Appeal No. 151 of 2004 (unreported) (Eldoret)** where the Court of Appeal held that:

*"**In the case of Ahmed Sumar vs. Republic [1964] EA 481, at page 483, the predecessor to this court stated as follows:***

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered".

The court continued at the same page paragraph H and stated:

'We are also referred to the judgment in Pascal Clement Braganza vs. R. [1957] EA 152. In this judgment, the court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

13. Although, I agree there was overwhelming evidence against the appellant, I am not satisfied that a retrial would serve the ends of justice. Firstly, the appellant was charged in April, 2003, the trial itself took over three years. He was convicted on 1st December, 2006 and by the time this appeal was determined, the appellant has nearly served the whole sentence. In my view that is adequate punishment and trial would be prejudicial to the appellant thus I decline to order it. Consequently, the appeal is allowed, the conviction is quashed and the sentence is set aside, the appellant is to be set at liberty forthwith unless otherwise lawfully held.

Judgment read and signed this 25th day of February, 2011.

M. KOOME.

JUDGE.