REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 95 OF 2010.

ELIJAH ONGUTI .....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from the original conviction and sentence by E.N. Maina – CM in Criminal Case No. 674 of 2010

***delivered on 11th August, 2010 at Kitale*.)**

J U D G M E N T.

1. The appellant **Elijah Onguti** was charged with the offence of attempted defilement of a girl contrary to provisions of section 9 (2) of the Sexual Offences Act. The particulars of the offence is stated that on the 28th February, 2010 in Trans Nzoia East District within Rift Valley Province attempted by use of the genital organ (penis) the appellant caused penetration into genital organ (vagina) of **T.M**, a child aged 12 years. The appellant also faced a 2nd and 3rd counts of assault contrary to section 251 of the Penal Code. The particulars of both the 1st and 2nd count stated that on 28th February, 2010 in Trans Nzoia East District within Rift Valley Province the appellant unlawfully assaulted **T.M and N.K** respectively and occasioned them actual bodily harm.

2. The appellant pleaded not guilty to all the charges and after trial, he was convicted and sentenced to 10 years imprisonment in respect of the first count, 2 years in respect of the 2nd and 3rd counts. All the sentences were to run concurrently. The appellant is aggrieved by the conviction and sentenced. He has appealed and in the petition of appeal, he has raised the following grounds:-

***THAT**, the learned magistrate erred in law and fact in holding that the offence of attempted defilement*

had been proved when there was no evidence at all.

(i) ***THAT****, the learned trial magistrate erred in law and fact when she failed to appreciate that there was no corroboration of the evidence of PW1 and who was a child.*

*(ii)****THAT****, the learned trial magistrate erred in law and fact when she held that all the charges against the appellant had been proved on the required standard and yet the evidence as presented fell below the required standard.*

(iii) ***THAT****, the learned trial magistrate erred in law and fact when she disregarded the defence of the appellant without giving any reasons.*

(iv) ***THAT****, the learned trial magistrate was biased against the appellant by refusing to give any due regard to the appellant's defence.*

(v) ***THA****T, the findings of the learned trial magistrate were against the weight of the available evidence.*

3. In further arguments to support the above grounds, **Mrs. Munialo,** learned counsel for the appellant submitted that the whole proceeding was vitiated by a mistake found on the evidence of the clinical officer's report which indicates that the offence occurred on 2nd February, 2010 when indeed the evidence from the other witnesses show the alleged offence occurred on 28th February, 2010. No evidence was given why the documents were amended which in essence destroyed the prosecution's case. The credibility of the evidence in support of the 1st count was also faulted because the offence is alleged to have occurred at 4.00 p.m. The evidence of PW4 was not corroborated despite the fact that the attempted defilement occurred in broad day light in the homestead of one Ghesora which was deserted. Thus if the appellant's intention was to defile the complainant, nothing would have prevented him from doing so.

4. The clothing that was produced in evidence was muddy, also not consistent with the evidence that the attempted defilement occurred inside the house. There was also an anomaly because the exhibits being the clothing which was produced by the complainant as opposed to the police. Further inconsistencies were pointed out by the evidence of PW5 who said the appellant tried to obstruct the complainant while walking on a foot path. However, the complainant testified that she ran to the home of Ghesora and the appellant followed her there and then attempted to defile her.

5. The State conceded to this appeal; **Mr. Onderi**, the Learned Senior Principle State Counsel submitted that the appeal in respect of the 1st count should be allowed and the appellant be retried because there was no age assessment report that was produced to enable the court determine the appropriate sentence. During the voire *dire* examination of the complainant, she stated that she did not know the day or month when she was born. It was therefore necessary for the learned trial magistrate to refer the complainant for age assessment for reasons that the penal consequences under the Sexual offences Act is based on the age of the complainant. However the State opposed the appeal in respect of the 2nd and 3rd counts on the grounds that there was overwhelming evidence that was proved to the required standard.

6. 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. During the *voire dire* examination of **T.M PW4** who is the complainant in regard to the 1st and 2nd counts. She said she was 12 years old but she did not know the date of her birth.

7. The learned trial magistrate found her suitable to give sworn evidence. She testified that on 28th February, 2010 at about 4.00 p.m she was walking home with **Boniface Omwanga**, a small boy when they were accosted by the appellant on the road. He obstructed them on the foot path but when they managed to pass the appellant who started to follow them, they started running, the small boy ran away but PW4 decided to enter the homestead of Ghesora. There was no one in the home but there was one house which was not locked so she entered. The appellant followed her, knocked her down and started removing her under pants. PW4 screamed and held her legs tightly together. The appellant bit her on the right cheek. She continued screaming that is when the appellant left her and disappeared.

8. PW4 ran to the police post and reported the matter to **P.C. George Mamnu** PW7. PW7 recorded the statement of the complainant and also of **J.K** the 2nd complainant who followed shortly and complained of having been assaulted by the appellant when she accosted him on the road and asked him why he was running away after attacking a child. PW7 told the trial court that he observed PW4 had a wound on the left cheek and her clothes were soiled. PW7 visited the scene and also the home of the appellant. When the appellant saw the police he attempted to flee but he was arrested with the assistance of the members of the public. PW7 referred the complainant to Kitale District Hospital where she was treated by **Linus Ligale**, a clinical officer. He completed the P3 form; he found the complainant had injury marks on the left cheek. The cheek was swollen and she had tenderness on the chest. He said that there was an error on the P3 form which was indicated as having been filled on 1st February, 2010 instead of 1st March, 2010.

9. Evidence was also given that while the appellant was fleeing from the scene where he had assaulted and attempted to defile PW4, **N. K** PW2, testified that she was talking with the mother of PW4, she heard someone screaming and when she went to check what was happening she met a young girl who told her someone was being raped. Suddenly the appellant emerged and PW2 tried to block the appellant and demanded to know where he was going after somebody was screaming that he had done something. The appellant pounced on PW2 with punches and kicks on the face and chest. He overpowered PW2 and she let him go. PW2 proceeded to police station and found PW4. The two were referred to the hospital.

10. PW2 was also examined by PW1 who found she had swollen face on the right cheek and upper lip. The upper lip had a cut. She was treated and the degree of injury was classified as harm. **Duncan Onsongo,** PW6 also testified that he heard someone screaming, when he went to check, he found the appellant being chased by PW2 and two other ladies. He also attempted to apprehend the appellant together with PW2 but the appellant became wild and started kicking and slapping PW2. PW6 accompanied PW2 to the police post where he met PW4 and also her father **William Mogaka** who testified as PW3.

11. The appellant was placed on his defence, he gave a sworn statement that on 28th February, 2010 while he was walking home, on the way he found two children fighting, and one was bruised and was bleeding. He separated the children but one went away crying. On his way, he met PW2, who accosted him and when he tried to explain PW2 slapped him. The two were separated by PW6. He was later brought to police post and was charged with the offence. Upon evaluation of the above evidence, the learned trial magistrate found that the charges against the appellant were proved. The appellant was convicted and sentenced accordingly. I agree with the learned State counsel that under the Sexual

Offences Act, the penal consequences are categorized according to the age of the victim.

12. There is nowhere on the record where the evidence of the PW4, the complainant who was said to be aged 12 years was confirmed despite the fact that during the *voire dire* examination PW4 who said she did not know the day and month when she was born she said she was born in 1997. The father of PW4 also testified and said that PW4 was born in 1998. The P3 form although indicated the age of complainant as 12 years there is no indication by the evidence of PW1 who filled it that he examined PW4's age. For reasons that no documentary evidence was produced as evidence of PW4's age and in view of conflicting evidence on the age of the complainant, the trial court should have referred the complainant for age assessment. For that reason I allow the appeal in respect of count 1.

13. This now leads me to the next issue of whether the appellant be subjected to retrial. The principles on whether or not to refer a matter that is vitiated by a fatal lapse on the part of the trial court for retrial have been settled in a long line of authorities by the Court of Appeal. See 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".

14. Since the appellant was convicted with the other offences of assault, I am of the opinion that a retrial will not serve the ends of justice. I find the evidence in support of count 2 and 3 overwhelming. The evidence of PW4 is clear and was corroborated by the clinical officer who examined her and found the physical injuries. The error on the P3 form was explained by PW1 in his evidence. I do not agree with the counsel for the appellant that the error regarding the date vitiated the prosecution's case. The evidence of PW4 which in any event the trial court which heard, and saw her testify believed that PW4 was a truthful witness. This is also in line with the provisions of section 124 of the Evidence Act as the appellant was also facing a sexual offence against a minor. The appellant assaulted PW4 and attempted to defile her but gave up and ran away. While trying to run away he was accosted by PW2 in the presence of PW6 he also assaulted PW2.

15. Accordingly I find no justification for interfering with the conviction and sentence in respect of the 2nd and 3rd count which I hereby upheld. The upshot is that the appeal in respect of the 1st count is allowed but the appeal in respect of the 2nd and 3rd counts are upheld the appellant will serve a sentence

of two years as the sentences were to run concurrently.

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

M. K. KOOME.

JUDGE.