REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

H.C.C.R.A NO.7 OF 2011

(From the conviction and sentence of E.O. OBAGA P.M. Busia in Busia P.M. Cr. Case no.707 of 2009)

WILLIAM OTIENO MUKANDE…….....….APPELLANT

VERSUS

REPUBLIC……...…….....…RESPONDENT

J U D G M E N T

The appellant William Otieno Mukande was convicted of the offence of defilement contrary to Section 145 (1) of the Penal Code and sentenced to life imprisonment. He lodged this appeal challenging the judgement of trial magistrate.

The appellant in his initial grounds of appeal, supplementary grounds and written submissions raised several issues:

a) that the age of the complainant was not established.

b) that there was no medical evidence to support the charge;
c) that important witnesses were not called to testify.
d) that the evidence was contradictory;
e) that Section 50(2) of the constitution was not complied with;
f) that the appellant's defence was not considered;
g) that the appellant's constitutional rights were violated in that he was remanded at the police station for over 4 days.

The facts of the case are that the complainant who was aged four (4) years at the material time was staying at her grandmother's (PW2)'S house (PW 2). The appellant was a herdsboy of PW2. The three persons stayed in one compound. The appellant had his own house within the same compound. PW2 shared a bedroom with PW1 using different beds. On the material day at around 8.30p.m PW2 went out of the house to the latrine leaving PWI sleeping in her bed. When she returned a short while later, she found the child uncovered and her clothes thrown on the floor. As PW2 entered the house, she met the appellant leaving her bedroom. On checking on the child, PW2 noticed some watery fluid on her genitalia and suspected that the appellant had sexually assaulted the child. The appellant denied any involvement when PW2 confronted him. PW2 reported the matter to police at Nambale Police Post. The complainant was examined by PW4 at Port Victoria District hospital. The appellant was later arrested and charged with the offence.

The appellant was convicted of the offence of defilement in Busia PM Criminal case no.1123 of 2002. He appealed and the conviction and sentence were set aside. An order for retrial was made which resulted in the proceedings in Busia PM Criminal case no.707 of 2009 which ended in a conviction. It is against the judgment of the trial magistrate in this case against which the appellant lodged this appeal.

Three witnesses testified in this case. PWI the complainant was eleven (11) years at the time she gave her evidence in the retrial. She told the court that she used to stay with her grandmother at her home in Mabunge. The appellant worked for PW2 as a herdsboy. On 04/08/2002 around 8.30p.m. the appellant went to her bedroom window and knocked calling the name of PW1 twice. The appellant then went round the house and entered through the door to the bedroom. He went to the bed of PWI, uncovered her and undressed her. The appellant then defiled PWI and walked out after warning the girl not to tell anyone what had happened. PWI's grandmother had gone out of the house to the latrine. PW2 testified that on the material evening, she dressed the complainant, put her to bed and she slept. PW2 left the house for a short call. When she returned, she met with the appellant coming out of the house. When PW2 confronted the appellant, he said that he had come to the house to pick a matchbox. On reaching her bedroom PW2 found the mosquito net drawn. She asked PWI who had drawn the net and removed her night dress; PW1 said it was the appellant. The appellant on being asked denied responsibility. The following day, PW2 reported the matter to the police. The complainant was sent for medical examination at Nambale Health Centre where she was referred to Busia District Hospital.

The investigating officer PW3 received PW2's report on 18/08/02 at Nambale police post. Investigations were carried out and the appellant charged with the offence.

In his defence, the appellant denied the offence. He said that he was working for PW2 at the material time. He was denied his three (3) months salary by PW2. At one time PW2 made sexual demands from the appellant who declined. He then left PW2's place and went to his parents home where he reported the mater. After that he was arrested on the framed up charges.

The trial magistrate did not believe the defence of the appellant. PW2 testified that the appellant had worked for her for only two (2) weeks. The court considered the defence of the appellant and found that it was a ploy. Having worked for two weeks only, the question of three months salary arrears did not arise.

During cross-examination of PW2, the appellant did not raise the defence that PW2 had a grudge against him due to the fact that he declined her sexual demands. If the allegation was true, the appellant would have taken up that line of defence at the time he cross-examined PW2.

Bringing the allegation of a frame up later was an after thought. I agree with the magistrate that the defence was not plausible.

The evidence of PW1 on what transpired at the material night was very candid. PW2 corroborated the evidence of her grand daughter. She met the appellant coming from her house where the complainant was sleeping. He said he had come to pick a match box which was untrue. PW2 said he had given the appellant a matchbox to use before he retired to bed. The appellant alleged that there was no medical evidence to support the charge. Yet PW4 testified that the hymen was broken which was evidence of penetration. The magistrate addressed the issue of penetration exhaustively. PW4 did not take any vaginal swobs for laboratory examination. The reason was that he examined the complainant the 4th day after the incident and it was unlikely that laboratory examination would bear any positive results. PW2 explained that the incident occurred in the evening of 04/08/2002. The following day she went to the office of an Non-Governmental Organization (NGO) dealing with children's matters to report the matter. She was referred to Nambale police station. From the police station, PW2 was sent to Nambale Health Centre. The centre lacked the capacity or the facilities to do the required medical examination and referred. PW2 to Busia District Hospital. Time had run out and PW4 found it would not serve any useful purpose to investigate existence of semen or discharge. PW4 came to a conclusion that the torn hymen was adequate evidence of penetration. The existence of sperms in the complainant's genitalia was not necessary to prove that there was penetration. The appellant had stayed in that home for two weeks and had sexually abused the complainant a few times and warned her not to tell her grandmother. The child was aged four

(4) years at the time of the sexual assault. The doctor found the approximate age of injury was four days. The injury was the broken hymen since all other parts of the genitalia were found to be normal. PW4's evidence further corroborates that of PW1 on the sexual assault.

The appellant alleges that some witnesses were not called to testify namely the N.G.O. personnel, mother of the child, two police officers P.C. Itano and PC Kilonzo and a neighbour. It is clear from the evidence that none of these people played any significant role in this case. Some of them were just mentioned by other witnesses. The mother of the child was not present during the incident. Calling of any of the said persons as witnesses would not have added any probative value to this case or influenced the court to reach a different finding.

Section 145 (1) of the Penal Code restricted the age of the victim to fourteen (14) years and below. PW4 in the medical examination form (P.3) gave the age of the complainant as four (4) years. PW2 the grandmother gave the same age. For purposes of Section 145 (1) the evidence as to age is adequate. The provisions of the section are different from those of Section 8 of the Sexual offences Act which calls for medical legal proof of age of the victim. The sentence under Section 8 is pegged on the age of the child unlike under Section 145 (1) of the Penal Code. It was not a legal requirement to produce a birth certificate or an age assessment report in this case.

The Section 19 of the Oaths and Statutory Declarations Act does not define who is "a child of tender years" in regard to giving testimony in court. The matter is left to the good sense of the court to decide. In some cases, courts have held that a child of ten (10) years and below is a child of tender years. Others have increased the age bracket slightly upwards. The law requires that a *voire dire* test be conducted before a child of tender years gives evidence in court. The test is intended to assist the court to determine whether the child has the capacity to give sworn evidence. In this case the trial magistrate did not conduct the test. The complainant was eleven (11) years at the time she testified. No reasons were recorded as to why the court omitted to conduct the test. I have perused the evidence of PW1 and it gives an impression of a child possessed of the intelligence to give rational answers to question. Her evidence was clear and detailed. The trial magistrate may have formed the same opinion about the child when she appeared before her. The magistrate may not have assessed PW1 as a child of tender years and therefore decided that the test was not necessary. Assuming that the test was necessary and that it was omitted due to an oversight on the part of the trial magistrate, the question which arises is whether the omission was fatal to the prosecution's case. The complainant cross-examined the appellant on her sworn evidence. There was therefore no prejudice caused to the appellant by the said omission. I come to the conclusion that the omission was not fatal to the trial.

The appellant did not raise the issue of being kept in police custody for four (4) days during the trial. This would have given the prosecution the opportunity to explain the delay. Even if the court was to find that the appellant's constitutional right under Section 72 of the former constitution were violated, such a finding does not affect the criminal trial. The appellant is entitled to compensation under Section 72 (6) should he prove that the police violated his rights.

The charge sheet in count 1 cites Section 145 (1) of the Penal Code as read with Section 8(1) and (2) of the Sexual Offences Act. The transitional provision allow the use of provisions in the Sexual Offences Act in a case where one was originally charged with the repealed law. The trial magistrate chose to utilize the provisions of the penal code. The procedure followed was correct since the offence was committed before the Sexual Offences Act was enacted. The use of the two sections in the statement of the offence in the charge does not render the charge defective. The person who drafted the charge may have had the transitional provisions in mind.

The appellant was acquitted of the offence of grevious harm in Count 11. The court found no evidence to support the charge. Having been acquitted of this charge, the appellant cannot bring it up as a subject of this appeal. The relevant ground therefore serves no useful purpose herein.

The contradictions on the dates of the two occurrence Book entries indicated on the charge sheet and the dates of arrest are negligible and do not affect the substance of the trial. The retrial and the drawing of

a fresh charge sheet may have led to the confusion on part of the police on the dates. The evidence is very clear that the appellant was arrested on 05/08/2002. He was examined by the doctor on 08/08/02 and charged in court the following day in the initial trial.

It is argued that the provisions of Article 50 (2) of the Constitution were not complied with. However, the accused was arrested and charged in early August 2002. The Constitution was promulgated on 27/08/10 about eight years later. The former constitution did not contain the provisions contained in Section 50 (2) of the current constitution The provisions of that section cannot apply retrospectively.

I come to a conclusion that the conviction was based on cogent evidence and it is hereby upheld.

On the issue of sentence, I take into consideration the fact that the appellant was aged 16 years when he committed the offence. PW4 the Clinical officer assessed the age of the appellant as he examined him on the sexual assault. Being under age, the appellant ought not to have been sentenced to imprisonment. At the time the appellant was sent for retrial, he had served four (4) years of the life imprisonment sentence imposed in criminal case no.1123 of 2002. He was convicted during the retrial to life imprisonment on 23/09/10. He has served about one (1) year of the sentence. The issue of the appellant's age during the commission of the offence seems to have escaped the attention of the trial magistrate. The appellant did not raise it in his defence. However, the age was established by the evidence of PW4 and must be considered. The appellant ought to have been given an alternative sentence available under the law. Having now served a total of five (5) years since he was convicted of the offence in the first case, I regard this as sufficient punishment.

I hereby order that the appellant be released forthwith unless otherwise lawfully held. The appeal is successful only to that extent.

Judgement dated and delivered in open court in the presence of the appellant and the State Counsel Mr. Okeyo on the 14th day of December, 2011.

F.N. MUCHEMI
J U D G E