FRED SIMIYU BARASA :::::::::::::::::::::::::::::: APPELLANT

~VRS~

REPUBLIC :::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT

The Appellant Fred Simiyu Barasa was convicted by Sirisia Resident Magistrate of the offence of defilement of a girl contrary to section 8 (1) (2) of the Sexual Offences Act No.3 of 2006 and sentenced to serve fifteen (15) years imprisonment. In his petition of appeal, the Appellant challenges both the conviction and sentence.

Mr. Onchiri argued the grounds of appeal raising several issues. He submitted that there were several contradictions regarding the date the offence was reported and on other material particulars on the evidence. He argued that the age of the Appellant ought to have been assessed at the beginning of the trial not at the end in order to determine how the proceedings would be conducted, whether in camera or in open court. The Appellant was locked in the police cells for about (5) days before he was charged. The act of the police and the state resulted in the violation of the constitutional rights of the accused contrary to section 72 (3) of the Constitution. The counsel argued that the charge was defective because its particulars did not comply with the wording of section 8 (1) of the Sexual Offences Act.

Mr. Ogoti, the State Counsel opposed the appeal. He asked the court to correct the sentence of 15 years imprisonment and substitute it with life imprisonment in accordance with the provisions of section 8 (2) of the Act. He submitted that the date of offence was clearly stated as 12/7/2007 and that there was no contradiction. For violation of constitutional rights the State Counsel referred the court to section 72 (6) of the Constitution which provides for a remedy. Finally, the state argued that there is no legal requirement to assess the age of the accused whose age is in doubt or is suspected to be a minor before the commencement of the case.

The provisions of section 8 (1) of the Sexual Offences Act reads:

> ***"A person who commits an act that causes penetration with a child is guilty of an offence termed as defilement."***

The statement of offence in the charge sheet reads:

> ***"Defilement of a child contrary to section 8 (1) (2) of the Sexual Offences Act."***

The particulars of the charge read:

> ***"On the 12th January 2007 in Mt. Elgon District, within Western Province committed an act which causes penetration with N.W a child aged six years."***

The offence under section 8 (1) is named "defilement". The section explains the offence as ***"an act with a child causing penetration".*** I find the wording of the charge correct. The statement of the offence consists all the ingredients of the charge. The charge is therefore not defective as argued by the defence.

The date of offence in the chare is 12/01/2007. The date to court is 24/01/2007. The O.B. number on the charge sheet is shown as number 20 of 22/1/2007. The P.3 form gives O.B number as 16 of 13/1/2007. The state explained that the Appellant was arrested on 22/1/2007 which gave rise to the O.B. number 20 of 22/1/2007 indicated on the charge sheet. PW4's evidence confirms the date of arrest. The P.3 form is clear that the report was made to the police on 13/01/2007 a day after the offence. The Appellant was arraigned in court on 24/1/2007 which was two (2) days after his arrest and twelve (12) days after the date of offence. I find that the two O.B numbers refer to different entries all relating to this case. The first date refers to the date of the report to the police and the second date is that of arrest. There is no contradiction that arises from the two O.B numbers. Even assuming there was such a contradiction or error on the record, the same would not be regarded as material to the case and section 382 of the Criminal Procedure Code would cure such an anomaly.

The Appellant argued that he was not given an opportunity to sum up after the close of the prosecution's case. Section 210 of the Criminal Procedure Code provides that:

> ***"The court after hearing such summing up or argument from the prosecutor or the accused as the case may be, the court may acquit if it appears that no case has been made up against him."***

The provisions of the section are optional to both the defence and the prosecution.

The heading of section 210 is ***"Acquittal of accused person when there is no case to answer".*** The section does not apply to cases where the court finds that an accused person has a case to answer. Section 211 is the law applicable to such cases. It explains the rights of the accused person when put on his defence. The failure by the court to give the prosecution and the accused a chance to sum up is not fatal to the criminal proceedings. There was no failure of justice occasioned by the omission.

It was argued that the evidence of PW1 and PW2 was contradictory and that it was not clear on what happened. PW1 was the mother of the complainant. She came home on the material day to find PW2, the complainant sick. She examined her private parts and found she was bleeding. She took her to Sirisia District Hospital where the doctor confirmed on examination that the girl had been defiled. PW2 was treated at Bungoma District Hospital. It was on 17/01/2007 when she identified the Appellant as the person who defiled her in a coffee farm on her way to school. PW1 the complainant gave unsworn evidence and said that the Appellant removed her underwear, removed his (Appellant) clothes and did bad things to her in the bush. She further said that she bled and felt pain. The doctor PW5 who examined the complainant confirmed that her hymen was broken and that she was bleeding. This state of affairs was caused by an act of penetration in the complainant's private parts. The evidence of the complainant and PW2 was clear on what happened. PW2 used

the language that "***bad things***" were done to her. But she later explained how she was undressed, how the accused removed his clothes and sexually assaulted her. The doctor's evidence left the court with no doubt about the act of penetration.

The Appellant in his sworn statement of defence denied the offence. He testified that on the material day, he did not meet the complainant let alone defiling her. He said he was arrested and kept in police custody for five (5) days. His defence was considered by the court but rejected as untrue. The court believed the complainant who knew the accused well since he was a pupil in her school. The incident took place during the day and there was no problem in identification.

On age assessment, the doctor confirmed that the Appellant was 19 years at the time of conviction. This was in February 2009. It follows therefore that at the time the trial commenced on 25/6/2008 , the Appellant was aged about 18 ½ years. At the time the plea was taken on 24/01/2007, the Appellant must have been around 17 years. The plea was not taken in camera as required by the Children's Act. The rest of the trial was conducted when the Appellant had attained 18 years which was in order and in the normal manner. The taking of the plea in open court does not nullify the proceedings although the Appellant was under 18 years at the time. Section 75 of the Children's Act has two important features:

1. ***It leaves it to the good sense of the court to form an opinion whether the accused is a child;***

2. ***It gives the court the discretion to clear the court since the word used is "may" not "shall".***

I therefore find that the taking of the plea in this case did not affect the validity of the proceedings neither did it occasion any failure of justice.

The age of the complainant was established to be six (6) years by the doctor. The age of the victim was not an issue on appeal.

On violation of constitutional rights of the Appellant, the charge sheet and the evidence of PW4 shows that the Appellant was detained in police custody for five (5) days. This issue was not raised during the trial. The accused only brought it up during his defence. The prosecution did not have an opportunity to give an explanation for the delay. The detention exceeded the time allowed by the law with three (3) days. In my considered opinion, this period is short and cannot be a good reason to nullify the criminal proceedings. I agree with the state that section 72 (6) provides a remedy for compensation which is available to the accused.

It is my finding that the Appellant was rightly convicted by the lower court. All the ingredients of the offence were proved. The conviction is hereby upheld. The sentence imposed was not in accordance with the law. Section 8 (2) provides for a sentence of life imprisonment in case of the victim being eleven years or less. The complainant in this case was aged six (6) years. I hereby set aside the sentence of fifteen (15) years imposed by the court and substitute it with life imprisonment.

The appeal has no merit and it is hereby dismissed.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 21st day of October, 2010 in the presence of the Appellant, the State Counsel and Mrs. Leting and Mr. Situma for Onchiri for the Appellant.

F. N. MUCHEMI
JUDGE