REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 190 of 2006

VINCENT ONCHWANGI ……. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From original conviction and sentence in the Chief Magistrate's Court Kisii

Criminal Case No.2208 of 2005 by S. M. S. SOITA ESQ., AG.S.P.M)

JUDGMENT

The appellant was convicted by the Resident Magistrate, Kisii of the alternative charge of indecent assault contrary to section 144(1) of the Penal Code. The court considered that he deserved more severe sentence than its jurisdiction allowed. It referred him to the acting Senior Principal Magistrate who sentenced him to life imprisonment. The particulars of the charge were that on 27/11/05 at O sub location in Kisii Central District within Nyanza Province he unlawfully indecently assaulted D A aged under 16 years by touching her private parts namely vagina. In the main charge, the appellant was charged with attempted defilement contrary to section 145(2) of the Penal Code that he attempted to have carnal knowledge of D A a girl under the age of 16.

The appellant was aggrieved by the conviction and sentence and preferred this appeal which was prosecuted by Mr. Masese. Mr. Kemo for the Republic opposed the appeal in its entirety.

Assuming the conviction was sustainable, the sentence imposed for the offence was illegal. The maximum punishment for indecent assault under section 144(1) of the Penal Code (now repealed) was 5 years in jail.

The prosecution called seven witnesses and their evidence was briefly as follow. The complainant was 7 years of age. She was this morning fetching firewood at the roadside with M M K aged, 10, when the appellant came and deceived her that they go to collect her father's receipt. He took her to a nearby maize plantation, removed her pant, pushed her down and penetrated her vagina using his penis. It was a painful experience and he had threatened to beat her if she cried. M saw what was being done to the complainant by the appellant and ran and called Stella Kemunto Masongo, an adult, who found the girl was with her pant in her hand and sitted astride the appellant who was having sexual intercourse with her. When the appellant was confronted and asked what he was doing to the child he ran away. Stella raised an alarm. Many people came. Seminal fluid was coming from the complainant's private parts. The complainant was taken to Kisii General Hospital through Kisii Police Station and admitted for a day. Medical evidence produced by Clinical officer Jackson Murauni from the Hospital did not reveal any

injury to the external or internal genitalia of the girl, but vaginal swab revealed pus cells. She had contracted a sexually transmitted infection.

The appellant gave unsworn statement in defence denying the charges. He stated he was going home at about 5 p.m. when he found three children, including the complainant picking firewood along the path. Someone hit his back. It was the complainant. He held her by the hand and broke a maize stalk. One of the girls, S began to scream saying he was pulling the complainant into the maize plantation. Members of public came. He was asked why he was pulling the complainant into the maize. S alleged he wanted to defile the complainant. He went home. Later he was arrested and charged. He did not call witnesses.

The trial court found the prosecution had established the guilt of the appellant beyond doubt and convicted him. In the grounds in the Petition of Appeal it was complained that the court had erred in finding the appellant guilty of the alternative charge, having found that there was no evidence to sustain the main count. It was further urged that the appellant was convicted on uncorroborated evidence.

On first appeal from a conviction the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has, however, to bear in mind that it did not see or hear the witnesses (Okeno v. Republic [1972] EA 23). The judgment of the trial court shows the evidence of the complainant and the other witnesses called by the prosecution was accepted. It means that the girl was defiled by the appellant. However, the court declined to reach that conclusion because there wasn't

"any medical evidence to prove defilement or an attempt

thereof ……."

The court found that instead

"the evidence on record clearly points towards indecent

assault on the complainant".

The court, I find, misdirected itself. The evidence on record neither pointed to attempted defilement nor to indecent assault. It pointed to defilement. The girl stated she was penetrated. After she was examined, she was allowed to give testimony while not sworn or affirmed. On account of her being a child her evidence required corroboration. On basis that the court was dealing with a sexual offence there was also need for corroboration. Mwas allowed to testify while affirmed. She was 10. Her evidence required corroboration. I agree with Mr. Masese that evidence that required corroboration cannot corroborate. However, there was evidence of Stella, an adult, who found the appellant in the act. That was independent and material corroboration. It corroborated the evidence of the complainant, M and E M, aged 10. The trial court ought to have found that the medical evidence that showed sexual transmitted disease contracted by the girl was materially consistent with the testimony of the girl that she had been sexually assaulted.

An accused cannot be convicted of an offence that is more grave than the one he was charged with. If he was charged with defilement and the evidence disclosed attempted defilement or indecent assault he was going to be convicted with the disclosed offence even if he was not charged with it. Section 179(2) of the Criminal Procedure Code provides that:

"when a person is charged with an offence and facts be

proved which reduce it to a minor offence, he may be

convicted of the minor offence although he was not

charged with it."

And section 180 of the Criminal Procedure Code provides that

"When a person is charged with an offence, he may be

convicted of having attempted to commit that offence

although he was not charged with the attempt."

The result is that the appellant was convicted of an offence not disclosed by the evidence. The conviction is quashed and sentence set aside.

However, I have considered the nature of the charge and the evidence that was adduced by the prosecution witnesses and which the court accepted. The treatment of the evidence by the court was, however, quite unsatisfactory. I consider the fact that the complainant was a minor. I am aware of the decision in Mwangi v. Republic [1983] KLR 522.

I order that the appellant be retried by another competent court.

Dated, signed and delivered at Kisii this 15th day of July 2009

A. O. MUCHELULE

JUDGE

15/7/2009

Before A. O. Muchelule Judge

Mongare cc

Mr. Kemo for state.

Mr. Sagwe for Mr. Masese for Appellant

Appellant present.

Court: Judgment in open court

A. O. MUCHELULE

JUDGE.