REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 178 of 2007

RAPHAEL OGONGO AKUMU ……..….. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

[From Original Conviction and Sentence in Criminal Case Number 1705 of 2005 of the Senior Resident Magistrate's Court at Nyando]

JUDGMENT

The appellant Raphael Ogongo Akumu appeared before the learned Resident Magistrate at Nyando Mr. R. K. Ondieki on the 30th November 2005, charged with two counts as follows:-

(i) Defilement of a girl contrary to Section 145 (1) of the Penal Code, that on the 22nd and 23rd day of November 2005, at [*Particulars withheld persuant to section 76 (5) of the Children Act, 2001*] had carnal knowledge of I. A. O., a girl under the age of sixteen years.

(ii) Abduction of a girl contrary to Section 143 of the Penal Code, in that on the 22nd day of November 2005 at [*Particulars withheld persuant to section 76 (5) of the Children Act, 2001*] unlawfully abducted I. A. O., a girl under 18 years from the custody of her parents without their consent.

The appellant pleaded not guilty in both counts and hearing of the case commenced on 6th March 2006, before the aforementioned Resident Magistrate. It was concluded on the 27th September 2007, when the judgment was delivered by learned Senior Resident Magistrate L. N. Mbugua (M/s) who took over the matter on the 4th May 2007.

The appellant was found guilty as charged in both counts and was sentenced to serve 20 years

imprisonment for the first count and 3 years imprisonment for the second count. He is dissatisfied with the decision of the lower court and has preferred this appeal on the basis of the grounds of appeal contained in the petition of appeal filed herein on 4th November 2007, by the firm of Wasuna & Co Advocates on his behalf. There are ten grounds of appeal as follows:-

(i) The learned trial magistrate D. O. Ndege (DM1) who heard the evidence of PW1 Iscah Atieno Odongo and the learned trial magistrate who concluded the case both erred and misdirected themselves in not affording the Appellant an opportunity to cross – examine PW1 thereby rendering the trial and subsequent conviction a nullity.

(ii) It was not open to the learned Senior Resident Magistrate L. N. Mbugua to take over the trial of the case from D. O. Ndege DM II and hear the evidence of PW2 without complying with the mandatory provisions of Section 200 of the Criminal Procedure Code. That irregularity was fatal to the proceedings and also rendered the conviction of the appellant a nullity.

(iii) It was not open to the learned trial magistrate to admit in evidence the P3 forms in respect of the complainant and the Appellant without calling the makers thereof and without assigning any reasons therefore and without seeking the Appellant's consent to admission of such hearsay evidence.

(iv) The learned Senior Resident Magistrate erred in convicting the appellant on the strength of medical evidence of examination that was purportedly carried out some 4 or so days after the alleged defilement and after the complainant had admittedly washed herself

(v) The learned Senior Resident Magistrate erred in convicting the Appellant of defilement when there was doubt that the Appellant defiled the complainant in view of the evidence of DW2 that on the night of the alleged defilement, the complainant had slept with their children away from the Appellant.

(vi) The ingredients of the offence of abduction were not proved and the learned Senior Resident Magistrate therefore erred in convicting the Appellant of the said charge.

(vii) The learned Senior Resident Magistrate misdirected herself in convicting the appellant on both counts notwithstanding that the prosecution failed to call witnesses whose evidence was crucial to the trial namely the complainant's parents and sister from whose custody she could have been abducted, the investigating officer and the people from the home she was brought by the Appellant to the police.

(viii) The learned Senior Resident Magistrate erred in law in convicting the Appellant pursuant to Section 49 of the Sexual Offences Act without an amendment of the Charge Sheet.

(ix) The conviction was against the weight of evidence

(x) The sentences were harsh and excessive in the circumstances of the case.

The appeal was argued on behalf of the appellant by Mr. Ooko, Advocate. He proceeded on the basis of the first nine grounds of appeal. He contended that the appellant was denied his constitutional right by being denied the opportunity to cross-examine the complainant after the "**voire –dire** " examination in which it was concluded that she gives a sworn testimony. He also contended that the trial in the lower court was irregular in that the case was conducted by several magistrates yet the provisions of Section 200 (3) of the Criminal Procedure Code were not applied. He went on to contend that there was error in the admissibility of the medical evidence in that the makers of the P3 forms did not testify and no ground was laid for the production of the same by a clinical officer contrary to Section 34 of the Evidence Act.

Learned Counsel for the appellant further contended that the evidence of DW2 raised doubt as to whether the appellant committed the offence and that he (appellant) was convicted pursuant to Section 49 of the

Sexual Offences Act and not Section 145 (1) of the Penal Code which had been repealed and no amendment of the charge sheet was made by the Prosecution. Regarding the second count, the learned Counsel contended that the ingredients of Section 143 of the Penal Code were not at all proved. He urged the court to set aside the appellants conviction and set him free.

The State was represented by the learned State Counsel Mr. Mutai. He took particular note of ground eight of the appeal and conceded the appeal. He however requested for a re-trial arguing that the trial was a nullity in so far as the appellant was charged with defilement under Section 145 (1) of the Penal Code (now repealed) and was sentenced under Section 49 of the Sexual Offences Act. He argued that the provision does not extended to sentencing and that Section 8 (1) of the Sexual Offences Act invoked by the trial magistrate is not a penal section. Otherwise, the learned State Counsel contended that there was adequate evidence to convict the appellant and that Section 200 (3) of the Criminal Procedure Code was complied with.

Regarding the proposed re-trial, learned counsel for the appellant argued that such action would prejudice the appellant who is an elderly person approaching sixty years and not in good health and who was in custody for along time.

A consideration of the grounds of appeal and the arguments advanced in support thereof in the light of the concession by the learned state counsel makes it necessary and prudent to narrow down the issues and deal firstly with those that relate to the legality or otherwise of the overall trial. The rest of the issues deal mostly with the reception and/or admissibility of the evidence in the lower court. These may have to be considered lately subject to this court's conclusion on the legality of the trial. This is important for the avoidance of any prejudging that may accrue to both the prosecution and the defence should there be a re-trial of the case in the lower court. As a first appellate court, this court is mandated to re-examine and re-evaluate the evidence adduced in the lower court and arrive at its own conclusions and findings. In doing so, it may invariably prejudice either side by prejudice issues that may otherwise be repeated in a fresh hearing of the case.

Be that as it may, grounds two (2) and eight (8) of the appellant's grounds of appeal relate to the legality of the trial. Ground two is a contention that the provisions of Section 200 of the Criminal Procedure Code were not complied with despite the trial having been conducted by different magistrates. Mr. Ooko stated that the trial was conducted by three magistrates viz R. K. Ondieki, D. N. Ndege and L. N. Mbugua. The learned counsel was however mistaken. The record shows that the trial was conducted by two magistrates. It started off with the learned Resident Magistrate R. K. Ondieki who recorded the evidence of the complainant Iscar Atieno Odongo (PW1) on the 6th March 2006 and that of Sergeant Hillary Ndung'u (PW2) on the 8th August 2006. The learned Senior Resident Magistrate L. N. Mbugua (M/s) took over on the 4th May 2007 and recorded the evidence of the remainder of the witnesses upto the conclusion of the case.

The proceedings of the 4th May 2007, are most significant for purposes of determining whether or not the provisions of Section 200 Criminal Procedure Code were complied with. Mr. Ooko contended that the said provisions were not complied with on the 8th August 2006. The 8th August 2006 is not the correct date but the 4th May 2007 when Magistrate L. N. Mbugua took over the case. The typed proceedings erroneously indicate that magistrate L. N. Mbugua presided over the case on that 8th August 2006. The actual record shows that it was magistrate R. K. Ondieki who presided on that date. The learned State Counsel contended that Section 200 (3) of the Criminal Procedure Code was complied with. The said provision states as follows:-

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right".

The question arising in view of that mandatory provision of the Criminal Procedure Code is whether the trial magistrate L. N. Mbugua complied accordingly. The trial court record clearly shows that there

was no strict compliance of Section 200 (3) of the Criminal Procedure Code. On the 4th May 2007 the incoming trial magistrate simply proceeded with the case from where it had stopped after noting that "**under Section 200 of the Criminal Procedure Code case is to proceed from where it stopped."** This was after the accused had requested that the case proceed from where it stopped. The accused took the initiative to request for a continuation of the case from where it stopped and the trial magistrate granted the request by stating that Section 200 Criminal Procedure Code provided for such conviction.

The trial magistrate erred. She abdicated from her duty to inform the appellant of his rights under Section 200 (3) of the Criminal Procedure Code. This constituted a miscarriage of justice and an invalidation of the proceedings from that point. Section 200 (3) Criminal Procedure Code is there to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate. The burden to inform an accused of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms. **(See CR. APP NO. 87 & 88 OF 2006 CYRUS MURIITHI KAMAU & ANOTHER =vs= REPUBLIC COURT OF APPEAL AT NYERI (Unreported).**

The appellant was thus prejudiced by being convicted upon evidence that was not wholly recorded by the convicting magistrate including that of the key witness i.e. the complainant (PW1).

Turning to ground eight (8) of the grounds of appeal, learned state counsel conceded the appeal on the strength of the ground which is essentially a contention that the trial magistrate convicted and sentenced the appellant on the basis of a wrong provision of the law (i.e. Section 49 of the Sexual Offences Act) under which he had not been charged. Learned Counsel for the appellant, argued that prior to the enactment of the Sexual Offences Act, the relevant law in operation was Section 145 (1) of the penal code under which the appellant was charged. However, at the time of the conviction the said Section 145 (1) of the penal code had been repealed and yet the prosecution did not deem it fit to amend the charge sheet. The learned State Counsel argued that the transitional provisions provided under the schedule to the Sexual Offences Act do not extend to sentencing and that Section 8 (1) of the said Act which was invoked by the trial magistrate is not a penal provision.

In invoking the Sexual Offences Act, 2006, the trial magistrate rendered herself thus:-

"For the offence of defilement court hereby invokes the provisions of Section 49 of the Sexual Offences Act as the charge in the penal code has since been repealed. In the circumstances I hereby sentence accused under Section 8 (1) of the Sexual Offence Act of 2006 to serve the minimum sentence provided for which is 20 years".

Section 49 of the Sexual Offences Act provides that:-

"The Acts identified in the second schedule are amended in the manner set out in the schedule".

The said schedule provides for consequential amendments and repeals and Section 1(2) of the same provides for the repeal of Section 145 of the penal code (inter alia). The appellant was charged under Section 145 (1) of the penal code, which basically provided for the punishment of an offender. It did not provide for a minimum sentence. It provided that an offender was liable to imprisonment with hard labour for life. Section 48 of the Sexual Offences Act 2006, is the transitional provision and provides that:-

"**The provisions of the first schedule shall apply".**

Part 2 of the said first schedule states:-

"For greater certainty, the provisions of this Act shall supersede any existing provisions of any other law with respect to sexual offence".

Part 3 of the said first schedule states:-

"Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws".

The aforementioned provisions of the Sexual Offence Act 2006 are very clear and specific. Consequently, the trial magistrate erred by invoking the Sexual Offence Act 2006 to sentence the appellant to a minimum of 20 years imprisonment. Although the trial magistrate could still sentence the appellant to 20 years imprisonment under the repealed Section 145 (1) of the penal code, the provision did not provide for a minimum sentence. It provided for a maximum sentence of life imprisonment. Under part 3 of the first schedule to Section 48 of the Sexual Offence Act 2006, the trial magistrate ought to have continued with the case to its logical conclusion under the repealed Section 145 (1) of the penal code. It seems that the trial magistrate was bent at applying the new law in view of the seriousness of the offence. However, in doing so, she erroneously invoked Section 8 (1) of the new Sexual Offences Act 2006 in sentencing the appellant. As correctly stated by the learned State Counsel the said provision is not a punishing or penal section. It actually creates the offence of defilement. The punishing or penal provision in the present circumstances would be Section 8 (3) of the Act. This is the section, which the trial magistrate intended to invoke. She may have slipped and indicated Section 8 (1) instead of Section 8 (3) of the Act.

The procedural defects mentioned hereinabove necessitate an interference by this court by way of quashing the appellant's entire conviction by the lower court and setting aside the sentence of 20 years imprisonment for the first count and 3 years imprisonment for the second count. However, considering the seriousness of the offences and the possible psychological effects they may have on the child victim at present or future, it is only fair and just that there be a re-trial of the case preferably at the Chief Magistrate's Court in Kisumu which I gather is a few kilometres away from Nyando District.

The Learned State Counsel indicated that the witnesses are traceable. The appellant's inconvenience arising from a re-trial would not supersede the ends of justice that is intended. In any event, the lower court record shows that the appellant had been released on bond while the trial progressed. As to the appellant's age, that is a natural phenomenon and as to his ill health, we shall leave that to providence.

In view of the impending re-trial there would be no need to consider and make findings in relation to the other grounds of appeal.

The orders of the court shall thus be:-

(i) The conviction and sentence of the appellant by the lower court be and is hereby quashed and set aside in its entirely.

(ii) There be a re-trial of the whole case before a different magistrate at the Chief magistrate's Court Kisumu.

Dated, signed and delivered at Kisumu this 26th day of May 2008.

J. R. KARANJA

JUDGE