REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 262 of 2003

CHARLES BARAZA OKWAYO ……..……..…… APPELLANT

V E R S U S

REPUBLIC ……..…….. RESPONDENT

JUDGMENT

The Appellant was upon trial before the Senior Resident Magistrate at Mombasa on a charge of defilement contrary to Section 145 (1) of the Penal Code convicted and sentenced to ten years imprisonment. He has appealed against that conviction and sentence on seven grounds of appeal, which can be summarized to four namely: -

1. That the learned trial magistrate erred in convicting him on contradicted insufficient and uncorroborated evidence of the complainant.

2. That the leaned trail magistrate erred in relying on incredible medical evidence.

3. That the learned trial magistrate erred in failing to consider or consider adequately his defence.

4. That the sentence of 10 years imprisonment was in the circumstances of this case harsh.

In his written submissions the Appellant argued these grounds of appeal together.

On ground 1 the Appellant submitted that the evidence of the complainant's mother PW2 was contradicted by that of the complainant and PW3. He contended that while PW2 said that she was at home when the children returned from grazing goats and reported to her that her daughters had been defiled by the Appellant, the children said she was not at home.

On ground 2 the Appellant argued that the doctors' evidence giving the age of the injuries he found on the complainant about one month demolished the prosecution case. On ground three he repeated what he had said in the lower court that the complainant's mother who had a bone to pick with him tramped up the charge against him. He argued that his livestock had damaged the complainants' mother's crops valued at Sh. 500/- which he had been unable to settle and that he had accidentally felled her water bucket and lesso into a well.

I have considered the evidence on record. Though the complainant and her brother were children of tender years aged 11 and 9 respectively, like the trial magistrate I find that they were intelligent and understood the duty of telling the truth. They were not shaken at all. PW3 the brother of the complainant was firm that the Appellant whom they knew as a neighbour defiled his sisters while he watched from a distance of five meters. The children did not scream because the Appellant had knife with which he

threatened to slaughter them if they screamed.

As regards the medical evidence I have no doubt that the doctor was referring to the period of one month or even more that the complainant had known the Appellant before she was defiled. That period cannot have been referring to the age of the injuries as he examined the complainant on 28th January 2002, two days after the date of the alleged defilement. Even if that evidence is excluded, from that of the complainant and her brother I am satisfied that the Appellant defiled the complainant.

The Appellant's claim that the learned trial magistrate did not consider his defence has no basis. She considered it and dismissed it in an afterthought. I have myself considered it and I agree with the learned trial magistrate that it was clearly an afterthought. The Appellant did not put the allegation of compensation and the felling of the water bucket into the well to the complainant's mother or the other witnesses.

Taking all these factors into account I find that the Appellants' appeal against conviction has no merit and I accordingly dismiss it.

As regards sentence the offence the Appellant was convicted of at that time carried a sentence of 14 years imprisonment. A term of 10 years imprisonment is therefore not harsh. The appeal against sentence must also fail.

In the upshot I find that this appeal has no merit and I therefore dismiss it in its entirety.

DATED and delivered this 12th day of June 2007.

D.K. MARAGA

JUDGE