REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

CRIMINAL APPEAL NO. 447 OF 2006

BETWEEN

KELVIN OTIENO OGUTU…….APPELLANT

-AND-

REPUBLIC…….....RESPONDENT

(An Appeal from sentence imposed by Principal Magistrate Mrs. G.L. Nzioka on 8th August, 2006 in Criminal Case No. 4293 of 2006 at the Makadara Law Courts)

JUDGEMENT

The charge brought against the appellant was defilement of a girl under the age of 16 years, contrary to s.145(1) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant herein, on *27th July, 2006* at [Particulars Withheld] Slums in Nairobi, had carnal knowledge of ***D A***, a girl under the age of 16 years.

At the time of plea-taking, on 8th August, 2006 the substance of the charge and every element thereof was read out to the appellant, in a language that he understands; and his response was: "It is true I slept with her." The learned Principal Magistrate then asked the appellant: "Did you defile the child? Have you understood the charge?" The appellant thus answered: "I was the first person to break her virginity"; and thereupon, the Court entered a plea of guilty.

The prosecutor then set out the facts of the case as follows. The complainant, a child aged 9 years, was at home, in the room where she used to sleep, on 27th July, 2006. The appellant entered the said room, removed the complainant's underpants, and had carnal knowledge of her. This incident was reported to the complainant's father, who then took her for medical attention; the doctor filled in a P3 form showing his findings. The matter was reported to the Police, and the appellant was arrested and charged.

Upon the appellant herein acknowledging the facts as true, the learned Principal Magistrate convicted him on his own plea of guilty. The prosecutor asked that he be treated as a first offender, and the appellant then made his plea in mitigation. His plea was as follows:

> "This is something that happened to me. I pray that the Court helps me. My mother died, leaving me with a brother and sister [to take care of], and if I am jailed, they would suffer."

The Court then pronounced sentence, in the following terms:

> ***"I have considered the accused [person's] mitigation and the fact that he is a first offender. But I have equally considered that offences of this nature are serious and prevalent… One cannot overlook the permanent psychological effect of the [offence] on the victim…***
>
> ***"The accused is sentenced to serve life imprisonment."***

Although an appeal, by law, could in the circumstances only have been against *sentence* (s.348, Criminal Procedure Code (Cap.75)), the appellant formulated his grounds of appeal in rather broad terms:

> (i) that the trial Magistrate had misdirected herself in holding that the prosecution had a weighty case justifying harsh sentence;
>
> (ii) that the trial Magistrate failed to note that the criminal case had arisen from family grudge;
>
> (iii) that the trial Magistrate failed to see that he had only pleaded guilty due to his lack of education and owing to his simplicity of mind.

On the occasion of hearing this appeal, the appellant came along with written submissions in which he contended that the trial Court in sentencing him, had failed to take into account the fact that he was a first offender. He stated that following the commission of the offence he had become remorseful and repentant and, if given an opportunity, he would not be involved in crime again. He contended that the learned Magistrate in imposing sentence, had not considered his mitigation plea fully. He urged that the sentence imposed against him was "harsh and excessive," and was "destined to ruin his life."

The grounds of appeal, in my opinion, form a jumble and lack focus on what is permissible in law; but the main thread in the appeal is a contest to the *sentence* of life imprisonment awarded by the trial Court. Learned State Counsel ***Ms. Gateru*** contested, quite rightly, I think, any claim in the appeal which goes beyond disputing the *sentence.*

But on sentence, learned counsel was prepared to concede to the appeal. The plea had been properly taken; the appellant had pleaded guilty – and, counsel urged, that position is to be preserved.

Ms. Gateru urged, however, that life imprisonment for the appellant was too harsh a sentence; firstly the appellant had saved the Court's time by pleading guilty; secondly, he was a first offender. A maximum sentence such as was awarded, counsel urged, was not called for; and the Court should substitute a shorter term.

While on the merits of the claims brought before this Court, I would accept ***Ms. Gateru's*** submission as meritorious, I have also addressed the broad framework of the law within which the competing claims in the appeal must be resolved.

The offence was committed on *27th July, 2006.* The charge was brought on the basis of s.145(1) of the *Penal Code* (Cap.63). That section formed an element in Chapter XV of the Penal Code, bearing the rubric "OFFENCES AGAISNT MORALITY." The substance of that chapter of the Penal Code, including the said s.145(1) thereof, were, in 2006, *repealed* and substituted by the *Sexual Offences Act 2006* (Act No. 3 of 2006) which carries as the date of assent, ***14th July, 2006*** and as the date of commencement, ***21st July, 2006.***

Clearly, if the offence herein was committed on ***27th July, 2006,*** this came *after* the entry into force of the Sexual Offences Act (on ***21st July, 2006***).

It follows that s.145(1) of the Penal Code (Cap.63) was *no longer available* to be the basis of the charge, at the time the appellant herein committed the offence on 27th July, 2006. So he was not brought before

the trial Court on the basis of an existing law; he should have been charged under s.8 of the *Sexual Offences Act 2006* (Act No. 3 of 2006) which thus provides:

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***"(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

What was before the Subordinate Court, therefore, was a *defective charge*, and could not have been the basis of a valid trial. However, validity or invalidity of the proceedings was not considered, as the case went through the *short-cut* of the guilty plea; and the Court *summarily* handed down conviction and sentence, with no opportunity to consider the procedure followed.

The High Court as a Court of unlimited jurisdiction to resolve *justiciable disputes*, and to ensure observance of *legal process*, cannot allow a conviction improperly arrived at to stand; and it follows that both the conviction and the sentence meted out by the lower Court must be quashed and set aside.

The only question remaining is whether this is a proper case for a *retrial*, under the provisions of the Sexual Offences Act, 2006.

The legal principles relating to retrial had been laid down in several decisions of authority. In ***Pascal Clement Braganza v. R*** [1957] E.A. 152 the Court of Appeal for Eastern Africa had stated (***Briggs, J.A.,*** at p.152):

> ***"We accept the principle that re-trial should not be ordered unless the Court is of opinion that on a proper consideration of the admissible, or potentially admissible, evidence, a conviction might result."***

That test, I think, is easily satisfied in the instant case, given the facts in the hands of the prosecution, and given the fact that the record shows the appellant to have many-times protested his own part in the incident which was the basis of the charge. This, therefore, is a typical case which speaks in favour *of orders for a retrial.*

I will, therefore, make orders as follows:

> ***(1) The proceedings of the trial Court are hereby annulled.***
>
> ***(2) This matter shall be mentioned before the Chief Magistrate at the Nairobi Law Courts, on Monday, 1st October, 2007 for directions for the filing of a fresh charge, and for directions for hearing and disposal.***
>
> ***(3) Production order shall issue in respect of the appellant herein, and in connection with the 2nd order herein***.

DATED and DELIVERED at Nairobi this 26th day of September, 2007

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Respondent: **Ms. Gateru**

Appellant in person