REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA 19 OF 2014

(*From original conviction and sentence in Criminal Case number 2 of 2013 of the Principal Magistrate`s court at Ukwala – Hon. R.M. Oanda-Ag PM)*

JAMES ODHIAMBO OKOTH ….....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

1. The Appellant was in the court below convicted on the Principle charge of defilement contrary to section 8(1) (4) of the Sexual Offencs Act whose particulars were that on 1st January, 2013 at [particulars withheld]village in Ugenya District within Siaya county he intentionally caused his penis to penetrate the vagina of B A O a child aged 14 years. He was sentenced to 15 years imprisonment and being aggrieved he filed this appeal.

2. His initial petition contained five grounds but at the hearing of the appeal his advocate, Mr. Kowinoh, relied on the three grounds in the supplementary petition. The said 3 grounds are:-

i) The trial magistrate erred in law and fact in convicting the appellant while the evidence on the age of the complainant was unsatisfactory and insufficient.

ii) The conviction and sentence is against the weight of evidence on record.

iii)The conviction and sentence is against the weight of evidence on record.

3.Mr. Kowinoh submitted that the trial magistrate did not administer the Voir dire before taking the evidence of the minor who was then fourteen years and that this was fatal to the prosecution`s case. On this he relied on the decision of the court of Appeal in Collins Odhiambo Oluoch V.R [2014] eKLR and two other High Court decisions. He also took issue with the fact that the age of the complainant was not proved and that this was also fatal. He urged the court to allow the appeal.

4. On her part prosecution Counsel Miss Wakio submitted that she too had noted the anomalies at the trial and that while she conceded the appeal she would ask for a retrial.

5. Mr. Kowinoh was however, of the view that since there was no mistrial a retrial would not do. He urged the court to quash the conviction and set aside the sentence.

6. As the first appellate court I am enjoined to reconsider and evaluate the evidence afresh so as to arrive at my own conclusion bearing in mind that I did not see the witnesses testifying (see Okeno V. R [1972]

E.A 32)I have done so in this case.

7. On the issue of voire dire it is indeed correct that none was conducted. The complainant was put on the stand and in her sworn testimony told the court that she was a class five pupil at st Joseph Ochiel. That she recalled that 1/1/2013 was a holiday and that she had gone to Kareka shopping centre with B E and C. On their way home the appellant chased them and then hit her with bottle and when she fell he got hold of her. When C intervened the appellant hit him too. He then took her to a bush and after undressing her and warning her not to scream had sex with her. After he released her she went home and told her mother. The matter was reported to Ukwala police station and she was examined at Ambira Hospital. Her mother, the clinical officer who examined her and the investigating officer were the only other witnesses. The appellant who made an unsworn statement denied that he committed the offence.

8. Section 19 of the Oats and statutory declarations Act is the law that deals with reception of evidence of children. The same provides as follows:-

" 19(1)" … where in any proceedings before any court or person having by law or consent of parties authority to receive evidence any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received though not given upon oath, if in the opinion of the court or such other person he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure code,shall be deemed to be a deposition with the meaning of that section....."

Authorities abound on the manner of administering the voire dire-see for instance **Sakila V.R (1967**) **E.A 403** and **Ayieyo V.R. (2008) eklr (GXF) page 684).**

9. The oaths and statutory declarations Act does not define who a child of tender years is and indeed in **Kibageny V.R. (1959) E.A 92** the court of appeal stated

" …. there is no definition in the oaths and statutory declarations ordinance of the expression child of tender years, for the purpose of section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age of under fourteen years."

It is to be noted however that our children`s Act now defines a child of tender years as one under the age of ten years-see **section 2 in Ayieyo V. Republic(2008) eKLR (GXF**) the court of Appeal ruled that **section 19(i)** of the oaths and statutory Declarations Act did not apply to a witness who then was 12 years old. In that case as in the case cited by Mr. Kowinoh advocate the court held that it was mandatory to administer the voire dire to the witness who was under ten years as she was a child of tender years. From the definition of a child of tender years in the children`s Act it was not necessary for the trial magistrate in the instant case to administer the voire dire as he was alleged to be fourteen years old.

10. As for the age of the complainant it is now trite that age must be proved as that is what determines the sentence to be imposed. In this case absolutely no evidence of age was adduced. Even the complainant and her mother did not make any reference to her age. This court has been urged to order a retrial. In **Ekimat V.R (2005) eKLR 182** the court held as follows:-

5. It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not follow that a retrial should be ordered.

6). A Retrial should not be ordered unless the court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for retrial should only be made where the interest of justicerequire it and should not be ordered where it is likely to cause an injustice to an accused person."

The interest of justice would have required me to order a retrial. However, something caught my eye which made me to conclude that even upon a consideration of the potentially admissible evidence a conviction might not result. It was the complainant`s evidence that this offence occurred at 8p.m. That means it was at night and dark. No questions were put to her to clarify how she identified the appellant as her assailant. The trial magistrate did not consider the issue of identification at all. He seems to have been contended that there was medical evidence of penetration. He did not bother to find out how she knew it was the appellant who perpetrated this heinous act upon her.

11. In the end I allow the appeal albeit not on the grounds cited, quash the conviction and set aside the sentence. The appellant be set free forthwith unless otherwise lawfully held.

E.N. MAINA

JUDGE

Signed, dated and delivered in Kisumu this 5th day of 2015

<u>In the presence of</u> :

Mr. Ruto for the state

The appellant in person

cc: Moses Okumu

ENM/aar