REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 27 OF 2014

From original conviction and sentence in Criminal Case number 1740 of 2010 of the Principal Magistrate`s court at Winam – Hon. J. SALA -RM)

ZAKAYO OKOTH ROMBO ….....APPELLANT

VERSUS

REPUBLIC ….... RESPONDENT

JUDGEMENT

1. On 1st November, 2010 the appellant was arraigned before the Winam Court and charged with Defilement contrary to section **8(1) (3**) of the Sexual Offences Act and in the alternative committing an indecent act with a child contrary to section 11(I) of the Sexual Offences Act.

2. The particulars in the main charge were that on 31/10/2010 at about 10 a.m at [particulars withheld] Sublocation in Kisumu East District within Nyanza Province, he intentionally caused his penis to penetrate the vagina of L A O, a child aged 14 years. Those of the alternative charge were that on 31/10/2010 at about 10 a.m in [particulars withheld] Sublocation in Kisumu East District within Nyanza Province he intentionally touched the vagina of L A O, a child aged 14 years with his penis.

3. He pleaded not guilty to both charges and in the ensuing trial the prosecution called six witnesses and the accused gave sworn evidence. In the end the trial magistrate found that defilement had not been proved as the P3 form produced did not prove that the complainant had been defiled let alone establish a nexus between the complainant and the accused. The trial magistrate observed that matters were not helped by the fact that the appellant was not physically examined; nor samples taken from his person for any tests. He also took issue with the fact that the P3 form was poorly filled and did not indicate the age of injuries suffered by the complainant and noted that it was unlikely that a grown man would defile a young 14 year old child and leave her with no vaginal tears as stated in the P3 form. The trial magistrate however, found the charge of indecent act had been proved and convicted the appellant and sentenced him to ten years imprisonment.

4. Being aggrieved by the conviction and sentence he appealed. In the petition he has faulted the trial magistrate for convicting him on insufficient evidence; for convicting him despite the complainant not having been found in his company, for relying on the evidence of PW1, PW2 and PW3 and for not finding that the complainant lied that she had never had sex yet upon examination, she was found to be pregnant. He also faults the trial magistrate for not taking into account that the complainant was mentally challenged and for not considering that the proceedings for sexual offences Act were not followed. He contends that he was never himself examined and that the sentence imposed was harsh in the circumstances.

5. At the hearing of the appeal Mr. Adiso the advocate for the appellant reiterated these grounds and urged this court to allow the appeal and set aside the sentence.

6. The appeal was opposed. Miss Muiru, prosecution counsel took the court through the proceedings of the lower court and urged the court to note that under **section 34** of the Sexual Offences Act evidence of previous sexual encounters can only be adduced with the leave of the court. She urged this court to disregard the evidence of the complainant`s pregnancy. As regards the omission to have the appellant medically examined and the lack of corroboration of the complainant`s evidence she urged this court to be guided by the decision of the court of appeal in **Dennis Osoro Obiri V Republic (2014) eklr and section 124** of the Evidence Act. On the sentence it was her submission that the minimum provided was 10 years and the trial magistrate was very lenient.

7. In reply Mr. Andiso submitted that the fact of pregnancy was only raised to impeach the credibility of the complainant since she had testified on oath that she had not had sex before. That it was intended to show that she was not a truthful witness. He contended that apart from the doctor and police officer only the brother of the complainant gave evidence. He submitted that the appellant had no contact at all with the complainant. He urged this court to allow the appeal.

8. As I am obligated to do I have reconsidered and evaluated the evidence in this case afresh so as to reach my own conclusion. I have also considered the submissions by both the advocate for the appellant and the Prosecution counsel. The first thing that came to my mind is the validity of the appellant`s trial given that the trial proceeded before different magistrates and that the one who finally convicted him only heard the defence. The record shows that whichever magistrate took over the matter complied with **section 200** of the Criminal Procedure Code. I am privy to the differing opinions of the court of appeal on the manner in which the court should go about this. In Kisumu Criminal Appeal Number 105 of 2009 Douglas **Osoro Sianyi Nyambonge** and Repulic and also in **Kisumu Civil Appeal No. 106 of 2009** between **Bob Ayub " alias" Edward Gabriel Mbwana " alias" Robert Mandiga** and Republic the court though dealing with a matter before the High Court was emphatic that the court had to comply with section 200 of the Criminal Procedure Code. In Criminal Appeal No. 106 of 2009 it stated:-

" The record before us, the relevant

part of which we have reproduced above,clearly shows that Musinga J,did not comply as was required of him, with the provisions of section 200(3) of the Criminal Procedure Code which as per section 201(2) was to apply Mutatis Mutandis in this case. He did not explain to the appellant his right to demand the recall and rehearsing (sic) of any witness as was required under that provision. Miss Oundo counters that by saying the appellant was represented by an advocate and so there was

no need for that. Our short answer to that is that it was the appellant who was on trial and the duty of the court as to the appellant and not to his advocate. The written law makes that duty mandatory. The mere mention in the judgment that section 200 was complied with is hollow without any evidence from the record".

The circumstances in that case were however, different from those of the instant case. Here the courts did not state the provisions of **section 200(3)**of the Criminal Procedure Code each time they were taking over the matter. However, the advocate for the appellant would be only too quick to give the response himself. Indeed, before the magistrate who convicted the appellant could state the provisions of section 200 to the appellant the advocate said he was ready to proceed with the defence hearing and even after the magistrate stated the provisions counsel was only too quick to respond that they would give sworn evidence. He did not specifically respond to the magistrate in respect of section 200 and did not wait for the court to explain the provisions of **section 211** of the Criminal Procedure Code. In a recent decision of **Appeal-kossam Ukiru V. R92014) eKLR**, it was held that where the record showed that the trial magistrate had informed the accused of the provisions of section **200 CPC** upon which his counsel said they would proceed from where the other court left that was adequate compliance. I too find that there

was in this case sufficient compliance as not to initiate the proceedings and that perhaps explains why that issue was not raised in the appeal.

9. On the merits of the appeal, I find that the complainant`s description of what was done to her was so vivid that she could not have been lying. She told the court that she was trying to collect money using a profoma when she met the appellant. When she asked him to contribute he said he had no money but promised to give her the money in his house. They rode to his house on his bicycle but once there he stripped her naked and then removed her clothes. He then caused her to lie on her back, spread her legs and inserted his penis into her vagina. Although she screamed nobody went to her rescue. It was on the way from his house that she met her brother(PW2). When she told him what had happened he went to the appellant`s house and knocked but the appellant refused to open. He called his brother (PW3) and together they took the appellant first to Chiga Administration police post and then to Kondele police station where they reported the matter. The complainant was then taken to hospital for examination. The record shows that the P3 form was filled on 2nd November, 2010 while the offence was committed on 31st October 2010- only a difference of 2 days. The same shows that she had foul smelling bloody discharge on the underpant and semen around the vagina. This evidence supports her testimony that she had been defiled. The testimonies of her two brothers corroborates that the appellant had her in his house on the fateful day. Moreover **section 124** of the Evidence Act provides that the evidence of a Sexual Offence victim does not require corroboration and it has so held in **Dennis Osoro Obiri V Republic (2014) eklr** where the court of appeal stated:-

"The effect of the proviso to section 124 is to create in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years....."

10. In the same case the issue of examination of the accused person was dealt with and the court held that such an examination was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the appellant had been defiled. The court was even more clear on this issue in Geoffrey Kioji V. Republic Appeal No. 270 of2010 (Nyeri) when it stated:

" Where available medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however, hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can

properly be convicted for defilement....."

11. That the complainant was pregnant was never put to her at the trial. Her being asked whether she had had sex before was done without the leave of the court and that against the provision of section 34 of the Sexual Offences Act. The answer should have been expunged from the proceedings in the first place. I have stated I believed her as did the trial magistrate whose reasons were that her evidence was clear, concise and devoid of contradictions. This court finds that the evidence against the appellant was overwhelming. PW2 saw the complainant coming from his house. In his defence the appellant stated that he had no grudge with the family of he complainant. PW2 and PW3 and even the complainant had no reason to lie against him therefore. He was positively identified as the perpetrator of that offence and the fact that the witnesses were from the same family is irrelevant.

12. On the whole, I find that the appellant was properly convicted and that the sentence meted was within the law. The complainant`s age was proved through a baptismal card. The sentence imposed was therefore lawful and so this appeal has no merit and is dismissed.

Signed, dated and delivered this 12th March, 2015

E.N. MAINA

JUDGE

In the presence of:

Mr. Ketoo for state

Appellant in person

Moses Okumu- Court Clerk