REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 49 OF 2012

BASIL OKARONI ……..APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

J U D G M E N T

1. The Appellant was found guilty and convicted of the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of The Sexual Offences Act No.3 of 2006. He was then sentenced to a prison term of 20 years. He appeals against both conviction and sentence.
2. At trial, it was alleged that on 6th June 2009 at ***[particulars withheld]*** village in Teso District within Western province intentionally and unlawfully caused his penis to penetrate the vagina of P.M.L (P) a child aged 14 years. A total of 12 witnesses testified, 8 for the prosecution and 4 for the Defence.
3. On 6th June 2009 P visited the home of the Appellant. She had gone to collect a book entitled "The Skipping Rope" which she had lent to S the son of the Appellant. She asked for water and went to fetch it inside the house of the Appellant. Whilst there the Appellant walked into the house, locked the door behind him and wrestled her to the floor and defiled her.
4. After the ordeal, P returned home distraught and in tears. Her brother C.M (PW2) saw her in this state. He also saw her sister take water and go to bath.
5. A few days later, on 13/06/2009 the Appellant met P on the road as she went to fetch water. He dropped a ksh.20 coin and requested her to pick it. He later gave her ksh.200/= and told her to keep part of the money and to return to him ksh.170/= in a sugarcane plantation. P did not do as told. She instead took the money to S.I (PW3) and asked PW3 to keep it. Later the Appellant visited PW3 and tried to retrieve the money.
6. P mother is V.M.A (PW4). She left home on 12/06/2009 to visit her sick mother who was at Mwihila Hospital. She returned home on 14th June 2003. She noticed that her daughter P was unusually shy and looked disturbed. On engaging her, P told her about the incident of 6/06/2009 and of 13/06/2009. She reported the incident to G.O (PW5) the village headman and arranged to take P to Nambale Health Centre. She later visited Alupe Hospital where Moses Khaemba (PW7) examined her and found evidence of forceful penetration into the vagina of the complainant.
7. The Defence presented 4 witnesses. The Appellant testified that on 11/06/2009, PW4 had requested him and his wife to keep watch over her children as she would be away. On 13/06/2009, at around 3.00p.m, he visited the home of PW4 when he was told by the children that they were hungry. Their last meal being the breakfast they had taken that morning. He then gave P money to buy "omena" and vegetables. He expected only part of the money would be used and the balance returned to him. This did not happen and so he went to inquire. It was then that he learnt that for some unexplained reason, PW3 decided to keep the money. He was later summoned by the village elder on the allegations that formed the compliant he faced.

8. It was his testimony that he left home at 10.00a.m on 6/06/2009 and never returned until 7.30p.m. He had attended a funeral and was in the company of his cousins Benard Nyongesa Okaroni (DW2) and Vincent Onga'na (DW3). He denied the charge and thinks that it was instigated by a land feud that exists between PW4 and himself.
9. That in the abridged version of the evidence am obliged to re-evaluate as a first Appellate Court. I am to reach my own conclusions after re-evaluation but I must give due allowance that, unlike the subordinate Court, I did not have the advantage of seeing and hearing the witnesses first hand. (**Okeno –vs- Republic [1972] E.A 32**).
10. So what are the grounds raised in the appeal? During the hearing of the Appeal, the Appellant through Counsel relied on the supplementary grounds filed on 2nd January 2013. In a nutshell the appeal raises the following grounds.

i) The conviction was against the weight of evidence presented.

ii) The Learned trial Magistrate failed to consider the alibi evidence tendered in defence.

iii) That the Learned trial Magistrate returned a conviction on the basis of evidence of a minor without conducting a *voire dire* and when the evidence lacked credibility.

iv) That the Learned trial Magistrate failed to sufficiently allow the accused his right to legal representation, denied him the opportunity of adducing evidence and failed to inform him of his rights to give final submissions.

11. I find it convenient to first consider whether or not the evidence of PW1 and PW2 was properly received. Both are minors. PW1 was 14 years old while PW2 was 12 years. Provisions of Section 19(1) of The Oaths and Statutory Declaration Act is on Evidence of Children of Tender years and reads:-

> **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 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 person, he is possessed of sufficient stands 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 within the meaning of that section."**

12) This Court has previously considered the meaning to be assigned to the term a "Child Of Tender Years" for purposes of the foregoing Provisions of the law. In Busia Criminal Appeal No 37 of 2009 **Paul Ongoma Okwara vs Republic** the Court observed.

"Who is a child of tender years? Neither the Oaths and Statutory Declarations Act nor The Interpretation and General Provisions Act (Chapter 2 Laws of Kenya) defines a child of tender years. And prior to the enactment of Children Act (Chapter 151 Laws of Kenya) that expression was, in the absence of special circumstances, taken to mean any child of an age or apparent age of less than fourteen years. Reference can be made to the following passage in the decision of Bosire J (as he then was) in Nywela –vs- Republic [1989] KLR 452 where he quoted the holding in Kibangeny – vs- Republic [1959]EA 92.

> **"The law as who can be regarded as a child of tender years was succinctly stated by Windham JA in the case of Kibangeny v R [1959] EA 92 at p 94.**
>
> **The learned judge had this to say"**
>
> **"There is no definition in the Oaths and Statutory**

Declaration Ordinance of the expression "Child Of Tender Years" for the purpose of section 19. But we take it to mean, in absence of special circumstances, any child of an age, or apparent age, of under 14 years although, as was stated by Lord Goddard, CJ. In R vs Campbell (1) [1956] 2 All ER 271 –

"Whether a child is of tender years is a matter of the Good sense of the court ….Where there is no statutory definition."

The emphasis by the Windham JA was that whether a child is of tender years is a matter of good sense of the Court. But following the enactment of The Children Act there is now a Statutory definition. The Act expressly defines a child of tender years to mean a child under the age of ten years. And although this definition would be for purposes of the Children Act itself, it is nevertheless helpful as the Courts can now, in addition to applying good sense, be guided by this Statutory definition."

13) With this in mind I now turn to the circumstances of PW1 and PW2. PW1 was 14 years and was sworn straightaway. PW1 would not be a Child Of Tender Years and so a *voir dire* inquiry was unnecessary. As to PW2, the Magistrate carried out the following inquiry before the witness was sworn.

"I am C.M, I am 12 years old. I go to school at *[particulars withheld]* in Std.4. I am a Christian of NCC. I am conversant with swearing for it entails stating the truth. I want to testify on Oath."

The inquiry required by Section 19 was properly taken. The child had said "**I am conversant with swearing for it entails stating the truth**". That statement reveals that the child not only understood the nature of an Oath but also the duty of speaking the truth. In addition her entire response to the inquiry showed that she possessed of sufficient intelligence to testify. That said the child was aged 12 year and if one was to go by the definition of the term "Child Of Tender Years" under the Children Act then the inquiry was not necessary and the Learned Magistrate would have erred on the side of caution when he conducted the inquiry. That could not possibly disadvantage the Appellant.

15) Let me now examine the evidence received by the trial Court. At the time of the alleged offence on 6th June 2009, P was aged just over 14 years. The Certificate of Birth put her date of birth as 9th May 1995.

16. Prior to the incident, she knew the Appellant well as they are neighbours. The Appellants son goes to the same school (***[particulars withheld]*** Primary School) as P and is known to her well enough that she would lend him a book. So the evidence of P against the Appellant is one of recognition. This is what she said,

"He had locked the door. I turned and recognized him. It was Basil Okaroni (accused)"

At this time they were alone in the room. She then gave a vivid account of how she was defiled by the Appellant. Hear this,

"Accused knocked me to the floor and I lay on my back. He pulled off my underpants and he loosed his long trousers fly. He unzipped. He then removed his penis and penetrated into my vagina. He lay on top of me, as I lay upwards. I had never had sexual intercourse before therefore I felt a lot of pain. I cried. The accused f**d me for about five minutes. When he finished, I saw mucous the substance mixed with blood on my vagina."**

17) There was evidence that after the incident, P went home distraught and in tears. When she got

home, she immediately took a bath. This evidence was given by P herself and corroborated by PW2. The evidence by PW2 supports that of PW1 that something unpleasant may have happened to P in the afternoon of that day.

18. There is then the events of 13/06/2009. The evidence of P is that the Appellant tried to entice her into having sex again using some money. The Appellant admits giving some money to P but says it was in good faith as P and her siblings had asked for help as they were out of food. So there would be at least common ground that on that day some money passed from the Appellant to P. Whose account is to be believed?
19. When P felt threatened by the overture, she took the money to PW3. PW3 kept the money and the Appellant tried to get it back from her. The visit by the Appellant to PW3 was confirmed by the Appellant in his Defence. PW1 and PW3 were cross-examined on two occasions. Once by the Appellant himself and the other, on recall, by his Counsel Mr. Ateya. PW1 was firm about the circumstances that surrounded the giving of the ksh.200/=. Under the first cross-examination one said,

> **"you dropped ksh.20/= and went with C and then returned and gave me ksh.200/= you told me to take the change in the sugarcane farm."**

PW1 was not only firm but the issue as to whether the money was given in good faith was not taken up in cross-examination.

20. In the circumstances I find that the evidence of PW1 which was based on recognition was corroborated by PW2. And the incident of 13/06/2009 as described by PW1 was supported by the evidence of PW3. The incident of 13/06/2009 was an attempt by the Appellant to re-engage the child in sex.
21. Was there medical evidence to support this? It was submitted by Counsel for the Appellant that the medical documents prepared at Alupe lacked any probative value because they were not produced by its maker. The Court record does not support this argument. The medical document prepared at Alupe Hospital was the P3 Form on the examination carried out on P on 19/06/09. It was prepared by a clinical officer called Khaemba. He personally testified on 15/6/2011 as PW7. He produced the report. This is what he returned as his findings:-

> **"Odemation Labiminora, very tender lexvix and healing lacerated hymen".**
>
> **Evidence of recent forceful penetration."**

The examination was carried out on 19/6/09 which was about 13 days after the incident. The findings were consistent with a recent act of defilement.

22. I turn to the next issue. The Appellants Counsel criticized the Learned Magistrate for failing to consider the Alibi evidence tendered in Defence. There can be no quarrel, I think, with the principle that **"an accused person who raised an alibi as a defence to a charge against him does not in law assume the burden of proving that alibi defence. All he needs to do is to bring that to the notice of the Court and the prosecution's duty to disprove it still remains "(Criminal Appeal 238 of 2008 Benson Mugo Mwangi -vs- Republic [2010] eKLR".** From the Lower Court proceedings and the answers to the questions posed in cross-examination, the Alibi Defence appears to have been first raised in the course of the Defence case. In these circumstances what was the approach to be taken by the Learned Magistrate? The Court of Appeal in **Wangombe –vs- Republic** [1980] KLR 149 said as follows:-

> **"On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it."**

The Court of Appeal then held that the proper approach to take in those circumstances is for the trial Court to weigh the evidence of the Prosecution against that of the alibi.

23. I have looked at the entire judgment by the Learned Magistrate and would agree with Counsel for the Appellant that the Learned Magistrate did not weigh the evidence of the prosecution against that of the Defence. It falls to this Court to now do so.
24. As pointed out in my earlier evaluation of the evidence of the prosecution witnesses, the prosecution case appeared strong enough to sustain a conviction. What is to be said of the alibi Defence? The Appellant told Court,

> **"On 6/6/09 at 10a.m, I left my home and left the complainant's mother in the home waiting for my wife. I went for a funeral and arrived back home at 7.30p.m."**

DW2's and DW3's evidence supported this evidence. The mother (PW4) of the complainant had said this,

> **"On 6/6/09 I went to our Pastors home to condole him. I was with other church members and the accused's wife. We left at about 10.00a.m. and returned home at 6.00p.m. <u>I left my home and went to the accused's home and the wife accompanied me. We left the accused and his children in the home.</u>"** (my emphasis).

25. A person who would have been critical in sewing up the Alibi would have been the wife of the Appellant. She could have disapproved the evidence of PW4 that the Appellant was left at home. Curiously, she was not called by the Appellant to testify on his behalf. When I weigh the evidence of the Defence witnesses against that of the prosecution witnesses (which includes, medical evidence) I reach a conclusion that the strength of the prosecution case displaces the Alibi Defence.
26. The remaining ground of Appeal is unmerited. The Appellant complained that he was not allowed the right to legal representation, he was denied the opportunity of adducing evidence and the Court failed to inform him of his right to give final submissions. The Court record tells a different story. When the trial commenced, the Appellant acted in person. Later, he was represented by an Advocate, Mr. Ipapu. Mr. Ipapu failed to attend Court on 14th October 2010 and the matter proceeded in his absence with five (5) witnesses testifying. Subsequently, the Appellant engaged a new Counsel Mr. Ateya. His new Counsel was allowed to recall the five (5) witnesses for further cross-examination.
27. At the Defence, Mr. Ateya failed to attend Court and the Learned Magistrate made the following remarks before proceeding:

> **"It is 10a.m. and the advocate of accused is absent. He had not said (sic) word of ask anybody to hold his brief. The date was taken in his presence. We shall therefore proceed with the case for this is a very old matter."**

I am unable to fault the Learned Magistrate. The history of the matter shows that the proceedings had previously been delayed because of the absence of the Appellant's Counsel.

28. The Court record shows that the Appellant was afforded a fair hearing. He should not criticize the conduct of the proceedings only because he was convicted.
29. I turn to the sentence. The victim was a girl of 14 years. Her Certificate of Birth was produced in proof of this. The Appellant was charged with Defilement contrary to Section 8(1) of the Sexual Offences Act as read with Section 8(4). That was erroneous because Section 8(4) is in respect to victims aged between 16 and 18 years. The Appellant ought to have been charged under Section 8(1) as read with Section 8(3). The error in the charge sheet persisted up to the end of the proceedings. Somehow, the Learned Magistrate, upon convicting the Appellant, imposed the correct sentence of twenty (20) years. That is what is provided as the minimum sentence under Section 8(3).
30. This Court is not minded to alter or interfere with the conviction or sentence on account of that

error in the charge sheet. I take the view that an error of this nature is within the contemplation of the provisions of Section 382 of the Criminal Procedure Code. That Section provides:

> **"382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in an inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

I reach this decision because the particulars of the offence correctly stated the age of the victim and the Appellant would or ought to have been fully aware of the nature of the charge he faced and the possible consequence. Secondly, the error in the charge was neither raised in the Lower Court proceedings or in the course of this Appeal.

31. The upshot, I dismiss the appeal in its entirety and uphold the Learned Magistrates decision on both conviction and sentence.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 5TH DAY OF JULY, 2013.

IN THE PRESENCE OF:

GEORGE OMBUNGA ……..COURT CLERK

APPELLANT IN PERSON ……..

WAWERU FOR STATE COUNSEL…….....

F. TUIYOTT

J U D G E