IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 99 OF 2012

BETWEEN

EZEKIEL ORAMAT SONKOY.....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kisii, (Sitati, J) dated 20th January, 2012

in

HCCRA NO. 124 OF 2011)

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JUDGEMENT OF THE COURT

The appellant, Ezekiel Oramat Sonkoyo, was charged before the Senior Resident Magistrates' Court, Kilgoris, with two counts as follows:-

Defilement of a Girl contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 particulars being that on the 17th day of August 2010 at ***[particulars withheld]*** Transmara District in Narok County did intentionally and unlawfully cause his penis to penetrate the vagina of L.S a girl aged 14 years without her consent in violation of Section 8 (1) as read with Section 8 (3) of the said Act and

child trafficking contrary to Section 13 (a) and (b) of the said Act particulars being that on the said date at the said place jointly with others not before court he knowingly and intentionally made arrangements and transportation within Kenya for purposes of commission of Sexual Offences against L.S a girl aged 14 years.

The trial was conducted by the Senior Resident Magistrate (B. O. Ochieng) who convicted the appellant on the first count and sentenced him to serve 20 years imprisonment. The appellant was acquitted on the 2nd count under Section 215 Criminal Procedure Code.

The appellant appealed to the High Court (Sitati, J) but the appeal was dismissed in the judgement delivered on 20th January, 2012. The appellant was dissatisfied by these findings and has appealed in this second appeal.

Section 361 (1) (a) Criminal Procedure Code limits our jurisdiction in a second appeal such as this one. We are to consider and deal only with issues of law but not matters of fact. This position has been restated in the many decisions of this court such as **M'Riungu v Republic [1983] KLR 455** where this court stated:-

> **"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (*Martin v Glyneed Distributors Ltd (t/a MBS Fastenings* – The Times of March 30,1983).**

See also **Kiarie v Republic [1984] KLR 739** and **Chemagong v Republic [1984] KLR 611.**

What, then, are the issues the appellant has raised in this appeal calling for our consideration?

In the home made amended Memorandum of Appeal which we allowed the appellant to urge 5 grounds of appeal are raised to wit:-

1. **THAT both trial and 1st appellate court failed to observe that the charge sheet was defective.**

2. **THAT both the trial and 1st appellate courts failed to appreciate that no offence was committed on the 17th August 2010.**

3. **THAT both the trial and 1st appellate courts failed to observe that the case originated from no first report.**

4. **THAT the trial court errored in not observing and complying with section 19 statutory declaration act.**

5. **THAT the trial court errored (sic) in not observing and complying with article 50 (2) (j) of the constitution.**

The matter before the trial court was rather straight forward. S.L (PW1) narrated that she was 14 years old. On 17th August, 2010 she was at home in Transmara District when the appellant paid a visit. After a few minutes the appellant asked to leave and PW1 escorted him out. The appellant asked PW1 to accompany him to his home and PW1 readily agreed. They went to his home where they slept. It is not clear from the record whether they slept together in the same bed on this day. At any rate the next day the appellant asked and PW1 agreed to accompany him to Eldoret. She again readily agreed. They boarded a matatu where the appellant paid appropriate fares. On getting to Eldoret the two visited the appellants mother and also the appellants grandmother where they were welcomed. The visits took about 2 months. During this period, and in PW1s' own words:-

> **"...we stayed two for months there. I used to sleep in a house. We slept in the same house. That is when we started to sleep in the same house. We slept in the same house. We made love. We slept on the bed with him..."**
>
> **And: "...we used to know each other. We were starting to be friends in 2009. We had done s** at his place before Eldoret. My place is not far from his place..."**

In cross – examination PW1 stated that the appellant did not force her to have sex. The appellant promised to marry her.

W.L (PW2) is an uncle and guardian of PW1. PW1 stayed at his home. On 17th August 2010 he arrived home to find PW1 missing. He made various reports and searches. After 2 months he and.D.K (PW3 who is PW1s' father) found PW1 in Eldoret in the company of the appellant. PW1 and the appellant were living as husband and wife. They were arrested and the appellant was subsequently charged in court.

No. 88807 PC David Murai (PW4) of Kilgoris Police Station received report, investigated the matter, arrested the appellant and presented him to court. PW4 also prepared P3 Form which was completed by a Clinical Officer Dickson Nenguseu (PW5), who examined PW1, found evidence of defilement and produced P3 Form in court as part of the evidence

That is the prosecution case that the trial magistrate evaluated and having found a prima facie case as having been established called on the appellant to answer. The appellant gave sworn testimony where although he still denied the charge essentially confirmed the prosecution case. Let him speak for himself:

> **"...We agreed with the girl we were boy and girl friends. I never defiled her. We agreed and decided to stay together. We went with her so that we give the parents time so that we go back to them officially. The parents didn't like it so the girl became confused. I pray that the court should be lenient and forgive me. I will never repeat that again..."**

When he was cross-examined by the court prosecutor the appellant stated:-

> **"...I know the girl. She is a friend of mine. She used to be a girl friend she was a lover. I had slept and had sex with her sometime back. I knew the age..."**

As we have already stated the appellant was convicted and duly sentenced, the trial magistrate reminding himself in the sentence that the appropriate sentence was set out in the Sexual Offences Act for an offence such as the one that the appellant faced. The appellant was represented by counsel in the first appeal where 12 grounds of appeal had been raised. The learned judge in a fairly well considered judgement re-evaluated the evidence and reached the conclusion that conviction had properly been entered and the sentence should not be disturbed.

The appeal came before us on 10th June, 2013 when the appellant appeared in person while Mr. G. A Mongare, learned Senior Prosecuting Counsel appeared for the respondent. The appellant complained that the evidence of prosecution witnesses did not support the charge relating to the date when the offence was committed.

The charge sheet states that the offence was committed on 17th August, 2010. Evidence of PW1 confirms that this is the day she left home and accompanied the appellant to his home. This is corroborated by the evidence of PW2 and PW3. The learned judge on first appeal on re-appraisal of the evidence expressed herself thus:-

> **"The interpretation by counsel of what the victim meant when she said "we never did anything" was that the appellant and the respondent did not have any sexual intercourse. I have considered those submissions in light of the entire testimony by the victim and that of the appellant and have taken the considered view that that statement by the victim should not be taken in isolation. The whole testimony taken together clearly shows that even on that first night, the appellant had intercourse with the victim and because of her age, she was defiled. I therefore refuse to buy into counsels' contention that there was no evidence of intercourse. Moreover, for the two months that the appellant and the victim were in an Eldoret home, they freely engaged in sex. It has been argued on behalf of the appellant that even if he had sex with the victim, the victim willingly gave herself to the appellant and that in the circumstances, it cannot be said that the appellant intentionally and unlawfully defiled the victim**

Under Section 42 of the Sexual Offences Act, No. 3 of 2006, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. I think it is necessary to consider the provisions of Section 45 of the Sexual Offences Act in order to determine whether indeed the victim in this case consented to the acts of defilement committed over a 2-month period. First of all, there is evidence to show that despite the victim's age (an issue to be addressed shortly hereafter) the appellant made the victim to believe that she was of marriageable age, when he was aware that the victim was infact a Form 1 student at *[particulars withheld]* **Secondary School. In effect, the appellant induced the victim into "consenting" to the act of defilement with that false promise that he would marry her. In my considered view therefore, the victim cannot be said, to have consented to the act of defilement....."**

We entirely agree with the learned judge on these findings which in effect mean that the charge sheet is not irregular in any way as the charge is supported by the evidence. In any event and considering the age of the complainant consent was not a necessary ingredient of the offence and needed not be proved.

The appellant also complains that there was no *"first report"* of the incident, presumably to police. But PW2 testified that upon finding PW1 missing, and after initial enquiries, he made a report to the police and to the District Officer.

The other issue raised is on reliance of the evidence of a child by the trial court. It is true that evidence of children must at all times be treated with utmost care by trial courts. Courts must be satisfied that children understand the nature of an oath if they are to give sworn evidence. Proper voire dire examination must be conducted and recorded by the trial court before evidence is taken. A general guideline on this was given by this court in **Samuel Wahini v Ngugi Republic (Criminal Appeal No. 218 of 2007** (ur) which quoted **Johnson Muiruri v Republic [1983] KLR 445** as follows:-

"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kiriga Kiune, Criminal Appeal No. 77 of 1982 (unreported) we said:-

"When in any proceeding before any court, a child of tender years is called as a witness, the court is required to form an opinion, on voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (Section 19, Oaths and Statutory Declarations Act Cap 15). The Evidence Act (Section 124, Cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided and not be forced to make assumptions."

The record by the trial court shows that when the trial commenced on 15th November, 2010 the trial magistrate carried out a voire dire and established that PW1 understood the nature and consequences of giving evidence on oath. PW1 in the event gave sworn testimony and was cross -examined by the appellant. The evidence of PW1 was corroborated by all the other prosecution witnesses. The appellant himself testified to living as husband and wife with PW1 for 2 months in Eldoret because he intended to marry the appellant after carrying out formalities. The appellant and PW1 engaged in s*** in Eldoret and Kilgoris. The appellant knew that PW1 was 14 years old. There cannot be any substance to the appellants complaint on this aspect of the matter at all.

The appellant's complaint on alleged breach of constitutional rights was dealt with at length by the learned judge on first appeal and found to have no merit. We need not revisit that aspect of the appellant's complaint again. We have considered the issue and have reached the same conclusion as the

learned judge.

There is no merit in the appeal and we accordingly dismiss it.

Dated and Delivered at Kisumu this 26th day of July 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR