IN THE COURT OF APPEAL

AT ELDORET

(CORAM: S. E. O. BOSIRE, W. S. DEVERELL & D. K. S. AGANYANYA .JJA)

CRIMINAL APPEAL 68 OF 2006

JAMES OROMO ……..…… APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(Appeal from sentence of the High Court of Kenya at Kitale (Lady Justice Karanja) dated 13th February, 2006 In H.C.CR.A. NO. 73 OF 2005)

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JUDGMENT OF THE COURT

This appeal arises from the decision of the High Court sitting in Kitale (W. Karanja J.) wherein she dismissed the appellant' appeal therein and confirmed the sentence of 27 years imposed upon him by the trial court.

The case against the appellant in the Senior Resident Magistrate's Court at Lodwar was one of defilement of a girl under the age of 16 years contrary to ***section 145 (1)*** of the Penal Code.

In the alternative, he was charged with indecent assault on a female contrary to ***section 144 (1)*** of the same code.

In the defilement case the appellant was alleged to have had an unlawful carnal knowledge of ***IF*** (PW2) a girl under the age of 16 years on 23rd January, 2005 at Kakuma Refugee Camp in Turkana District within Rift Valley Province while in the second count, which we think was an alternative charge, he on the same day, unlawfully and indecently assaulted the complainant by touching her private parts.

The appellant is a refugee from the Sudan. He lives at Kakuma Refugee Camp with other refugees who include the complainant and her mother AF(PW3).

On 23rd February 2005, the complainant was with PW 3 at the camp. It was night time and they were sleeping outside their house when the appellant came there together with another person.

It was alleged the appellant came to where the complainant and PW3 were sleeping and knelt near their legs. That the appellant then left briefly and then he came back and picked the complainant from the mat where she had been sleeping and took her behind the house.

Soon after, PW3 heard cries of the complainant who then came from behind the house holding her dress. She was shivering and when asked by PW3 what had gone wrong she said Okirbong (the appellant's nickname) had taken her behind the house and hit her on her private parts – which she pointed at.

Due to her screams neighbours came out of their houses, including Tony Ong'or (PW4), who were explained by PW2 what had happened.

The appellant was apprehended by community leaders and security guards at the camp and PW4 accompanied them to Kakuma Police Station where he was handed over to No. 79689 Pc. Stephen Kemboi Mitei (PW5) who rearrested him and charged him with the offence subject to this appeal.

In his sworn evidence before the trial court the appellant testified that he was a pupil in standard VIII in non-formal educational program at the camp. That the charge framed against him was false. He knew PW2 who was his niece aged 5 years.

That on 23rd February, 2005 at 11.00 a.m. he was together with one James Ochang at home where they were sleeping in the compound of their house. He did not see PW2, PW3 and PW4.

That he had entered his compound at 10.00 p.m. and found James Ochang in the compound.

At 11.00 p.m. he heard PW3 crying and asked her what was happening. That then she told PW4 to catch the appellant which he refused to do.

Then he saw PW2 who was just quiet then PW3 alleged that the appellant had had carnal knowledge of PW2. That he entered his house and cried.

That at 11.30 p.m., Sudanese Security men came and whisked him out of his house.

According to his testimony, PW3 had a grudge with him because she wanted to take away the property belonging to his brother who is in Sudan, on 16th February, 2005 but the appellant declined to let her do so.

That because of this PW3 quarrelled him, the appellant.

The Senior Resident Magistrate (M. A. Ong'ondo) in his judgment delivered on 20th July 2005, examined and evaluated the evidence which was adduced before him by the witnesses for the prosecution as well as that of the appellant and stated:

> "***The complainant (PW2) was checked on her genitalia by her mother (PW3) who saw the presence of spermatozoa thereon while PW4 who was present at the home confirmed that PW3 did so at the material hour.***
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> ***The complainant also named accused by his nickname "Okirbong" as the person who had carried her away from the mat before she was seen crying from behind the house. She also identified the accused in court. Moreover, Exh. 1 produced by PW1 who examined her on 24/02/05 shows that sexual intercourse had taken place.***
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> ***The evidence of PW3 who checked her private parts at the material time, PW4 who confirmed so and PW1 who examined her on 24/02/05 as per exh. 1 and the condition of her (PW2) private parts at the time, afford corroboration to her unsworn testimony in all material aspects – see*** *Fred Wanjala – Cr. Appeal (sic) No. 51 of 1984* ***C.A. at Kisumu.***
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> ***Due to the findings that the evidence of PW 1, PW 3 and PW 4 were clear, compact and corroborated the unsworn truthful testimony of PW2 I thought those witnesses truthful. Therefore, the prosecution case is credible."***

On the appellant's evidence, the trial court said:

> "***the accused person claimed that he did not see PW2, PW3 and PW4 or at all at the time and yet he went on to state that he saw PW3 crying and claimed that the accused had defiled her (PW3's) daughter (PW2) and that PW2 was quiet. He further told the court that when PW3 told PW4 to catch him (accused) PW4 refused. Therefore accused contradicted himself in that respect in his defence statement as it was doubtful as to whether he saw PW2, PW3 and PW4 at the material time.***
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> ***He also claimed that PW3 had a grudge against him over his (accused brother's property but PW3 denied it even in her cross-examination. Moreover, PW4 told the court that pW3 loved accused. Therefore accused may have built up the story to make his defence look credible. However upon weighing the defence version against the credibility of all the prosecution witness evidence, I find it contradictory, hence doubtful and false. I accordingly dismiss the defence story as contradictory and a loss of lies".***

Thus, the learned trial magistrate believed the evidence of the prosecution and disbelieved that of the appellant as a result of which he convicted the appellant and sentenced him to 27 years imprisonment.

The appellant was not happy with his conviction and sentence and so filed an appeal to the superior court at Kitale in which he listed 4 grounds of appeal, all of which were in form of mitigating factors.

In the superior court on 13th February, 2006 the appellant stated as follows:

> "***I have filed my appeal for mitigation. My appeal is only against the sentence. Those years are very many. I am begging the High Court to reduce the sentence. I know now that the offence is serious. I did not know that before. I ask court to help me".***

Mr. Mutuku who appeared for the State before the superior court opposed the appeal and in his judgment the learned Judge said that since the appeal was against the sentence only, she had perused through the record and found that the case had gone to full trial and that the appellant had been properly convicted.

That the victim was aged between 3 and 5 years which was definitely a very tender age. According to her the trial magistrate had considered the mitigation along with all the circumstances surrounding the matter. That he took into account the seriousness of the charge and the prevalence of the offence. In her view, the seriousness of this offence could not be down played and that the maximum sentence was life imprisonment. In her view, 27 years imprisonment was well deserved. Then she said:

> "***I see no need to interfere with the same. Courts have the duty to send out a message that defilement is very serious and will not be tolerated in our society. These young helpless children must be protected by law. The sentence was properly meted out. I see no need to interfere with the same. This appeal is therefore dismissed. Appellant to serve the sentence imposed by the lower court".***

The appellant, not being happy with this decision too, filed this appeal before us and in his own home drawn memorandum of appeal lists seven (7) grounds of appeal which were not the subject of the appeal before the superior court.

He complains about the language used before the lower court for which he was not accorded proper interpretation in the language he could understand, whether the case was proved beyond any reasonable doubt, that he did not draft the grounds of appeal presented before the superior court, the poor investigation of the case and which count between the main and the alternative counts he was convicted of.

All these grounds were not before the superior court for a decision and we are under no obligation to go through and make any decision on them.

A second appeal to this Court should only raise a point or points of law, (see ***section 361 (1)*** of the Criminal Procedure Code).

But what was argued before the superior court by the appellant was about the severity of the sentence and under ***section 361 (1) (a)***, this is a question of fact which cannot be entertained by this Court as it lacks the requisite jurisdiction.

In this case, while we feel the sentence was extremely harsh, the law does not allow us to intervene as the sentence is lawful. We therefore order that this appeal be dismissed. Order accordingly.

Dated and delivered at Eldoret this 11th day of April, 2008.

S. E. O. BOSIRE

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR