



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.37 OF 2010**

*(An Appeal arising out of the conviction and sentence of Hon C. KABUCHO - SRM delivered on 18<sup>th</sup> January 2010 in Kiambu CM. CR. Case No. 1106 of 2009)*

**SAMUEL MUOI KARAGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Samuel Muoi Karago was charged with **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 20<sup>th</sup> July 2009 at about 7.00a.m. at [particulars withheld] Village in Kiambu County, the Appellant unlawfully did an act of causing penetration with his genital organ (penis) into the genital organ (vagina) of R W (the complainant), a child aged 13 years. He was alternatively charged with **committing an indecent act to a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant committed an indecent act with the complainant by touching her private parts namely vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main charge of **defilement**. He was sentenced to serve twenty (20) years imprisonment. He was aggrieved by his conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of prosecution's evidence that did not establish his guilt to the required standard of proof. He faulted the trial magistrate for relying on the evidence of identification by the complainant, without calling for corroboration, to convict him. He was of the view that the evidence adduced by the prosecution could not have linked him with the offence because no independent eye witness was called to testify in the case. He was aggrieved that his defence was not considered before the trial magistrate reached the verdict that he had defiled the complainant. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

Prior to the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He relied on the written submission to urge the court to find that his appeal had merit and should be allowed. Ms. Sigei for the State opposed the appeal. She submitted that the prosecution had adduced sufficient evidence to establish the guilt of the Appellant to the required standard of proof. She urged the court to disallow the appeal and confirm the conviction and sentence of the Appellant.

The facts of this case are straight forward. The complainant, who testified as PW1, told the court that on 20<sup>th</sup> July 2009 at about 7.00 a.m. as she was walking to school, she was accosted by a man who dragged her to the nearby maize plantation, removed her pants before sexually assaulting her. After he was through, the man disappeared from the scene. The cry for help by the complainant was heard by PW3 C N who arrived at the scene and saw school books scattered at the scene. She went into the maize plantation and saw the complainant. Her clothes were full of dust and blackjacks. She inquired from her what had transpired. The complainant told PW3 that she had been raped by a man with a white cap. PW3 escorted the complainant to her home where she found PW2 J W I the mother of the complainant. The complainant was taken to Kiambu District Hospital where she was seen PW4 Dr. Stephen Muhoho who noted the following: the clothes of the complainant were soiled and had blackjacks. She had tenderness on her jaw and on the back of the head. She had tenderness on the lower abdomen. Her hymen though not torn was inflamed. There was no discharge nor did the vaginal swab reveal any spermatozoa or pus cells. PW4 was of the opinion that the complainant had been defiled.

As regards the identity of the perpetrator, the complainant then aged 13 years, testified that she knew the man who sexually assaulted her as the Appellant. She used to meet with the Appellant prior to the incident although she did not know his name. There was no evidence that she gave the description of her assailant to the police when the first report was made. The only description she gave was to PW3 when she told her that the man wore a white cap. On 5<sup>th</sup> August 2009, while walking to school, the complainant saw the Appellant. She told the court that she identified the Appellant as the man who sexually assaulted her. When he saw her, he pulled down his cap. The complainant went to the nearby Kihingo Chief's Camp and reported the incident to PW5 APC James Gitahi who returned to the scene where the complainant had seen the Appellant and arrested him. The Appellant was taken to Kiambu Police Station where the case was assigned to PW7 PC Colleta Mutoko to investigate. After concluding her investigations, she formed the opinion that a case had been made for the Appellant to be charged with the offence that he was convicted.

When he was put on his defence, the Appellant denied committing the offence. He was emphatic that he did not know the complainant. In essence, he was saying that he was a victim of mistaken identity. He was emphatic that he had not committed the offence that he was charged with.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (see Njoroge –vs- Republic [1987] KLR 19). The issue for determination by this court is whether the prosecution adduced evidence to establish the guilt of the Appellant on the charge of **defilement** that was brought against him to the required standard of proof beyond any reasonable doubt.

In cases such as the one the Appellant was charged with, the prosecution was required to establish penetration, the age of the victim and the identity of the perpetrator. In the present appeal, the prosecution failed to establish to the required standard of proof that the complainant had been penetrated. PW4, the doctor who examined the complainant about six hours after the incident noted that although the complainant's hymen was inflamed, it had not been broken. There was no spermatozoa or pus cells seen. Taking into totality the injuries that the complainant sustained, including injuries on her head and abdomen, there was clear evidence that an attempt had been made to penetrate the complainant. This court is of the view that the offence that was disclosed is **attempted defilement** contrary to **Section 9(1)** of the **Sexual Offences Act** and not the charge that the Appellant was convicted of **defilement** contrary to **Section 8(1)** of the **Sexual Offence Act**.

As regard to the age of the complainant, PW2 the mother of the complainant produced the complainant's birth certificate which indicated that the complainant was born on 6<sup>th</sup> January 1996. The age of the complainant is material in defilement cases because it is the age of the victim that determines the sentence that will be meted out should the accused be convicted.

On identification of the perpetrator, the only evidence that the prosecution adduced is that of the

complainant herself who testified that she knew the Appellant by sight prior to the sexual assault. Although she did not give the description of her assailant in the first report that she made to the police, when she saw the Appellant on 5<sup>th</sup> August 2009, about two weeks after the incident, she was able to recognize him. She made a report to the police resulting in the arrest of the Appellant. Although the Appellant denied that he was the one that had sexually assaulted the complainant, upon re-evaluation of the evidence adduced, this court formed the firm view that indeed the complainant positively identified the Appellant.

The complainant's evidence was in fact that of recognition rather than mere identification. This court has warned itself of the danger of convicting the Appellant based on the sole evidence of identification. Having warned itself, this court notes that the sexual assault occurred during day time and the complainant was exposed to the Appellant for a sufficient long period of time to be certain that it was the Appellant who had sexually assaulted her. From her testimony, it was clear that the complainant was telling the truth. The proviso of **Section 124** of the **Evidence Act** therefore applied. There was no need for the prosecution to adduce corroborative evidence to support the complainant's testimony of identification. The Appellant's defence did not dent the otherwise strong culpatory evidence that was adduced against him by the prosecution witnesses.

In the premises therefore, the Appellant's appeal against conviction lacks merit and is hereby dismissed. The Appellant's conviction on the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act** is however set aside and substituted by the cognate disclosed offence of **attempted defilement** contrary to **Section 9(1)** of the **Sexual Offences Act**. The custodial sentence imposed on the Appellant under **Section 8(3)** of the **Sexual Offences Act** is set aside and substituted by a sentence of this court under **Section 9(2)** of the **Sexual Offences Act**. Taking into consideration the fact that the Appellant was in remand custody during the trial in the magistrate's court, and taking into consideration the fact that the Appellant is required to benefit from remission, and taking into consideration that this court would have sentenced him to serve a custodial sentence of ten (10) years, this court commutes the custodial sentence of the Appellant to the period already served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY 2018**

**L. KIMARU**

**JUDGE**