No. 419/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.129 OF 2012

KIMANZI KAKUTHU …….....……..APPELLANT

VERSUS

REPUBLIC ……...……...RESPONDENT

[Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Sexual Offence Case No. 27 of 2011 by Hon. A.G. Kibiru, SPM, on 13/9/12]

JUDGMENT

1. **Kimanzi Kakuthu,** the appellant was charged with defilement contrary to **Section 8(1)** of the S**exual** Offences Act No. 3 of 2006. Particulars of the offence being that on **23rd** day of **June, 2011** at around 8.30p.m at **[Particulars Withheld]** in **Kitui County,** intentionally and unlawful caused his penis to penetrate into the vagina of **S M** a child aged 12 years.
2. In the alternative the appellant was charged with committing an Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars of the offence being that on the **23rd** day of **June 2011** at around 8.30pm at **[Particulars Withheld]** in **Kitui County** willfully and intentionally committed an act which caused penetration to **L K** by inserting his penis into her genital organ namely vagina without her consent.
3. In count II, the appellant was charged with defilement contrary to **Section 8(1)(3**) of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence being that on diverse dates between **23rd and 24th day of June 2011** at about 8.00 p.m. at **[Particulars Withheld]** in **Kitui County** intentionally penetrated his penis into the vagina of **L K** a girl aged 15 years.
4. In the alternative the appellant was charged with **Indecent Act** with a child contrary to **Section 11(1**) of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence being that on diverse dates between **23rd and 24th day of June 2011** at around 8.00 p.m. at **[Particulars Withheld]** in **Kitui County** intentionally committed an **Act of Indecency** with **L K** a girl aged **15 years** by touching her private parts namely breasts, buttocks and vagina by using his hand.
5. He was tried of the offences, convicted on count 1 and sentenced to serve twenty (20) years imprisonment. He was however, acquitted of count 2 and the alternative. Being aggrieved by the conviction and sentence the appellant appealed on grounds that:-

i. There was no evidence of penetration.
ii. Evidence adduced by the complainants was contradictory and doubtful.
iii. The defence put up was not considered.
iv. The case was not proved beyond reasonable doubt

6. The case as presented by the prosecution was that on 23rd June, 2011, PW4, **L K** lured PW1 **S M** into accompanying her to Mbitini Market. They encountered a gentleman who had a motor-cycle that she identified as the appellant. He bought them 'githeri'. He then took them to a lodging. The appellant and L undressed and engaged in sexual intercourse. The appellant and L then held PW1, covered her mouth with a towel and the appellant penetrated her as **L** held her legs apart. She could not scream as her mouth was covered. They stayed until morning. The appellant left at 8.00am and returned in the evening. That night the appellant had coitus with L prior to having carnal knowledge of PW1. **L** and the appellant left. She untied the towel and managed to reach a lady called L to whom she narrated her ordeal.
7. PW2, **Lenah Mueni Musyoka** who knew the appellant very well reported the matter to the police. PW1 was taken to hospital for examination.
8. In his defence the appellant stated that he took customers to the lodging who paid him for services rendered. He left them there. Thereafter he was summoned to the police station. It was alleged that he had defiled the complainant. He stated that he had disagreed with PW2 and PW4 L who was with the complainant. The police officer demanded 10,000/= from him to have the matter settled which he could not raise. Consequently, he was framed up.
9. The appeal was canvassed by way of written submissions.
10. This being a first appellate court it is duty bound to re-examine exhaustively all the evidence on record in order to determine the question whether the evidence is enough to sustain a conviction. (***See Okeno versus Republic [1972] E.A. 32).***
11. Evidence adduced by PW1 was that she left home because PW4 convinced her that she was taking her to Nairobi where her brother was to take her to school. Nothing was stated about the relationship between PW4 and PW1.
12. According to PW4, the appellant was supposed to take them to Nairobi but he took them to a lodging instead.
13. PW4 introduced herself as a house-help working in Nairobi. Her evidence contradicted in material particulars evidence adduced by PW1 as to what actually transpired while in the room at the lodging. It was PW1's allegation that the appellant and PW4 had consensual sex for about two (2) hours prior to the appellant and PW1 covering her mouth with a towel, an act that enabled the appellant to penetrate her hence defiling her. This happened on two (2) occasions. Pw4 on the other hand claimed that the appellant stuffed a towel into her mouth and had carnal knowledge of her.
14. PW5, **Musyoka Katumbi** the watchman at the lodging stated that at the time of being taken to the lodging the appellant claimed that PW1 and PW4 were his children while the witnesses said he was their uncle. The appellant left going to purchase food. He returned and they slept. He left the room the following day at 9.00am. On the said date the two (2) girls spoke to him and said that they had missed a motor-vehicle destined for Nairobi. In the evening the appellant returned to the room with food. One of the girls, PW4 was sent to pay for the room. He received money from her
15. The appellant left at 9.00pm. Thereafter PW1 went and told one of the customers (PW2) that they had been defiled.
16. As correctly stated by the trial magistrate, penetration is a crucial ingredient in a case of defilement. In convicting the appellant he based it on the fact that the hymen of PW1 was broken. He dismissed the charge where PW4 was the complainant because she was sexually active.
17. Looking at the evidence adduced, it was stated by PW1 that the appellant penetrated her on two consecutive days. PW4 purportedly assisted him by holding her legs apart. On examination according to the P3 form filed and the post rape care form, the complainant was sexually active. Her hymen was already broken. This was evidence that despite her age she had been engaging in sexual intercourse. On the date she alleges to have been defiled her labia majora, minora and cervix hand no laceration or inflammation. No spermatozoa were seen. There was nothing to suggest that she had engaged in coitus on the two (2) occasions.
18. The law is clear. If a trial magistrate believes the complainant in sexual offences he may convict on her evidence perse. But such conviction should be treated cautiously. **(See the proviso to Section 124 of the Evidence Act).** It was alleged by PW1 that after she was defiled, the following morning the appellant left them with some KShs.100. He locked the door from outside. This was an insinuation that they were not able to leave the room. It is not stated how they

managed to survive throughout the day until 9.00pm. Nothing was stated why they did not seek help from any person. It was not stated why they could not even bang the door, or open the window and raise an alarm. Her credibility is questionable. If indeed she was defiled amidst a struggle, whence she had to be held by two (2) people. There could have been signs of struggle like bruises or lacerations. There was absolutely nothing to suggest any intrusion on her private parts. It was therefore misdirection on the part of the trial magistrate to reach a conclusion that she had been defiled by the appellant. There was no proof beyond reasonable doubt that what PW1 stated was what indeed transpired on the material night, hence no proof that there was penetration of the complainant on the night of **23rd June, 2011.**

19. From the foregoing, the appeal succeeds. The appeal is allowed. I therefore quash the conviction and set aside the sentence imposed. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** day of **OCTOBER, 2014.**

L.N. MUTENDE

JUDGE