REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 44 OF 2011

REUBEN KARIUKI MUNYI .. ...….....….....APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Criminal Case No.328 OF 2008 at Resident Magistrate's Court at Runyenjes by Hon. D.O. ONYANGO – SRM on 2/12/2008

J U D G M E N T

REUBEN KARIUKI MUNYI the Appellant herein was charged with the offence of **defilement contrary to section 8(1) as read with subsection (3) of the Sexual Offences Act No.3 of 2006.**

The particulars as stated in the charge sheet were as follows;

REUBEN KARIUKI MUNYI alias KARUMBE: On the 30th day of April 2008, in Embu District of Eastern Province had carnal knowledge of JKN

He also faced an alternative count of **indecent assault on females contrary to section 11(1) of the Sexual Offences Act.**

The particulars as stated in the charge sheet were as follows ;

REUBEN KARIUKI MUNYI alias KARUMBE: On the 30th day of April 2008, in Embu District of Eastern Province unlawfully and indecently assaulted JKN touching her private parts namely (v*)**

The matter proceeded to full hearing and the Appellant was convicted of the offence of defilement and sentenced to 25 years imprisonment. And being dissatisfied with the Judgment he filed this appeal citing the following grounds;

1. ***That the learned trial Magistrate erred in law and facts and convicted the Appellant with single evidence.***

2. ***That the learned trial Magistrate erred in law and facts by convicting the Appellant without evidence of investigation officer.***

The Prosecution called a total of five (5) witnesses. PW1 who was said to be 12 years old was examined by the Court and found fit to give sworn evidence. Her evidence was that on 30/4/2008 at 11am she went to the stream to fetch water. On her way back she met the Appellant a (neighbour). He pulled her into a nearby banana plantation and removed her pant and made her lie on the ground on banana leaves. He defiled her. When he was through he warned her against telling anybody as he would kill her if she did. She knew him very well as an immediate neighbour. She put on her pants and took her water and went home. She found her mother but never told her for fear of what the Appellant had told her. After a few days her mother (PW2) noted that the child had difficulty in walking. After persuading her she was able to tell her that the Appellant had defiled her. This was on 3/5/08. A report was made to the assistant chief and then to the police. PW1 was taken to hospital on 4/5/2008 and she was treated. A P3 form was filled for her on 5/5/2008. The Doctor (PW5) who examined the complainant found her to have been defiled. He said her hymen was missing but she had no injuries in the genitalia nor spermatozoa. PW4 rearrested the Appellant and recorded witness statements. He then charged the Appellant.

In his unsworn defence the Appellant stated that he was arrested on 4/5/2008 and later charged.

I have considered the submissions by the Appellant and the learned State Counsel. I have equally evaluated the evidence adduced in the Court below. Ref:

1. ***OKENO -V- REPUBLIC [1972] EA 32***

2. ***SIMIYU & ANOTHER [2005]1 KLR 192***

From the evidence on record it is clear that PW1 was a minor.There was no documentary evidence to confirm her age though the Appellant was charged with an offence under the Sexual Offences Act. Age of a child may be established through a baptismal card, birth certificate or age assessment by a medical officer. There is no evidence to show that any of these documents was produced. Secondly the age indicated in the P3 form was not shown after an age assessment. PW5 was examining PW1 in relation to the allegation of defilement. Sentences under the Sexual Offences Act are based on the age of the victim and age must therefore be proved. This was not done in this case. I need not go further than this.

In the case of ***M'OBICI & ANOTHER -V- REPUBLIC [2006]2 KLR 166*** which followed ***MWANGI -V- REPUBLIC [1983] KLR 522*** it was held;

"A retrial should not be ordered unless the appellate Court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result".

In this case the only evidence directly connecting the Appellant with this offence is that of PW1.

This girl went home after the ordeal and found her mother. She did not mention anything to her until 3/5/2008 when the mother persuaded her because of her difficulty in walking. PW1 was treated on the 5th day of the incident but was found to have no injury in her genitalia. It was not indicated that her hymen had been freshly perforated. Its given that the defiler threatened to kill her but the said defiler was not living with her. Her mother was there and she did not report this to her at all, until the 5th day.

It is true that under section 124 of the Evidence Act the Court may convict on the basis of the evidence of the alleged victim alone. The learned trial Magistrate indicated in his Judgment that PW1 was steady and composed even under cross-examination. And that she appeared intelligent enough to understand the importance of telling the truth. I did not see this child but the period it took for her to report this ordeal to the mother or anybody else appears abit questionable. The threats could only have

been real if the Appellant was maybe living with the minor in the same homestead or if they were meeting anywhere. There is no evidence there were any chances of them meeting. I therefore find that besides the proof of age there was need for some other evidence to corroborate her evidence on identification. Had there been such other evidence however weak I would have considered a retrial.

On a proper consideration of this evidence, I do find that the end result of a retrial in this may not be a conviction. As per the holding in the case of ***M'OBICI & ANOTHER -VS- REPUBLIC*** (supra) a retrial may not suffice. Secondly would it be in the interest of justice to order for a retrial? In the case of ***ELIREMA & ANOTHER -V- REPUBLIC [2003] KLR 537*** it was not found fair to order for a retrial where the Court was not sure that witnesses would still be available. In the instant case the Appellant has served almost five (5) years in prison. The complainant may now be about seventeen (17) years. Its not clear whether she would be willing to come and testify against the Appellant considering the nature of the charge.

And for those reasons raised above I would not find it just to order for a retrial. It follows that the appeal succeeds and the conviction is quashed. The sentence is set aside. Appellant to be released forthwith unless held under a separate lawful warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21ST DAY OF JUNE 2013.

H.I. ONG'UDI

J U D G E

In the presence of;