REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 241 OF 2012

PAUL KARUGA MUNIU ….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 183 of 2011 in the Senior Resident Magistrate's Court at Githunguri – B. M. Nzakyo (SRM) on 26/9/2012

JUDGMENT

1. This Criminal Appeal stems from the Appellant's conviction in **Senior Resident Magistrate Cr. Case No. 183 of 2011** at Githunguri law courts, wherein the appellant **Paul Karuga Muniu,** was convicted for the offence of defilement contrary to **Section 8(1)** as read with sub-section **(3)** of the **Sexual Offences Act No. 3** of **2006 laws of Kenya**.

The brief particulars were that, on 18th day of February 2011 at about 6.00 p.m. Githunguri District within Central Province he unlawfully committed an act causing penetration with genital organs (penis) into the genital organ (vagina) of A.W.N. (identity concealed on account of her being a minor).

2. In the alternative, the appellant faced a charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006**. It had been alleged that on the same dates and place he caused contact between his genital organ (penis) and the genital organ (vigina) of the said A.W.N.

3. Upon conclusion of the trial, the learned trial magistrate convicted the appellant on the main count and sentenced him to 20 years imprisonment. The appellant appealed against conviction and sentence on grounds that he was convicted on insufficient and contradictory evidence, the content of the P3 form was at variance with the evidence of **PW3**, and that there was no corroboration from any eye witness. He also contended that his defence was not duly considered.

4. M/s. Ndombi the learned state counsel in answer to the grounds of appeal, stated that the charge of defilement was proved in the lower court to the standard required, and the sentence meted out was lawful. She urged that the complainant, a thirteen year old minor knew her assailant well, that the birth certificate confirmed her age while the medical evidence confirmed that she had been defiled. Lastly that the court considered the appellant's defence and found that it did not exonerate him from blame.

5. Upon afresh evaluation of the lower court record, I find that there is no dispute that the complainant was a minor aged only 13 years at the time of the offence. **PW2**, her mother testified to this fact and produced a birth certificate as evidence. There is also no dispute that the minor was defiled in view of her own evidence and that of the medical witness who confirmed that the missing hymen in the child was indicative of penetrative intercourse.

6. The more vexing question is that of the identity of the perpetrator. **PW1** the minor testified that she was alone on her way from school on 18th August 2011 after 4 p.m, when the appellant who was commonly known as **"Baba Caro"** but whose names she knew as Paul Karuga, emerged from a path in the tea bushes. He held **PW1** with one hand and placed the other hand on her mouth to stop her from screaming. He dragged her into the overgrown tea bushes and pushed her onto the grown.

7. What followed is best captured in her own words:

> **"He removed my pants.It appeared that he did not have a belt he pulled down his trouser.He knelt down as he did so.After he pulled down his trouser he had a short on and a pant which was whitish.It is commonly called "wanawake".He pulled the short and pant down and then he lay on me took his male private organ and forcefully inserted it into my private parts. He told me that I knew he was my uncle and that if I told anyone what happened he would kill me.He forcefully had sex with me and he ejaculated.He was holding me tightly and kept pointing at me hushing me up not to scream.I was feeling pain and felt chocked in my chest and throat."**

8. **PW1** testified that she noted blood and whitish discharge oozing from her genitalia when the appellant was done with her. She however did not report this wicked encounter to her parents when she arrived home because the appellant had warned her to keep it to herself or he would kill her. She reported the matter to the parents two weeks later on 2nd March 2011, and set events in motion which culminated in the arrest and arraignment of the appellant.

9. The appellant denied the offence on oath and put forward an alibi defence, in which he stated that at the material time he was away in Nairobi, signing documents in respect of coffee farmers SACCO where he is the secretary. He called one Julius Onguti Obuchare as a witness to support his testimony.

10. In evaluating the prosecution's evidence afresh, I had in mind the appellant's defence and inquired into the entire evidence to satisfy myself whether the prosecution had by its evidence left any reasonable possibility of that defence being true because, should there be any doubt, benefit thereof must be accorded the appellant. See – **Ouma v Republic [1986] KLR pg 619.**

11. An accused person is under no obligation to prove his innocence or to explain himself even where he raises an alibi defence. An alibi raises a specific defence and an appellant who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer. It is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. See - **Kiarie v Republic [1984] KLR pg 740**.

12. **PW1** was a 13 years old minor, who testified on oath after being subjected to extensive voire dire examination, and found to understand the seriousness of testifying on oath. The offence occurred in broad day light in the late afternoon. The person who attacked her was a relative and was well known to her as they lived within the same locality. On this score the evidence was corroborated by **PW2** her mother and **PW4** her father who testified that the appellant was related to them by marriage.

13. **PW4** the father testified that his sister is married to the appellant's brother and that they grew up in the same village. Both parents denied there being any pre-existing bad blood between them and the appellant. The testimony of the three prosecution's witnesses that the appellant and the minor

were well known to each other prior to this incident found support in the appellant's own testimony. He testified that he had known the minor for many years, and that they were related and lived in the same village.

14. The minor's testimony shows that school ended at about 4.00 p.m. on the material day. Sometime thereafter she left for her home and on the way she ran into the appellant and the rest is as set out above. The appellant on the other hand testified that he was at his SACCO Headquarters in Nairobi from 2 p.m. to 6 p.m. on the stated date. **DW2** corroborated the fact that he was in Nairobi to sign some documents.

15. After careful consideration of all the evidence on record it is my humble opinion that the actual time of the offence, and indeed that of the appellant's return from Nairobi was not set with any degree of certainty. The minor did not testify to having looked at a watch to establish the time of attack and neither did the appellant. The time testified to in each case, is an estimation to the best of the knowledge of the person testifying. It is therefore my finding that sometime on the evening of the ill-fated day, the appellant was returning home from Nairobi when he came upon **PW1** who was returning home from school and this puts him at the scene of the offence at the pertinent time.

16. I analysed the evidence of identification with great caution bearing in mind what was stated in the case of **Republic Vs. Turnbull & others (1976) 3 All ER 549**, that mistakes can be made even in cases of recognition and that an honest witness may none the less be mistaken.

17. The minor's evidence places the appellant at the scene and debunks his alibi defence. I found no reason to believe that the minor pointed a finger at a relative with whom there was no pre-existing ill will just to fix him. The record shows that she withstood cross-examination beautifully and in any case the appellant did warn her at the scene to remember that her is her relative, and that he would kill her if she reported the matter to anyone.

For the foregoing reasons the appeal is found to be lacking in merit and is accordingly dismissed in its entirety.

SIGNED DATED and **DELIVERED** in open court this **29th day** of **August 2013.**

L. A. ACHODE

JUDGE