



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 245 OF 2013**

**(Appeal from the Original Conviction and Sentence in Criminal Case No. 7 of 2011 dated 17<sup>th</sup> May 2013 in the Senior Resident Magistrate's Court at Kangema by Hon. Orimba - SRM)**

**JAMES MITHAMO KARIGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The Appellant herein James Mithamo Karige was convicted by the Senior Resident Magistrate at Kangema for the offence of defilement contrary to Section 8(1) and (3) of the Sexual Offences Act, No. 3 of 2006. He also faced an alternative charge of committing an indecent act contrary to the Sexual Offences Act. He was sentenced upon conviction on the main count to serve 20 years imprisonment. He appeals against that conviction and sentence.

The Appellant raised grounds of appeal in the following respects:- That the trial Magistrate erred in basing the conviction on the testimony of prosecution witnesses who were contradictory thus contravening Section 163 (c) of the Evidence Act. He also challenged the fact that he was not medically examined to ascertain if he had indeed committed the offence. Another ground was that critical and vital witnesses were not called to testify as required by Section 150 of the Criminal Procedure Code. He urged that the case was not proved beyond a reasonable doubt whereas the evidence adduced was incapable of sustaining the conviction. Finally, he appealed that the trial Magistrate failed to take into account the defence raised.

The Appellant challenged the testimony of the complainant, her mother and the neighbour as well as that of the investigating officer. He stated that they conspired to frame him due to a hidden grudge with the neighbour Mama Wangeci PW3 who was a friend to the complainant's mother PW2. An attack was made of the evidence of the prosecution witness (PW3) and the finding of a skirt and the examination of a trouser and blouse for blood stains per the evidence of PW4 the police officer. The Appellant argued that the evidence was contradictory as there was inconsistency in the items taken for forensic examination. The incident was stated to have taken place on 3<sup>rd</sup> January 2011.

The State opposed the Appeal through the State Counsel Mr. Okeyo. He supported the upholding of the conviction on grounds that it was safe, the sentence lawful and ought not be disturbed. He urged the Court to dismiss the appeal as it lacked merit.

The evidence of PW3, the neighbour was cogent and in spite of the poor handling of the exhibit, plausible. Even if the evidence of the blood stained skirt was excluded, the complainant PW1 was clear in her testimony that the Appellant had offered her a motorbicycle ride to her home only for him to take her to a public centre, buy her a soda and take her to his rental house where he is a neighbour to PW3 where he threatened to lock up PW1 if she did not give in to his demands to remove her panties. PW1 testified that he defiled her and gave her a trouser to wear as her skirt was blood stained after the act. He was seen by PW3 leaving his residence in the company of PW1. She then called the mother of PW1.

The recovery of the skirt and the handling of the said exhibit by PW3 was not proper as PW3 should

have handed it over to the police directly. The police investigator PW4 testified that he took possession of both the skirt and trouser which were produced as exhibits in the trial. PW5 was the medical officer who examined the complainant. Her evidence was that PW1 showed lacerations and bleeding consistent with defilement. The examination was on 4<sup>th</sup> January 2011 the day immediately after the defilement. The medical examination of the complainant revealed sexual activity had taken place and the said examination was so proximal as to connect the Appellant. The evidence of PW3 corroborates the testimony of PW1 the complainant as both place the Appellant at the scene. There is no evidence that the two witnesses conspired at all to frame the Appellant. In cross-examination, there was no elicitation of such. It seems as an afterthought and entirely misplaced. Even assuming the skirt had not been recovered, there was sufficient evidence on record to convict for the offence. The evidence of PW1 was corroborated by the evidence of PW3 and the conviction based on the evidence adduced would stand. The law provides the statutory minimum which was handed out as the sentence in the case by the trial Magistrate.

Having, at this stage of the appellate process, evaluated and analysed the facts of the case and the verdict of the learned trial Magistrate I find that the said Magistrate did not err either on the law or facts. The conviction was safe and the sentence lawful. I find no merit in this Appeal and dismiss it in its entirety.

**Dated signed and delivered this 27<sup>th</sup> day of November 2013**

**Nzioki wa Makau**

**JUDGE**