



NTETU OLE PONOKAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence in Kajiado SRM Criminal Case No. 1203 of 2007 – W. N. Kaberia, SRM)

J U D G M E N T

1. The Appellant was charged with, tried and convicted of the offence of **defilement of a girl under the age of eleven years** contrary to **section 8(2)** of the **Sexual Offences Act, 2006**. He was sentenced to serve **twenty-five (25) years imprisonment**. He has appealed against both conviction and sentence.

2. It was alleged in the particulars of offence that on 18th September 2007 at in Kajiado District within Rift Valley Province, the Appellant had unlawful carnal knowledge of one NMM, a girl aged nine (9) years.

3. The grounds of appeal put forth by the Appellant, duly rephrased for clarity, are as follows-

- (i) That he was not arraigned before court within 24 hours as decreed by the Constitution.
- (ii) That there was no corroboration of the testimony of the complainant.

4. The Respondent supports the conviction and sentence. I have considered Appellant's submissions. He was unrepresented. I have also considered the submissions of the learned State Counsel.

5. It was conceded by the learned State Counsel that the Appellant was arrested on 20th September 2007 and arraigned in court on 15th October 2007, some twenty-five (25) days later. The Appellant says that he was kept in police custody all this while. No explanation was offered before the trialcourt for this long delay in arraigning the Appellant before the court.

6. The complainant's testimony was that she did not know the Appellant and that she was given his name by other children with whom she was herding cattle. The Appellant was not found in the act, nor was he arrested at the scene.

7. The circumstances in which the complainant was given the name of the Appellant were not given. The children who gave the Appellant's name were not called to testify. Despite the long period in which he was held in police custody, no proper identification parade appears to have been conducted.

8. Finally, the testimony of the doctor who examined the complainant was that although the posterior wall of the vagina was torn, there was no injury on the **labia minora, labia majora** and **cervix**, and she had no discharge. The doctor's conclusion was that there was no penetration. Penetration is of course a fundamental ingredient of the offence that was charged against the Appellant.

9. The Appellant's conviction is thus clearly unsafe and cannot be permitted to stand. The appeal must succeed. The conviction is quashed and the sentence imposed set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

10. The delay in preparation of this judgment is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully regained my health.

DATED AT NAIROBI THIS 29TH DAY OF AUGUST 2012

H. P. G. WAWERU
JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS

28TH DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA

.....
JUDGE