



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CORAM: F. AZANGALALA**

**HC. CRA. NO. 159 OF 2009**

**BETWEEN**

**KIPCHIRCHIR KOSGEI..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***[Being an appeal from the Judgment of the Senior Resident Magistrate – B.N. Mosiria, dated 14<sup>th</sup> September, 2009***

***at Iten Senior Resident Magistrate’s Court in CRC. No. 483‘A’ of 2008]***

**JUDGMENT**

The appellant, **Kipchirchir Kosgei**, was charged with two counts of defilement of a girl contrary to section 8 (2) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. It was alleged, in count 1, that the appellant, on 8<sup>th</sup> September, 2008, within the Rift Valley Province committed an act of penetration to the vagina of **V.K** aged 7 years by his penis.

It was alleged, in the second count, that the appellant, in precisely those same circumstances, same place, and same date committed an act of penetration to the vagina of **J.K** aged 7 years by his penis.

The appellant also faced two alternative counts of indecent assault contrary to section 11 (1) of the same Act. It was alleged in the first alternative count that the appellant in precisely the same circumstances,

same place and same date committed an indecent act with **V.K** aged 7 years by touching her private parts namely, vagina. In the second alternative count, it was alleged that the appellant in precisely the same circumstances, the same place, and the same date committed an indecent act with **J.K** aged 7 years by touching her private parts namely, vagina.

The appellant was tried before **B.N. Mosiria**, (SRM) who after considering the evidence presented by the prosecution found the appellant guilty of the two principal counts. After regarding the appellant's mitigation, he sentenced him to life imprisonment.

The appellant was dissatisfied with his conviction and sentence and has appealed to this court against both conviction and sentence on the primary grounds that the appellant was convicted on insufficient, uncorroborated and untested evidence; that his defence was not considered and that the sentence imposed was harsh in the circumstances.

When the appeal came up for hearing, learned counsel Mr. **Oluoch** for the state, stated that he was conceding the appeal, but then asking for a retrial. Counsel contended that there had been a departure from the terms of section 208 of the Criminal Procedure Code (CPC) in that the two complainants were not cross-examined after testifying. Mr. **Oluoch** submitted that the evidence laid against the appellant was convincing and compelling and as all the witnesses will be available, this court should order a retrial.

Counsel for the appellant on his part submitted that no case had been made for a retrial. In his view, the appellant was convicted on uncorroborated testimonies of the complainants and his appeal should be allowed in its entirety.

Having considered the record and the submissions of counsel, I agree with the learned Senior Deputy Prosecution Counsel that on the authority of **Sula –vrs- Uganda [2001] 2 EA 556**, the complainants herein were liable to be cross-examined to test the veracity of their evidence. They were not. Their evidence was not taken in accordance with Section 208 (2) and (3) of the Criminal Procedure Code (Cap 75 Laws of Kenya).

I have considered and re-evaluated the evidence on record as I was duty bound to do (See **Okeno –vrs- Republic [1972] EA 32**). Having done so, I have come to the conclusion that the complainant's testimonies could safely be relied upon as a basis of the appellant's conviction given the provisions of Section 124 of the Evidence Act. Counsel for the appellant contended that the said testimonies were not corroborated and therefore conviction of the appellant was not safe and his appeal should therefore be allowed in its entirety. Counsel in my view and with all due respect did not appreciate the provisions of section 124 of the Evidence Act aforesaid.

However, even if corroboration was required, there were the testimonies of **E.K** (P.W.3) and **S.K** (P.W.4) who were the mothers of the complainants. The two mothers found the complainants in distressed condition and on examining them, found a whitish discharge from their private parts. There was then the testimony of **Abedi Cheruiyot**, (P.W.7), a clinical officer at Iten Hospital. He found that the private parts of the complainants had tears and a discharge which according to him showed that the complainants had had intercourse.

In the result, I am satisfied that the prosecution presented evidence upon which a conviction for the offences preferred upon the appellant could be founded. The appellant was convicted on 14<sup>th</sup> September 2009. He was admitted to bond during his trial which trial took just about a year. The learned Senior Deputy Prosecution Counsel has assured the court that the prosecution have their witnesses and can mount a speedy trial. I am satisfied that the appellant will therefore suffer no undue prejudice if a retrial is ordered.

I therefore allow the appeal, quash the appellant's conviction and set aside the sentence of fifty years imposed upon him. The appellant shall be retried on the basis of the original charges before a different Magistrate with competent jurisdiction. Pending his retrial, the appellant may be released on bond on such terms as the trial Magistrate shall determine.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET LTHIS 31<sup>ST</sup> DAY OF MARCH 2011.**

**F. AZANGALALA**

**JUDGE**

***Read in the presence of:***

1. Mr. **Chepkonga** holding brief for **Kibowen** for the appellant and
2. Mr. **Oluoch** for the state.

**F. AZANGALALA**

**JUDGE**