REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 61 OF 2009

PHILIP KIPKURUI KITUR ……..…… APPELLANT

VERSUS

REPUBLIC ……...…….. RESPONDENT

(Appeal from the judgment of the Principal Magistrate at Bomet, Hon. T. Okello given in Bomet PM CR. C. NO. 2062 of 2005)

JUDGEMENT

On 12th November, 2009, the Appellant, **Philip Kipkurui Kitur,** was sentenced to six (6) years imprisonment after being found guilty and convicted of the offence of defilement of **S.C.**, a girl aged 6 years.

Aggrieved by the conviction and sentence, the Appellant lodged appeal and contended in his Petition of appeal that the trial court erred in relying on insufficient evidence and in shifting the burden of proof to the Appellant. He also contended that the sentence was "harsh and cruel". He prayed that the conviction be quashed and the sentence set aside.

When the appeal came up for hearing before me on 2nd February, 2011 the Appellant told the court that he had handwritten submissions that he wished to rely on. I allowed him to file and rely on the same. He told the court that he did not wish to state anything else save that he wanted the sentence meted out by the trial court to run concurrently with the sentence meted out in the judgment appealed against by him in appeal No. 60 of 2009 which (appeal) was dismissed.

The State Counsel, **Miss N.M. Idagwa,** appeared for the Respondent/State and opposed the appeal. She submitted that the appeal had had no merit. It was her submission that the Appellant defiled two sisters at the same time and at the same place and was convicted in both cases and that the appeal in the other case (being appeal No. 60/2009) was dismissed for want of merit and the Appellant is serving a similar jail term of six years in that appeal.

This is the first appellate court and I am alive to the need to give the appellant a fresh reconsideration of the case. I have carefully perused the evidence and made my own inferences and conclusions. The offence was committed at night. The issue was whether there was sufficient evidence that the complainant recognized the Appellant as the person who defiled her. The complainant was aged 11 years at the time of the hearing in 2007. The offence was allegedly committed on 5th December, 2005, one year and 5 months

earlier when the complainant was aged about 10 years. She was in standard 5 in May, 2007. She was at home with her younger sister, C. Her mother, a single parent, had to go to her uncle's house. The complainant knew the Appellant. She used to see him repairing bicycles at a place called K[...] Centre. He came to the house when the complainant's mother was not there. The complainant was in bed with her sister, C.. The Appellant had a torch which he flashed. He did not conceal his face. He removed the inner wear of C., and defiled her. When he tried to defile the complainant, the latter resisted. But the Appellant managed to remove the complainant's clothes and to touch her private parts. The complainant raised alarm. The defiler fled. Her mother returned. She told her the Appellant had defiled her. Her mother in turn reported the Appellant to the police.

The complainant's sister **V. C.,** who was defiled by the Appellant also saw the Appellant. She was younger than the complainant. She also knew him well. She saw him with the light from the torch.

PW6, Alice Cheruiyot, gave evidence that she examined the complainant. The trial magistrate did not record who PW6 was and what expertise he had to examine the complainant and to fill the P3 form. Without medical evidence, the charge could not hold. PW3 did not state who filled and/or signed the P3 form which PW6 produced as an exhibit. Without the evidence of the maker, it was valueless as an exhibit.

It was the duty of the trial court to ensure that the record reflected what expertise PW6 had and whether PW6 could produce the P3 form. The trial court failed to ensure this, basic as it was. This is a case in which an offence was clearly committed, yet the conviction has to be quashed due to errors on the part of the trial court that could have been avoided. An offender who deserves long incarceration has to go free.

In the light of the above, I have no alternative but to quash the conviction which cannot hold in absence of medical evidence. However, there is evidence of indecent assault on the complainant contrary to **Section 144(1)** of the Penal Code.

Accordingly, I quash the conviction on defilement and instead substitute it with conviction for indecent assault on a female contrary to **section 144(1)** of the Penal Code. The Appellant shall serve a sentence of six years for the indecent assault. It is so ordered.

DATED at **KERICHO** this 6TH day of April, 2011

G.B.M. KARIUKI, sc
RESIDENT JUDGE

COUNSEL APPEARING
Miss. N.M. Idagwa State Counsel for the Respondent
Appellant in person
Court Clerk – Mr. Koech