REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 77 OF 2007

SIMON KIPTOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. H. M. Nyaga (Senior Resident Magistrate)

in Kabarnet SRM.CR. No. 228 of 2007 delivered on the 18th September 2007)

JUDGMENT

SIMON KIPTOO (herein, the Appellant), appeared before the Kabarnet Senior Resident Magistrate charged with the offence of defilement contrary to S. 8 (3) of the Sexual Offences Act.

It was alleged that on the 11th April 2007 in Baringo District, he had canal knowledge of A.C, a girl under the age of sixteen (16) years.

There was an alternative count of indecent assault erroneously brought under the repealed S. 144 of the Penal Code. Both counts were denied by the appellant but after trial, he was convicted and sentenced on the main count to serve life imprisonment.
Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the following grounds:-

(1) That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant by relying on medical evidence which does not link the appellant with the offence.

(2) That the learned trial Magistrate erred in law and fact in relying on contradictory evidence.

(3) That the learned trial Magistrate erred in fact and in law in relying on evidence where there was no proper identification of the appellant.

(4) That the learned trial Magistrate erred in fact and in law in convicting and sentencing the accused where there was no establishment of the age of the complainant.

(5) That the learned trial Magistrate erred in fact and in law in delivering a judgment without analyzing the appellant's defence and giving reasons for its rejection.

(6) That the learned trial Magistrate erred in fact and law by giving a ruling to proceed with judgment without the benefit of hearing the case and seeing the demeanour of the witnesses.

(7) That the learned trial Magistrate occasioned miscarriage of justice by rendering a judgment on a matter he did not preside over and by failing to give the appellant the opportunity to state whether or not he wished the case to proceed to Judgment.

(8) That the learned trial Magistrate erred in fact and law in convicting the appellant and imposing a sentence which was harsh and excessive.

(9) That the learned trial Magistrate erred in fact and law by sentencing the appellant on a plea and proceedings which were a nullity on account of violation of the appellant's Constitutional rights occasioned by his unlawful stay in police custody.

(10) That the learned trial Magistrate erred in fact and law by meting out a harsh sentence in disregard of the appellant's health condition.

May it be noted that for purposes of correct grammar and making sense, the aforementioned grounds of appeal are not exactly worded as they are in the amended petition of appeal dated 5th November 2010. **MR. TARUS**, learned Counsel, argued the said grounds on behalf of the appellant while the learned State Counsel, **MR. KABAKA**, appeared for the respondent and opposed the appeal.

In his submissions, Mr. Tarus, went through all the ten grounds and contended that the medical report by the Clinical Officer (PW 1) did not incriminate the appellant and was unreliable as the complainant was examined on 16th April 2007 yet the incident occurred on 11th April 2007. Therefore, the doctor's findings with regard to the presence of sperms in the complainant was erroneous. It was also not established whether the sperms were those of the appellant thereby implying that the complainant could have had sexual intercourse with anybody. In that regard, reference was made to the case of **PETER KUBAI MBUGUA VS. REPUBLIC ELDORET HIGH COURT CRIMINAL APPEAL NO. 56 OF 2006**. It was also contended by Mr. Tarus, that the complainant's age was not assessed. It was not proved that the complainant was aged thirteen (13) years. Further, the evidence by PW 2, PW 3 and PW 4 was contradictory with regard to the alleged entry into the complainant's room by the appellant.

Mr. Tarus, contended that the contradictions should have been resolved in favour of the appellant and went on to submit that the appellant was not properly identified as the culprit since a torch could not in darkness provide favourable conditions for identification neither could the moonlight. Learned Counsel wondered where the appellant's clothes went if he was indeed seen running away while naked.

On identification, learned Counsel relied on the decisions in **MITIKO MANKO CHACHA Alias MUTURA VS. REPBULIC KISII HIGH COURT CRIMINAL APPEAL NO. 10 OF 2006, MICHAEL OCHIENG ODONGO VS. REPUBLIC CRIMINAL APPEAL NO. 208 OF 2006 AT KISUMU (C/A) AND DAVID MASINDE SIMIYU & ANOTHER VS. REPUBLIC CRIMINAL APPEAL NO. 33/34 OF 2004 AT ELDORET (C/A).**

It was also contended by the learned Counsel that the appellant's defence was disregarded by the trial Court without reasons being given and that the learned trial Magistrate failed to comply with the provisions of S. 200 of the Criminal Procedure Code thereby occasioning a miscarriage of justice.

On the alleged violation of the appellant's Constitutional rights, it was submitted by learned Counsel that the appellant was held in police custody for an extra three days. In that regard, reference was made to the case of **PAUL MWANGI MURUNGA VS. REPUBLIC CRIMINAL APPEAL NO. 35 OF 2006 AT NAKURU (C/A)** and that of **ANN NJOGU & OTHERS VS. REPUBLIC HIGH COURT CRIMINAL APPLICATION NO. 551 OF 2007 AT NAIROBI.**

On sentence, learned Counsel contended that the same was harsh, excessive and contrary to the law. Further, the sentence was imposed without regard to the mitigating factors.

On his part, the learned State Counsel, contended that it was proved by PW 1 that the complainant was aged 13 years at the time of the offence and that she was defiled. The complainant confirmed that she was indeed aged thirteen (13) years old.

The learned State Counsel also contended that the complainant identified the appellant as a neighbour and that she saw him when a torch was flashed at him. Further, the appellant was seen by PW 3 while naked and on top of the complainant, he was also seen with the aid of moonlight by PW 4 while running away from the scene.

The learned State Counsel contended, that the identification of the appellant was by recognition and that the evidence in support thereof was watertight. Further, the appellant's conduct of disappearing from the scene after the offence showed that he was guilty. With regard to S. 200 of the Criminal Procedure Code, the learned State Counsel substituted that the same was complied with by the learned trial Magistrate.

As to the sentence, the learned State Counsel submitted that S. 8(3) of the Sexual Offences Act provides for a minimum sentence of twenty (20) years, therefore, the sentence imposed by the learned trial Magistrate was neither harsh nor excessive in view of the circumstances of the offence.

On the delay in bringing the appellant to Court, the learned State Counsel submitted that there was a delay of about four (4) days but in any event, a remedy was provided for under S. 72 (6) of the Former Constitution. Further the issue was not raised at the earliest opportunity thereby rendering it an afterthought.

Having considered the grounds of appeal in the light of the submissions by both sides, this Court is required to embark on its cardinal duty of re-visiting the evidence and arriving at its own conclusion. In doing so, it is appreciated that the trial court had the advantage of seeing and hearing the witnesses (**See, OKENO VS. REPUBLIC (1972) EA 32 and ACHIRA VS. REPUBLIC (2003) KLR 707**).

In brief, the prosecution case was that, the complainant **A. C (PW 2)** was at the material time aged 13 years old and a Primary School pupil. On the material date at about 1.00 a.m. she was asleep at home in the company of **D.C.M (PW 3)**, her younger sister, when the appellant went there and knocked opened a window. She knew the appellant as a neighbour. He entered the house through the window and lay on her. He tore her clothes and undressed her. Thereafter, he defiled her while gagging her mouth with a piece of cloth. A torch was shone on his face by D who later fled from inside the house while screaming. By the time their mother (PW 4) arrived at the scene, the appellant had fled.

D (PW 3) confirmed that it was the appellant who entered the house and defiled the complainant. She had previously known him. She was sleeping on the same bed with the complainant when she felt a commotion on the bed. She fetched a torch and shone it on the appellant whom she recognized. He was at the time naked and on top of the complainant. She screamed and was insulted and thrown out of the bed by the appellant. She fled out of the house and continued screaming until their mother arrived at the scene just as the appellant was fleeing from the scene.

H.C (PW 4) is the mother of D (PW 3) and an aunt to the complainant (PW 2). She heard the distress calls and rushed to the house in which the complainant and D were sleeping. On arrival, she spotted the appellant emerge from the house and run away. She saw and recognized him as there was bright moonlight. He fled while naked. She pursued him while shouting out his name. He out raced her and on arrival at his house she found it open and empty. She returned to where the complainant and D were and confirmed that the complainant had been defiled. She took her (complainant) to hospital on the following day and referred the matter to the police at Kabarnet. The report was received at about 11.30 a.m. by **P.C. JULIA MOROP (PW 5)** of Kabarnet Police Station. Thereafter, investigations commenced. A P3 form was issued and completed at the Baringo District Hospital. The appellant was arrested on the 24th April 2007 after an arrest Order was issued to the Kipsarman D.O's office. He was arrested by Administration

Police officers and handed over to P.C Julia (PW 5) who eventually charged him with the present offence. A Clinical Officer at Baringo District Hospital, **MOSES SUSWA (PW 1**) examined the complainant on the 16th April 2001 and concluded that she had been defiled. He completed and signed the necessary P3 form which was produced in Court.

The appellant was placed on his defence on the basis of the foregoing evidence by the prosecution. He denied the offence and stated that he was at his home on the material date after having gone to the hospital. He was unwell and was told by his mother to spend the night with his nephew called Chirchir. After a meal was prepared for him by Chirchir, they slept on the same bed. At about 1.00 a.m. he heard distress calls from H's (PW 4) home which was about twenty (20) metres away. He walked out of his house accompanied by Chirchir. He thought that the calls were the usual noises normally made by the complainant's younger siblings. He contended that he did not defile the complainant and did not know why she framed him up. He, however, remembered that sometimes ago there was a quarrel between him and H (PW 4) after her goats ate his crops. It was H (PW 4) who in the morning of the material date informed him that a person had defiled the complainant. They followed the footprints of the culprit but in vain. Neighbours who answered the distress calls framed him up saying that he was suffering from the disease AIDS. **CHIRCHIR JACKSON (DW 2)**, confirmed more or less what the appellant stated. He said that after they heard the distress calls, they went out of the house and called out H (PW 4) who did not answer. Thereafter, they went back to sleep.

The appellant's brother, **ISAAK CHESIRE (DW 3)**, was at his home about hundred (100) yards from that of H (PW 4) when he heard the distress calls. He walked out of his house and noted that the calls were from H's home. He called the appellant to enquire about the calls but never got to know what was wrong. He did not go to H's home but saw a torch light outside the home.

After assessing and analyzing the evidence in totality, the learned trial Magistrate concluded that the case against the appellant had been proved beyond reasonable doubt.

The learned trial Magistrate correctly noted that the alternative count was defective as it was brought under S.144 of the Penal Code which had already been repealed by the Sexual Offences Act. Nonetheless, the learned trial Magistrate went ahead to convict the appellant on the main count of defilement.

A fresh scrutiny of the evidence by this Court leaves no doubt that indeed the offence of defilement was committed against the complainant who was thirteen (13) years at the time. There was no particular dispute that the complainant was thirteen (13) years old and that she was defiled on that material date at about 1.00 a.m. Her evidence coupled with that of PW 1, PW 3 and PW 4 confirmed as much.

In his submissions, learned Counsel for the appellant took great issue with the evidence adduced by the Clinical Officer (PW 1). He argued that that evidence could not be relied upon since the complainant was examined five days after the fact thereby rendering the possibility of detecting sperms in her body remote. This argument would not hold water considering that the Clinical Officer clearly stated that there was penetration and that spermatozoa was seen on high vaginal swab and on urinalysis. Besides, penetration having been confirmed, the presence or non-presence of spermatozoa was immaterial.

An act which causes penetration with a child amounts to the offence of defilement under S. 8 (1) of the Sexual Offices Act No. 3 of 2006 and a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty (20) years. (**See, S. 8 (3) SEXUAL OFFENCES ACT**).

Whereas S. 8 (1) of the Sexual Offences Act creates the offence of defilement, S. 8 (3) sets out the punishment for the offence if the victim is aged between twelve (12) and fifteen (15) years.

It would therefore follow that the charge was wrongly framed in as much as both provisions (i.e. S. 8 (1) and S. 8 (3) of the Sexual Offences) were not invoked. Herein, only S. 8 (3) of the Act was invoked. The charge should have been framed as follows:-

"Defilement, contrary to S. 8 (1) as read with S. 8 (3) of the Sexual Offences Act 2006."

Be that as it may, the error was not substantial as to cause any prejudice to the appellant who clearly understood the charge facing him and actively participated in the trial which culminated in his conviction for the offence.

In any event, there was no objection to the charge and if it arose, the error would be curable under S. 382 of the Criminal Procedure Code. Basically, the main and crucial issue for determination was whether the appellant was the person responsible for defiling the complainant. The defence raised was a denial and a contention that the appellant was incriminated by the complainant and her mother/aunt (PW 4) without good cause. The appellant implied that an earlier confrontation with the complainant's mother/aunt (PW 4) over her goats which had eaten his crops may have created a grudge between the two. There was no denial from the defence that the appellant and the complainant's mother (PW 4) were neighbours and known to each other. Indeed, there was no denial that other than the complainant's mother (PW 4), the appellant was also very well known to the complainant (PW 2) and her sister (PW 3). So, if they all said that it was the appellant who defiled the complainant then the defence put forward would be devoid of any credit as found by the learned trial Magistrate.

This court would similarly find as much. It was not upon the appellant to prove his innocence. The burden was on the prosecution to prove beyond reasonable doubt that it was the appellant who was responsible for defiling the complainant.

It is the view of this Court that the prosecution succeeded in discharging its burden of proof. The complainant (PW 2) said that it was the appellant who defiled her. This was corroborated by her sister (PW 3). It was dark but a torch obtained by PW 3 provided adequate and direct light for purposes of identifying the culprit. The torch flash was shone directly at the appellant. He was seen or caught with "***his pants down***" by PW 3. He was also seen running away from the scene after the fact by the complainant's mother (PW4). She said that there was bright moonlight which enabled her see the appellant while running away naked.

In actual sense, PW 2, PW 3 and PW 4 saw and recognized the appellant whom they clearly knew as a neighbour. There was nothing substantial to show or suspect that the said witnesses incriminated the appellant without any good reason. It is the finding of this Court that he was positively identified as the person responsible for the offence. His conviction by the learned trial Magistrate was based on sound evidence and is hereby upheld. However, the sentence imposed by the learned trial Magistrate though lawful was, in the opinion of this Court, rather on a higher side for a first offender.

The minimum sentence provided for under S. 8 (3) of the Sexual Offences Act would have been appropriate in the circumstances. To that extent, this Court would reduce the sentence to twenty (20) years imprisonment.

Concerning S. 200 of the Criminal Procedure Code, it was contended by the appellant that the same was not complied with when the trial of the case was taken over by a second Magistrate.

The record shows that the trial was commenced by **P. M. MURIUKI (SRM)** on the 24th May 2007 and concluded on the same date. The Judgment was to be rendered on the 26th June 2007 but it would seem that Mr. Muriuki moved out of Kabarnet Court and indeed the Judiciary. The matter was then taken over by **H. M. NYAGA (SRM**) who ordered that the proceedings be typed so that he may render the judgment in accordance with S. 200 C.P.C. This was done on the 21st August 2007 and judgment was accordingly delivered on 18th September 2007. In essence, the provisions of S. 200 (1) (b) of the Criminal Procedure Code were complied with when Mr. Nyaga took over the matter.

S. 200 (1) (b) of the CPC provides that:-

"Subject to sub-section (3), where a Magistrate, after having heard and recorded the whole or part of

the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and exercises that jurisdiction, the succeeding Magistrate may-
where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor or re summon the witnesses and recommence the trial."

Herein, the incoming Magistrate acted on the evidence recorded by his predecessor and rendered the judgment instead of re-summoning the witnesses and recommencing the trial. He was entitled to do so and more so when there was no indication from the appellant that he preferred that the witnesses be re-summoned for a fresh start of the trial. There was no objection by the appellant to the course of action taken by the incoming Magistrate. He cannot now be heard to say that S. 200 CPC was not complied with.

On the contention by the appellant that his constitutional rights under S. 72 (3) of the Old Constitution were violated by being held in police custody longer than prescribed, the remedy does not lie in an acquittal but in compensation as provided for under S. 72 (6) of the same Old Constitution. In any event, the issue was raised without the prosecution being given an opportunity to explain the delay in bringing the appellant to Court thereby smacking of an afterthought.

All in all, this appeal lacks merit. It must and is hereby dismissed. However, the life imprisonment sentence imposed by the learned trial Magistrate is reduced and substituted for twenty (20) years imprisonment.

J. R. KARANJA

JUDGE

[Delivered and signed this 24th day of May 2011]