REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 94 OF 2010

MARK TOO KIENG .....APPELLLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being Appeal against Judgment from Iten Senior Resident Magistrate's Court delivered on 15th June, 2010

by Hon. B.N. Mosiria – Senior Resident Magistrate).

J U D G M E N T

Mark Too Kieny (herein, the appellant), appeared before the Senior Resident Magistrate at Iten charged with the offence of defilement contrary to section 8(2) of the Sexual Offences Act.

It was alleged that on the 2nd October, 2007 at 6.30 p.m. in Marakwet District, he committed an act which caused penetration into the genital organ of C.J, aged eleven (11) years.

There was an alternative count of indecent assault contrary to section 11 (1) of the Sexual Offences Act. The appellant pleaded not guilty to both counts but after trial, was convicted and sentenced to thirty (30) years imprisonment on the main count.

Being dissatisfied with the conviction and sentence, the appellant filed this appeal based on the grounds contained in his petition of appeal filed herein on 24th June 2010. His major complainant is that he was convicted on the basis of insufficient evidence adduced by a single witness. He also complains that the prosecution failed to call essential witnesses and that the learned trial magistrate disregarded his defence. He further complains that his constitutional rights were violated by his detention in police

custody for a period longer than prescribed.

In support of the grounds, the appellant presented written submissions at the hearing of the appeal in which he represented himself. The learned State Counsel **Mr. Kabaka,** appeared for the respondent.

The appellant urged this court to allow the appeal and was supported by the learned State Counsel who conceded on the basis that the prosecution case was not proved beyond reasonable doubt and that the sentence imposed by the learned trial magistrate was unlawful since section 8 (2) of the Sexual Offences Act provides for a mandatory sentence of life imprisonment yet the appellant was handed down a sentence of thirty (30) years imprisonment.

The learned State Counsel submitted that the complainant's evidence indicated that nothing wrong was done to her on the material date and the evidence by PW2 indicated that the appellant's conduct was not consistent with his guilty. Further, the evidence by PW4 was not watertight in showing that there was penetration.

Notwithstanding; the position taken by the respondent, the obligation of this court is to re-visit the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all witnesses. In that regard, the prosecution case was briefly that on the material date, the complainant **C.J (PW1)** aged 12 years was heading home from school at about 5.00 p.m. when she met the appellant and another person. They blocked her way when she attempted to pass them. The appellant slapped and covered her mouth. The two pulled and pushed her into a bush and then into a forest where the appellant removed her clothes and unzipped his trousers. He then proceeded to defile her while his colleague sat down and covered her mouth.

Thereafter, she was left along Kaplenge route which was a distant route from her home. She proceeded to the home of her aunt G where she arrived at 4.00 a.m. She went there after she had slept in a house where she was taken by the appellant and colleague and where she was fed by the two before sleeping. She reported to her aunt who in turn informed her mother. Later, the appellant and his colleague were arrested after the matter was reported to the Chief.

The complainant's mother **M.K (PW2),** said that the appellant was her neighbour. On the material date, her daughter (PW) left home for school but did not return in the evening as expected. She (PW2) sent her son to look for her daughter but in vain. In the morning, she went looking for her daughter in school but did not find her. She reported to a village elder and together with the appellant they all went in search of the complainant. She (PW2) later located the complainant at her aunt's home in a place called Chebara. The complainant told her that she was defiled by the appellant. She examined her private parts and found them swollen. She then took her to hospital at Kapsowar and thereafter went to the Kapsowar Police Station where the appellant and his colleague were taken after their arrest. **P.C. Francis Busienei (PW3)** of Kapsowar Police Station received the appellant and his colleague on 4th October 2007 after they had been arrested by the chief's administration police. He thereafter commenced investigations and ended up charging the appellant with the present offence.

Gedion Yego (PW4), a clinical officer at Chebiemit District Hospital examined the complainant and found evidence which suggested that she had been defiled. He completed the necessary P3 form showing and confirming that the complainant was indeed defiled.

On the basis of all the foregoing facts, the appellant was placed on his defence. He denied the offence and

said that he was at home with his wife on the material date. On the following morning he learnt that a neighbour's children had gone missing. Thereafter, the complainant was found with a man who was found guilty by the court and convicted. He was in the group which had earlier searched for the complainant in vain. The appellant's sister, **Veronica Kiyeng (DW2),** confirmed more or less what the appellant stated. She said that she was with the appellant on the material date.

The appellant's wife, **Gladys (DW3),** also confirmed that the appellant was at home on the material date. Both Veronica and Gladys believed that the charges against the appellant was false. After considering the appellant's defence alongside the prosecution evidence, the learned trial magistrate was convinced that the complainant, (PW2) was a witness of truth and that her evidence was credible. It was on that basis that the learned trial magistrate convicted the appellant. Having scrutinized the evidence a-fresh, this court is satisfied that the evidence by the complainant (PW1) coupled with that of the clinical officer (PW4) and to some extent that if the complainant's mother (PW3) confirmed that the complainant was indeed defiled on the material date.

The complainant's mother (PW3) did not witness the happening of the incident. However, she examined the complainant after the fact and noted that her private parts were swollen.

The clinical officer (PW4) attempted to be evasive with regard to the fact of penetration but he generally agreed and confirmed that the complainant was defiled. It was therefore obvious that if the complainant was defiled then there was penetration of a male organ into her female organ. Section 8(1) of the Sexual Offences Act, defines as defilement, an act which causes penetration with a child. The provision creates the offence of defilement while section 8(2) of the Act prescribes the punishment for such offence with a child aged eleven (11) years or less. The complainant was aged eleven (11) at the time of the offence.

Although the charge was wrongly framed, the appellant clearly understood it and actively participated in the trial which culminated in his conviction. He was not prejudiced in any manner nor was any injustice occasioned. In any event, he did not raise any objection to the charge in the trial. However, the objection was raised in this appeal, but since it does not go to the substance and core of the offence, the defect or error is curable under section 382 of the Criminal Procedure Code. The charge should have been framed thus;-

"Defilement; contrary to section 8(1) read with section 8(2) of the Sexual Offences Act."

Be that as it may, the issue that was crucial for determination was whether the appellant was the person responsible for defiling the complainant. The evidence showed that he was well known to the complainant's family. This fact was not denied. It was therefore possible that complainant's allegations against the appellant were not picked from nowhere and must have had a solid foundation as there was nothing to suggest that she acted out of malice. Indeed, her evidence in court was found credible by the learned trial magistrate. He saw her testify. He was in a better position than this court to make findings based on credibility. Such findings would not normally be interfered with by a first appellate court unless no reasonable tribunal would make such findings or it was shown that the findings of the trial court are erroneous in law (see, **Republic v.s. Oyier(1985)KLR 353 and Buru Vs. Republic (2005)2 KLR 533).** The complainant (PW1) whose evidence was relied upon by the learned trial magistrate to convict the appellant did not create an impression in the mind of the trial court that she was not a straight forward person or raise suspicion about her trustworthiness or do something that indicated that she was a person of doubtful integrity and therefore an unreliable witness (see, **Ndungu Kimanyi Vs. Republic (1979 – 80)I KLR 1442)**.

It would strongly appear that the complainant had no purpose in not telling the truth as to what happened to her and who was responsible. She clearly implicated the appellant and another. Consequently, this court would affirm the learned trial magistrate's findings to the effect that the appellant was responsible for defiling the complainant. His conviction is therefore upheld by this court. On sentence, the learned trial magistrate imposed an unlawful sentence which calls for interference. Section 8(2) of the Sexual Offences Act provides for a sentence of life imprisonment yet the appellant was handed down a sentence of thirty (30) years imprisonment. Consequently, the thirty (30) years imprisonment sentence is hereby set aside and substituted for life imprisonment. Otherwise, the appeal is devoid of merit and is dismissed.

J. R. KARANJA

JUDGE

(Delivered and signed this 24th day of May 2011.