IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.28 OF 2010

SARUNI MANGUYU…….....…..……APPELLANT

VERSUS

REPUBLIC……..…….....……..RESPONDENT

(An Appeal from original conviction and sentence in Narok C.M.CR.C.NO.720 of 2009 by Hon A. G. Kibiru, Principal Magistrate, dated 22nd January, 2010)

JUDGMENT

The appellant was charged in the court below with defilement of a girl aged ten (10) years contrary to **section 8(1)(2)** of the **Sexual Offences Act, No.3** of **2006.**

To prove these charges, the prosecution called 7 witnesses the combined effect of whose evidence was that on 15th July, 2009, the appellant, the complainant, **(P.W.2),** and the latter's brother, **P.W.6** were herding livestock together, near their homestead. Some goats returned to the homestead. P.W.1, the mother of the complainant drove them back to where the rest of the livestock were but did not find the complainant and the appellant. P.W.6 directed her to where the two were. Behind some bushes P.W.1 found the appellant lying on top of the complainant. The appellant rose and pulled up his trousers, talked to P.W.1, asking whether the complainant was dead or sick and thereafter fled.

P.W.1 called the complainant's father, P.W.3 who together with P.W.1 took the complainant to the hospital. On the way to the hospital, they met the appellant who they arrested and later handed over to P.W.7, P.C. Simei Mokua. P.W.4, Daniel Cherop, a clinical officer at Narok District Hospital examined the complainant and noted that her labia manora and majora were normal. Her hymen was, however broken, with bruises on the external part of the vagina. She had white discharge confirmed by laboratory tests as white cells. There was no spermatozoa.

The appellant in his defence denied committing the offence of defilement against the complainant maintaining that his problems started when he demanded payment of his salary which had not been paid for ten months by the complainant's parents for whom he worked.

The learned trial magistrate (A.G. Kibiru, P.M.) considered the evidence by both sides and being persuaded by the prosecution version of the events, convicted and sentenced the appellant to life imprisonment. The appellant was aggrieved and has preferred, through counsel, this appeal on 7 grounds which may be condensed as follows:

i) that the complainant's age was not proved;
ii) that the trial magistrate failed to inquire if the appellant was fluent in Kiswahili, the language

used at the trial;
iii) that the trial magistrate erred in rejecting the appellant's defence;
iv) that the sentence was harsh and oppressive.

Learned counsel for the respondent supported the conviction and sentence arguing that the appellant was caught red-handed having sexual intercourse with the complainant in broad daylight; that the appellant was arrested the same day and medical examination found that the complainant had been defiled; that there was evidence of the complainant's age and; that the defence of delayed salary was an afterthought.

I have duly considered these arguments. The P3 form produced in evidence by Daniel Cherop (P.W.5) concluded that the complainant was sexually assaulted. This conclusion was based on the findings that the complainant's hymen was broken and that there were bruises on the external part of the vagina. There was also evidence (contained in the P3) that the alleged defilement took place six hours before the examination. In other words, like the learned trial magistrate, I am satisfied that there was evidence that the complainant was defiled. The only question that fell for determination in the court below and which is also the main ground in this appeal is whether the defilement was committed by the appellant.

It is common ground that the appellant was known to both the complainant and her mother having been employed by the complainant's grandmother as a herds boy. The complainant, her brother (P.W.6), their mother, (P.W.1) and step mother (P.W.5) all confirmed that the appellant was grazing in the same area with the complainant. The complainant and her brother gave very clear account of events following a *voir dire* examination, The appellant tricked the complainant, separating her from her brother, by sending her to go and drive the sheep. When she bent to tie her shoe laces, the appellant struck, pulling her down, removed her pants and began to defile her until the appearance of the complainant's mother, who interrupted him. He was caught, as it were, read-handed with his pants down. The complainant's pants had been removed and she was crying in pain. This was in broad day light. The complainant was examined and found to have been sexually assaulted which finding confirmed that there was penetration. The absence of spermatozoa *per se* can not negate this. No explanation though was given as to the probable cause of the presence of white cells.

The complainant's evidence of how the appellant defiled her, the discovery of the appellant on top of the complainant, the complainant's account and the medical evidence leave no doubt that the appellant committed the defilement. His defence that he had not been paid salary for several months was raised too late in the day, at the defence stage thus denying the prosecution witnesses opportunity to comment on it. It is inconceivable that the delayed salary alone would make the entire family, the clinical officer and the police to conspire in order to link the appellant with the offence charged. The defence was properly rejected by the trial court.

Turning to the question of the use of Kiswahili language, at no place in the proceedings is it recorded that the appellant complained that he had difficulties in the language. Looking at the proceedings, I have no doubt that, by pleading not guilty in Kiswahili, cross-examining all the witnesses, some at length, in Kiswahili and giving unsworn evidence in defence in Kiswahili, the appellant understood and communicated in Kiswahili.

Regarding the complainant's age which has a direct bearing on the sentence of life imprisonment impose by the trial court, it was submitted by learned counsel for the appellant that there was no evidence to support the allegation that the complainant was 10 years. In support of this argument, he referred me to the following decisions of the High Court:

i) **Z.K.J.** Vs. **Republic**, Kak, H.C.Cr. Appeal No.177 of 2009, in which Lenaola, J correctly found that there was conclusive evidence of the complainant's age, as it was not clear from the evidence whether the complainant in that case was 15, 16 or 17 years

ii) **Geoffrey Ogeyo** Vs. **Republic**, Kisii H.C.Cr. Appeal No.232 of 2009 where Musinga, J found that the learned trial magistrate failed to establish the actual age of the complainant where the age was variously given as between 14 and 15 years.

iii) **Hillary Nyongsa** Vs**. Republic,** Eld.H.C.Cr. Appeal No.123 of 2009 in which Mwilu, J held that age can only be proved by the production of a birth certificate or any other medical age assessment report.

It is instructive to note that a conviction and sentence under **Section 8** aforesaid depends on the age of the victim. It is therefore essential that the age be proved beyond reasonable doubt. However, personally I do not subscribe to any requirement that insists that age can only be proved by means of a birth certificate or any other such documentary evidence. If that were to be so, then a good majority of children victims of sexual offences will never get justice as it is common knowledge that such documents are not generally available to the rural or even urban families. In my view, it is enough that the court be satisfied that there is some other evidence proving the age of the victim.

In **I.E. Collingwood's Criminal law of East and Central Africa (London: Sweet and Maxwell**, 1967 Ed. at P 123, the issue of age of a defilement victim is discussed as follows:

"The facts which the prosecution must prove beyond all reasonable doubt are unlawful carnal knowledge and the age of the girl…….....
Proof of age is vital to a conviction for defilement……
The question of age in a charge of this description is of the greatest importance and must be proved, and moreover, proved beyond all reasonable doubt……..
Age may be proved by production of a birth certificate, or particularly in the case of Africans, by the evidence of a person present at the birth."

Similarly the Court of Appeal in the case of **Kenneth Kiplangat Rono** Vs. **Republic**, Criminal Appeal No. 66 of 2009, has also held that age can be proved by evidence other than documentary evidence.

As far as I am concerned, at ten years, the complainant must be presumed to know her age. Secondly, there cannot be a more accurate evidence of age than that given by the mother of a child.

I am satisfied, as the learned magistrate was, that the complainant was ten years of age hence the imposition of life imprisonment in terms of **section 8(1)(2)** of the **Sexual Offences Act**. I find no basis or justification for interfering with the decision of the court below.

For the above reasons, the appeal fails and is dismissed.

Dated, Delivered and Signed at Nakuru this 18th day of May, 2011.

W. OUKO
JUDGE