REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 110 of 2007

CYRUS MURIITHI MBOGO……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

J U D G M E N T

CYRUS MURIITHI MBOGO- hereinafter referred to as the appellant was charged before the Principal Magistrate's Court Kerugoya with 3 counts which have since been repealed from the penal code. These counts were:-

Count 1: ABDUCTION OF A GIRL UNDER THE AGE OF SIXTEEN

YEARS OF AGE contrary to Section 143 of the Penal Code.

Count II: DEFILEMENT OF A GIRL contrary to Section 145 (1) OF

THE PENAL CODE.

Count III: INDECENT ASSAULT ON A FEMALE contrary to Section

144(1) OF THE PENAL CODE.

Particulars on all 3 counts are as in the charge sheet. He denied all the charges and the matter went to full hearing with the prosecution calling a total of ten (10) witnesses. On his part the accused person made an unsworn statement of defence and called no witnesses. He was found guilty on Counts 1 and III. On Count 1 he was sentenced to 1 year imprisonment. On count 2, the learned trial magistrate totally misapplied the law and sought to sentence the accused under the newly enacted Sexual Offences Act although he had been charged under the penal code. He sent him to a more senior magistrate for sentencing and the sentence of 15 years imprisonment was meted out against the accused person.

Being aggrieved by the conviction and sentence on both counts, the appellant filed this appeal. I wish to point out at this early stage and this is one of the grounds of Appeal herein, that having been charged under the Penal Code, the appellant could not have been punished under the Sexual Offences Act which came into operation when the case was still going on. This was contrary to Section 23 (3) e of the ***"Interpretation and General Provisions Act"*** Cap 2 of the Laws of Kenya which provides:-

> ***"Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not:-***
>
> ***(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, Penalty forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted,***

continued or enforced, and any such penalty forfeiture, or punishment may be imposed, as if the repealing written law had not been made."

The above provisions are very clear and I need not expound them. It was wrong for the Magistrate to sentence the appellant under the Sexual Offences Act on Count 2. That sentence was unlawful and the same is hereby set aside.

On the rest of the appeal, it is incumbent upon me as a first appellate court to re-analyse the evidence adduced before the trial court and arrive at my own finding as to whether the conviction was safe or not. In a nutshell, the evidence before the trial court was that the complainant was a girl aged 12 years. She testified on oath after the trial magistrate satisfied himself that she could understand the nature and purport of the oath. She narrated to the court how on the night of 17/4/2005 she was sent by her mother PW3 to take out garbage to the dumping pit. She left the house but according to her, she was accosted by a stranger who held her right hand and ordered her not to scream otherwise he would stab her with a knife. The said stranger is said to have taken her to a house about 300 meters away. There she found the appellant's co-accused. She was fed with ugali and sukuma wiki after which the appellant took her hand and took her to the bedroom where he defiled her as the co-accused stood there holding a knife. She said that the appellant and his accomplice locked her up in that house as they left for work. The appellant is said to have defiled her every evening before the 23/4/2005 when she said they allowed her to leave the house. Meanwhile, her mother had reported her missing at Wang'uru police station. When she left the house on 23/4/2005, she met her friends PW2 and another. The 2 knew that she had been missing and so they alerted a police officer who arrested the complainant and took her to Wang'uru police station to await her mother. Her mother later received information that her daughter was at Wang'uru police station. She went there and took the complainant. She was issued with a P3 form and she took her to hospital for examination. She was found to have been defiled and contracted a sexually transmitted disease. The P3 form was produced in court as exhibit. The complainant then led the police to the house where she said she had been detained. The Appellant and the accomplice were subsequently arrested and charged with the said offences.

In his defence, the appellant told the court that he was arrested while resting in his house on 28/4/2005 for reasons he did not know. He said that he did not know the complainant and further that he knew nothing about the offences he was charged with.

In his petition of Appeal, he proffered 10 grounds. The last 3 relates to the unlawfulness of the sentence in count 2 which I have already dealt with. It is noted that although the appellant did not raise it as a ground of appeal, his counsel submitted that he was detained in police cells for longer than allowed by the constitution. The Criminal Procedure Code does not allow the appellant to raise grounds that are not included in his petition of appeal without the leave of the court. Be that as it may however, my finding is that although the appellant claims to have been detained in cells for 8 days before being taken to court, he was ably represented by counsel in the subordinate court. He is therefore deemed to have waived that right and he cannot raise it here. It would have been different if he had not been represented by counsel (see *JOSEPH AMOS OWINO-V-R- Criminal Appeal No.450 of 2007 (Kisumu)*

The case of *JOHN KURGAT – V- R- (unreported) Eldoret Criminal Appeal No. 83/2007* is also persuasive in this subject. That ground is there unsustainable and it must fail. Learned counsel for the state conceded the appeal mainly on the ground that the complainant was not found in the appellant's house. He also claimed that the girl was arrested in a swoop which is actually not in the record. The record clearly states that after she left the house, she was seen by PW2 who together with her sister reported to a police officer and they even accompanied her to the police station (see page 13 (in red) of the proceedings. Contrary to the submission by the state counsel the complainant reported the incident to her teacher (PW4) after the mother had already found her and taken her home from Wanguru police station. I do not know which proceedings the learned state counsel was referring to. His concession of the appeal on grounds other than the illegality of the sentence on

count 2 was in my considered view not convincing at all.

On my part, I have considered the evidence adduced before the trial court along with the grounds of appeal proffered. I note first and foremost that the complainant was aged 12 years old was not a child of tender years for any intents and purposes. She was not of an age where one is not fully aware of her surroundings. She was therefore able to comprehend all that was happening around her. After she was abducted, she stayed in the appellant's house for almost 5 days and although she only saw the appellant in the evening, there is no reason whatsoever for her not to recognize him. There was light when he is said to have defiled her. Although there is evidence that she was seen playing outside the house, and she could infact have been staying there out of her own free will, this does not absolve the appellant of the responsibility not to abduct her. Under Section 143 of the Penal Code, the consent of the girl under 16 of age is immaterial. The consent must be from the mother or father or any other guardian who was responsible for the girl. There was no consent from PW3- the complainant's mother – otherwise she could not have reported the matter to the police station and to the neighbours.

Although I did not have the opportunity to see the complainant testify so that I could assess her demeanor, I am satisfied she was old enough to appreciate her surroundings and even identify her captors. I note as noted by the trial magistrate too that according to the complainant, when the police and her parents went to the house where she was being held captive on the night of 22/4/2005, the 2nd accused was holding a knife to her head and she could not therefore scream to attract their attention (see page 8 (red line 26-27). All this narration was not a figment of the complainant's imagination. I am satisfied that she was indeed taken from her mother's lawful custody to the house of the appellant's accomplice by the appellant who then used to defile her every night.

I therefore find that the magistrate did not err in finding count 1 proved beyond any reasonable doubt. The evidence on record did prove the charge and was sufficient to support the conviction. I find no basis for upsetting that conviction. I uphold the same.

On the issue of the defilement however, whereas I harbour no doubt that she was defiled by the appellant severally, I find that it is not safe to uphold the conviction on that count. I say so because as stated earlier, the sentence imposed was unlawful.

Secondly, after the complainant was taken to the police station, she stayed there for 3 days and there was an opportunity for her to have been carnally known by persons other than the appellant herein. The investigations officer should have taken the appellant to hospital for examination to confirm if indeed the appellant had the same sexually transmitted infection- which was not done. Although the complainant was defiled, as confirmed by the P3 form, the medical evidence adduced did not confine the act of defilement to the appellant. It is for those reasons that I find the conviction on count 2 unsafe. I allow the appeal as far as count 2 is concerned and quash the conviction thereon along with the attendant sentence. The appeal on Count 1 is nonetheless dismissed. I uphold the conviction and sentence of 1 year imprisonment imposed by the learned trial magistrate. The appellant's bail is hereby cancelled and he will be escorted to prison to complete his sentence from where he left it.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 24th day of Feb 2010.
In presence of:-The appellant and Ms Matiru and Omwega for the state