REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL 39 OF 2009

JOSEPH KIPLIMON:.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted on his own plea of guilty in Eldoret Chief Magistrate's Criminal case No.1397 of 2009 of the offence of defilement of girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, Act 3 of 2006. The particulars were that on the 26th day of February 2009 at ***[particulars withheld]*** village in Keiyo District of the Rift Valley Province he unlawfully defiled the girl aged five years. He now appeals to this court and has raised six grounds of appeal that he pleaded guilty at trial due to torture and blackmail by the police officers who arrested him. That he is illiterate and did not understand the language used in court and therefore he pleads for a retrial of his case. That because he is a first offender the sentence of 50 years is extremely harsh and uncalled for. That the prosecution did not proof (sic) this case beyond reasonable doubt as required by law and that the Appellant is married to two wives with five children and he is a sole breadwinner of his family and prayed for a non-custodial sentence under the Community Service Order. The Appellant repeated those grounds at the hearing of his appeal save for withdrawing the ground that the prosecution had not proved the case beyond reasonable doubt. At the hearing he also admitted that the trial was in Kiswahili and he understands Kiswahili and that means that the ground of illiteracy and not understanding the court proceedings falls by the roadside. He added that the sentence was harsh yet he pleaded guilty and he was a first offender adding that even when a child makes a mistake first time he is punished lightly.

The state opposed the appeal and Learned state counsel Mr. Kabaka submitted that this was a conviction on the Appellant's own plea of guilty and the sentence meted out was legal. He submitted that the claim about police torture was an afterthought.

Of the grounds of appeal as filed only two remain for consideration the Appellant having

admitted at the hearing of the appeal that he understands Kiswahili and his trial was conducted in Kiswahili and having withdrawn the ground of prosecution not having proved the case as required. The Appellant's ground that he pleaded guilty due to police torture and threats were not explained to this court as in what way and to what extent and the nature the police threats and torture took. These threats and torture, if indeed they took place were not brought to the attention of the trial court which could have dealt with them even before a plea was taken. True the Appellant was then, as now, not represented by counsel. But unlike now when before this court he raises the issue of police torture and threats he did not do so at the trial court. If there were indeed any threats and torture then surely they would have been very fresh at the plea stage and the Appellant would not have failed to raise the issue with the first court. If he was innocent as he says he would have protested his innocence and told the court, his protector, what the police had done to him. I therefore find that there were no police threats or torture that led to the Appellant pleading guilty. And if any such threats and torture did exist, which I find they did not, then the Appellant did nothing before the trial court and also before this court to prove them. This ground must fail. The ground about the Appellant having two wives and five children does not prove his innocence or lead this court to the conclusion that the trial was not properly conducted so as to order a retrial. And the offence with which the appellant was charged and was convicted of does not fall for punishment by way of a non-custodial sentence. The sentence for defiling a five year old girl is imprisonment for life. The Appellant was only escaped with a term of imprisonment of 50 years.

What about the need for a retrial? No grounds whatsoever are given as to warrant a retrial. No rule of natural justice, statutory protection or evidence is shown to have been sacrificed leading to the conviction of the Appellant. He pleaded guilty to the charge facing him. The P3 produced in court was vivid as per the little 5 years old girl's account of how she was sent by her mother to buy paraffin from a nearby shop about 5.00pm. On her way back home she met a man she knew as the accused and whom she called "**Jossy**" who sent her back to the shop with 10/= to buy mangoes. On bringing the mangoes back he grabbed her and defiled her. The child's mother followed to find out why the child was taking that long and it was then the girl explained her ordeal in the hands of the Appellant. The clinical findings on examining the victim were that she had a tear of the Fossa navicularis and bilateral frictional burn in her vagina as well as the hymenal right having sustained a fresh tear. She had a scratch on her right thigh. The examining doctor said that the clinical findings confirmed without doubt that the girl was sexually violated. And that is what was read out to the Appellant in the facts at trial and it is that he agreed with to be the facts. This appeal has not an iota of merit and it must fail in its totality. It is accordingly dismissed.

DATED SIGNED AND DELIVERED AT ELDORET THIS 29th

DAY OF APRIL 2010.

P.M.MWILU
JUDGE

IN THE PRESENCE OF:

Andrew Omwenga - Court clerk

Mr. Kabaka - For state

Appellant - Present.