REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 4 of 2009
(From original conviction and in Criminal Case No. 540 of 2007 sentence of the Senior Resident Magistrate's Court at Kaloleni before Hon. F. Andayi - SRM)

K.T……..……..…….…APPELLANT

VERSUS
REPUBLIC ……..……RESPONDENT

JUDGMENT

K.T (the appellant) was convicted on a charge of defilement of a child contrary to section 8(1) of the Sexual Offences Act. The prosecution case was based on particulars that on 23rd November 2007 at about 11.00am in Kaloleni District, he committed an act which caused penetration with his genital organ namely penis to D.C, a girl aged 15 years.

He had faced an alternative charge of indecent act on a child contrary to section 11(1) of the same statute, being that he on the same date and place touched D.C's private parts namely vagina.

The appellant had denied the charges and after due trial in which prosecution called four witnesses and appellant was the only defence witness, he was sentenced to serve fifteen (15) years imprisonment.

D.C (PW1) narrated to the trial court that appellant is her cousin, being son to her elder paternal uncle. In August 2007, while staying with him, she had sex with him on three occasions, ending with the one of 23-11-07 – two of the incidences took place during the day.
Appellant and her brother slept in one room, while D slept in another room and it was her testimony that appellant would go to her room every night and engage in sex with her, urging her to keep quiet and not make any noise. She told the trial magistrate that the first incident was in July, followed by another on 8-8-07 (when C had gone to visit their grandmother) and then 23-11-07 at 10.00am when she accompanied him to the forest to cut trees and he engaged in sexual intercourse with her. She told her brother C about the first incident, she didn't tell him about the second incident but she told her married cousin F (who lived nearby) and she reported the third incident to her uncle K. As a result of these indulgences, PW1 got pregnant.

On being cross-examined by the court, she stated that she never slept with any other man apart from the appellant.

C.K (PW2) confirmed to the trial court that he used to stay with the appellant and D at K and the three of them slept in one house on invitation by the appellant. His evidence is that he was sleeping in one room while PW1 and appellant slept together in another room. His evidence was as follows;

> ***"When I saw things have (sic) become too much, I reported to the elders. I had seen them engage in sexual intercourse. They were not putting lights in their room. I had got out for a short call and when I came back, I saw through small holes in the wall that they engaged in intercourse…."***

So he informed K.K about the matter. According to him D now looked pregnant because she had a bulging stomach, yet she did not have

that kind of appearance when they went to stay with appellant.

On cross-examination he stated:

> ***"I saw the act of intercourse at midnight. You sleep with your lights on. It is because you have your vidonga (witchdoctor's paraphernalia) you say you cant sleep in darkness"***

C.K an uncle to D and appellant confirmed that C.K and D used to sleep in the appellant's house and since he was their provider, there was no problem with that arrangement. He was later called by an elder brother K.K who reported to him that D and appellant were sleeping together and he wanted PW3 to question the pair. So a meeting was called and appellant was questioned but he denied but D claimed that appellant had asked her to engage in sex for food. C said they had started those indulgences in August.

D was then taken for medical examination and the evidence of Mwangolo Chigulu (PW4) a clinical officer at Mariakani District Hospital is that upon examination, her hymen was perforated with a whitish discharge and growth of pus cells. He made the conclusion that there was adequate penetration – the P3 form was produced as exhibit.

In his defence appellant opted to remain silent.

The trial magistrate in his judgment had no doubt that PW1 was indeed pregnant – as demonstrated by evidence for prosecution witnesses, including the medical evidence, and held that the fact of pregnancy was in itself proof that there had been penetration of her genital organ with that of a man and further buttressed by the medical evidence of the clinical officer who confirmed penetration.

In determining who was responsible for the penetration, the learned trial magistrate took into account the fact that D claimed to have got pregnant as a result of the August encounter (which is the one C witnessed) and that appellant is charged with the incident of 23-11-07). He concluded that it was due to the complainant's expectant condition being visible that the issue was brought to the fore and she disclosed all their previous rendezvous.

The trial magistrate noted the need for corroboration, warned himself of the danger of convicting on uncorroborated evidence, but was satisfied that complainant was telling the truth.

In determining her truthfulness and why she had not reported the incident to either C or K (much as she claimed she had done so), the trial magistrate was persuaded that this was due to fear, taking into consideration the prevailing conditions that appellant was her guardian with whom she was staying, her father was dead, and her mother stayed away from them, so the consequences of reporting would have rendered her homeless and that it was due to these very circumstances, that appellant took advantage of PW1 knowing that she was almost a destitute with very few options of whom to turn to if he got her out of his house and trial magistrate held that appellant created an opportunity for himself to commit the offence when he took on PW1 to stay with him. He observed the complainant's demeanor when she appeared in court, stating it was one of anger at the appellant and at one time during cross-examination she cried a lot when appellant suggested that she was lying about what happened – I cannot fault such reason, the foundation and rationale has a lot of merit – certainly appellant played psychological games on PW4 to ensure she gave in to his advances.

The evidence was well considered and properly analyzed and I am persuaded that the conviction was based on a well considered judgment and was therefore safe. I uphold the conviction.

The offence carries a mandatory minimum sentence and so the sentence was legal and I confirm it.

The upshot is that the appeal has no merit and is dismissed.

Delivered and dated this **12th** day of **May 2010** at Malindi.

H. A. Omondi
LADY JUSTICE