REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 16 of 2008

(From original conviction and in Criminal Case No. 276 of 2007 sentence of the Senior Resident Magistrate's Court at Lamu before R. K. Ondieki - RM)

PETER KARIUKI KAMAU ….……...…..….APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

JUDGMENT

The appellant (Peter Kariuki Kamau) was convicted on two charges of defilement of a girl under the age of eleven (11) years contrary to section 8(2) of the Sexual Offences Act No. 2006.

The prosecution case was that on diverse dates during the month of May 2007 at unknown time during the day at M[particulars withheld], in Lamu District, the appellant did an act which caused penetration with a child namely JWN, a child under the age of eleven years, and R S M also a child under eleven years.

R(aged 13 years) and J (aged 10 years) went to the appellant's home on 22-5-07 over lunch hour. They found him outside his house – he gave them seats inside his house and served them rice and sugar cane. After the girls had eaten, appellant took them to his bedroom and undressed J, then lay on her, after unzipping his trousers. He did the same thing with R. He told the children not to tell anyone – so they left and rushed back to school. The following day, they informed the teacher.

According to R(PW1), three days later, J told her to go to the appellant's house – again the two girls went together, appellant defiled them, and gave them mangoes and cashewnuts then they returned to school.

On the third occasion, the girls went to the appellant's home, he defiled then, but did not give them anything. PW1's sister informed her mother about the incident and she was beaten, then taken to the police station where a report was made.

On cross-examination PW1 stated that she had not been defiled before the incidences with appellant and that while he was defiling Jon his bed, she stood at the bedroom door – appellant having locked the main door.

J (PW2) confirmed the incident and that appellant had sex with them after making threats to kill and that when she attempted to cry, he got hold of her neck. She too confirmed that appellant defiled them on three separate occasions and she did not tell anyone because he had threatened them. On cross-examination she denied ever having been defiled by anyone else previously.

Z M (PW6) the mother of Jgot to learn that J had been visiting the appellant who would then defile her – she got this information from one Wangare.

Peter Muthee, head-teacher at M[particulars withheld]Primary School got information about the two girls conduct – that they were usually seen at the appellant's house – so he summoned Jwho confirmed that she had been to appellant's house in the company of R and that both of them had been defiled. This information was then relayed to Daniel Murigo Gakure (PW4) a police reserve cum farmer in M[particulars withheld]who got other police reserves, interrogated the girl and appellant, then handed appellant to the police. The girls were then taken to Mpeketoni sub-district hospital for examination and according to John Gikonyo (PW7) a clinical officer, on examination J had no visible injuries, but her hymen was broken. She had a whitish discharge, and he formed the opinion that there was possibility she had been defiled despite there being no spermatozoa detected.

He also examined Rwho had no injuries or bruises, but her hymen had been broken and she had a whitish discharge with pus. He formed the opinion that she had been defiled – the P3 forms in respect of the girls were produced as exhibit.

On 12-6-07, the clinical officer examined Peter Kariuki Kamau – he had no physical injuries, his urine had pus and other organisms, he formed the opinion that appellant had defiled the girls – the P3 form in respect of appellant was produced s exhibit.

On being put to his defence, appellant gave sworn testimony in which he described events surrounding the night of his arrest and suggested it was all based on an existing grudge between him and some of the reservists.

The trial magistrate in his judgment noted that he sexual rendezvous between the girls and appellant came to light after a pupil informed the headteacher of the association between the complainants and the appellant and as a consequence the police reservists did the ground work. The trial magistrate was persuaded that from an observation of the two girls, they were truthful and had no reason to frame the appellant. His defence was considered and found to be of no relevance as the person (Kandende) whom he had a boundary dispute with was not related to any of the girls. Further that appellant never challenged the girls' evidence that he defiled them in his house in May 2007.

The trial magistrate observed that appellant was well known to the girls. Appellant elected to say nothing in mitigation, and the trial magistrate held that he was not remorseful – he was sentenced to life imprisonment.

Appellant was dissatisfied with these findings and appealed on grounds that:

(1) He did not have sexual intercourse with the girls.
(2) He was framed by the mother of the girls.
(3) One police reservist had taken J W form her home on 8-6-07 and she slept at his home
(4) One child as beaten so as to say what has did not know
(5) The time lapse from date of offence to date of examination made the medical findings questionable.

In his written submissions, the appellant that he was prejudiced as the charge sheet did not disclose the date and time when the offence occurred and there was no independent investigation carried out despite an allegation that there had been a series of defilements.

Further that some prosecution witnesses such as W, the alleged pupil were not called to testify and he also queried why PW3, a father to one of the complainants was suddenly stepped down, never to return to testify and no reason was even given for that – he reads bad faith in this and suggests its probably because those witnesses whom prosecution avoided to call would have given evidence adverse to prosecution.

Some of the contents of the written submissions are so jumbled up and completely incomprehensive, so what I have done is to glean out what appears to be relevant to this appeal.

Counsel for the State, Mr. Ogoti, conceded the appeal saying that at the end of the trial the trial magistrate in his judgment at age 5 line 5, convicted the appellant on both counts, then at line 11 he said "I sentence accused to life imprisonment" without specifying the charge especially bearing in mind that the charges referred to the girls as being under eleven (11) years of age, yet in PW1's evidence she told the trial court that she was 13 years and count 2 carries a mandatory sentence of not less than 20 years – so that life sentence ought to have been specific. However Mr. Ogoti asked for a retrial saying there was evidence that appellant was involved, and no prejudice would be occasioned as sentence was only passed on 6th February 2008 and all witnesses will be available to testify.

Appellant is opposed to a retrial.

In considering a retrial, the court must take into account the nature of evidence that was presented at the trial, the likelihood of getting all the prosecution witnesses to testify without undue delay and the portion appellant has served on his sentence.

I think Mr. Ogoti made an error as regards the charge, both count 1 and 2 read as defilement of a girl under eleven years – yet PW1's evidence was that she was over 11 years and even the medical officer stated as much so that as far as the sentence goes visa vis the charges it was not a departure from what is provided in law – and I suppose even if appellant was to serve life sentence on both counts – it would end up just being one life sentence. However the first error is that the evidence suggested an offence other than the one appellant was charged with, yet he was convicted for the offence of defiling a girl under eleven years. Then there is the pupil who is said to have disclosed to the head teacher about the two girls' visits to the appellant's house – yet the said pupil was not mentioned by name nor called. There is also W who is said to have been the one who informed J's mother about her daughter's indulgencies, yet she never testified to clarify where she had got such information from.

There is also PW3 J M, a father to one of the girls, who only gave his name and had hardly begun his testimony when he was suddenly stepped down without any reason or explanation being given. Could it be that were these witnesses to testify they would have given evidence adverse to prosecution? The scenario here then fits in with what was envisaged in the **Bukenya & 5 others v Uganda Case 1968 EALR** and I hold that the failure to call those individuals was prejudicial to the appellant. Would this warrant an acquittal? I look at other evidence about the time lapse before the medical examination was carried out – the girls were examined in June – the offence took place in May, - which would not affect the determination of presence or absence of the hymen – taking all these into account the I would say the rest of the evidence is such that it would only be fair and just that there be a retrial. I also take into account that appellant was sentenced to life imprisonment and has so far only served two years of that – so no great prejudice will be occasioned.

The upshot is that the conviction is quashed and sentence is set aside. The appeal is allowed. The matter shall go for retrial. Since it is apparent there is now a different magistrate in Lamu, I direct that appellant do appear before the SRM Lamu on 18th May for trial directions.

Delivered and dated this **10th May 2010** at Malindi.

H. A. Omondi
JUDGE