REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL 169 OF 2008

GEORGE HEZRON MWAKIO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

The Appellant herein **GEORGE HEZRON MWAKIO** has filed this appeal against his conviction and sentence on a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(3) OF THE SEXUAL OFFENCES ACT**. The particulars of the offence were that:-

"On the 27th day of October, 2007 at around 9.00 p.m. in Taveta district within Coast Province, had carnal knowledge of M. M, a girl under the age of 16 years."

In addition the appellant placed a second count of **CHILD TRAFFICKING FOR SEXUAL EXPLOITATION CONTRARY TO SECTION 18(1) OF THE SEXUAL OFFENCES ACT.**

The prosecution called a total of seven (7) witnesses in support of their case. The brief facts were that on 27/10/2007 **M.M** the complainant, a girl aged 15 years had escorted her sister to C Estate. On her way back home at about 6.00 p.m., she met the accused who professed his love for her. The complainant declined his advances saying she was a student. Appellant then held her hand and began to pull her along with him. The complainant called out for help but nobody came to her assistance. Appellant took her to his house. The complainant asked a man there to rescue her but he just walked away. Then after 8.00 p.m., the appellant took her to a nearby sisal plantation where he raped her. They then continued walking all the way to Tanzania.

The complainant was eventually rescued by police from Kitoto Police Post. She was returned to Kenya. The Appellant was also arrested and handed over to Kenyan authorities.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. On 13/3/2008, the learned trial magistrate delivered her judgment in which she convicted the Appellant and after listening to his mitigation, sentenced him to serve thirty (30) years imprisonment. It is against this conviction that the Appellant now appeals. The Appellant opted to rely entirely upon his written submissions which had been filed in court. **MR.**

MUTETI, Learned state counsel appeared for the Respondent/state and opposed the appeal.

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC [1972] E.A.32**, where it held that:-

"It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld"

I have perused the written submissions of the Appellant and I note that he has raised four (4) main grounds of Appeal.

- § Defective charge sheet
- § Identification
- § Insufficiency of evidence
- § Failure to consider defence

With respect to the charge sheet the Appellant raises issue with the fact that the words ***'unlawful'*** were not included before the term ***'carnal knowledge'*** in the particulars of the charge. I have looked at the charge sheet and have noted that indeed this is so. However, this does not render the charge sheet defective in charges brought under the Sexual Offences Act 2006. This omission would have been fatal if the accused had been charged under the Penal Code [see **ALFAYO GOMBE OKELLO -VS-REPUBLIC CRIMINAL APPEAL 2003 OF 2009**]. The passing of the Sexual Offences Act 2006 rendered the Penal Code provisions on Rape and Defilement obsolete. Under the old law provision was made for sexual relations with a minor who was for example one's wife – giving legality to the system of child marriages practiced in some parts of the country. However, under the new Act, any act of sexual intercourse with a child under the age of 18 years is unlawful. Child marriages are outlawed thus one cannot raise the defence that the minor was his wife. As such the omission of this word ***'unlawful'*** is not a fatal defect and indeed inclusion of the word unlawful would be unnecessary since under the Sexual Offences Act any and all acts of sexual intercourse with a child under the age of 18 is unlawful. As such I find this ground to have no merit and the same is hereby dismissed.

The second ground of the Appellants appeal is that the evidence adduced before the lower court was not sufficient to warrant a conviction. I will therefore proceed now to re-examine and re-evaluate this evidence. The complainant told court that the Appellant defiled her. In her own words at page 1 line 7:-

"The accused lay me on the ground and asked me whether I had never (sic) had sexual intercourse. He removed my panties, He smeared saliva on my vagina. He then tried to penetrate my vagina with his penis. He was unable to penetrate my vagina"

Later under re-examination at page 5 line 12 the complainant explains that

"His penis partly entered my vagina"

This act as described by the complainant was a clear act of defilement. The fact that the Appellant was unable to fully penetrate her does not in any way diminish or negate the offence. Section 2(1) of the Sexual Offences Act 2006 defines penetration this way

"Penetration" means the <u>partial</u> [my emphasis] or complete insertion of the genital organs of a person into the genital organs of another person"

This makes it clear that even partial penetration constitutes the offence of defilement.

Rape and defilement are both crimes which are perpetrated under the cover of darkness. There is unlikely to be an eye witness. In many cases the only corroboration is medical. In this case the complainant after her rescue by Tanzanian Police officers was taken to Taveta sub-District Hospital where **PW7 DR. HENRY NGENO** examined her. He completed her P3 form which was produced as an exhibit **PEXH1**. He noted scratch marks on the complainant's legs. There were most likely sustained due to being dragged through the sisal plantation in which the complainant said she was raped. The doctor noted lacerations on the labia minora and on the vaginal walls. There is evidence of forced penetration and confirms the complainants testimony that the Appellant had a lot of difficulty penetrating her vagina. Lastly the doctor noted that her hymen was broken. Once again this provides evidence of penetration. This evidence from the doctor corroborates in all material respects the complainant's evidence that she had been defiled, Further **PW4 SHABAN OMARI** – the police Officer from Tanzania who rescued the complainant told court that she told him she had been abducted meaning that she was not willingly with the Appellant. **PW4** also noted that the complainant appeared to have some injuries. All this evidence is sufficient to prove that defilement did actually occur.

In cases of defilement, it is important to establish the age of victim. The complainant told the court that she was 15 years old. **PW2 J.M**, the complainant's father also told the court that his daughter is 15 years of age. Lastly the doctor who examined the complainant **PW7** assessed her age to be approximately 15 years.

I am therefore satisfied that the complainant fell within the 12-15 year bracket envisaged by Section 8(3) of the Sexual Offences Act.

On the issue of identification, the complainant told the court that the Appellant met her on her way home and declared his love for her. He then pulled her with him to his house. Later he took her into a sisal plantation and defiled her. Thereafter the Appellant led her on a long trek which ended up in Tanzania, clearly in an attempt to ensure that she did not return home. The complainant was in the company of the Appellant from 27/10/2007 6.00 p.m. to 28/10/2008 when they ended up in Tanzania. This was a period of several hours. The complainant had ample time to see and identify the Appellant who made no attempt to disguise himself. The complainant's evidence on the identity of the Appellant is corroborated by **PW3 E** . She told the court that she saw the Appellant pulling the complainant away with him. The complainant called out to **PW3** to help her but the Appellant threatened her not to interfere. **PW3** then informed the complainant's parents. **PW2** the complainant's father confirmed that **PW3** informed him that she had seen ***'MWAKIO'*** [the appellant] pulling the complainant towards Taveta Sisal Estate.

Last but certainly not least **PW4**, the police officer from Tanzania identified the Appellant as the man who he found walking with the complainant in the Kileo area. The appellant told **PW4** that the complainant was his wife but the complainant vehemently denied this and said she had been abducted. **PW4** became suspicious and decided to detain them both and later handed them over to Kenyan authorities at Taveta Police Station. The appellant in his defence denied that he was arrested in Tanzania. There is no reason why **PW4** an officer from neighbouring country would bother to come to a Kenyan Court to testify that he arrested the Appellant in Tanzania if infact no such arrest occurred. The Appellant does not allege that there was any grudge between him and **PW4**.

On the whole, I find the evidence on identification to be overwhelming. The complainant herself had ample time and opportunity to see the Appellant. Further **PW3** and **PW4** both testified that they saw the Appellant with the complainant. The fact that when **PW3** met them, the Appellant was pulling the complainant to go with him is clear indication that he had some ulterior motive towards her. I am satisfied that there has been a clear, positive and reliable identification of the Appellant by the witnesses and I find no possibility of error.

Lastly the Appellant claims that his defence was not given due consideration. On the contrary I find that the records shows that the trial magistrate did consider the defence raised by the appellant that he had been framed and dismissed the same as untenable.

I find the totality of evidence in this case to have been cogent, consistent and reliable. All relevant witnesses were called to testify. I am satisfied that the prosecution proved their case beyond reasonable

doubt. The Appellant conviction was both sound and safe. I therefore have no hesitation in upholding the same.

The lower court did listen to the Appellant's mitigation and thereafter sentenced him to serve thirty (30) years imprisonment. The minimum sentence provided by Section 8(3) of the Sexual Offences Act is twenty (20) years. However, the appellant was a repeat offender having earlier being convicted on a charge of attempted rape. The learned trial magistrate before passing sentence noted at page 4 line 17:-

" Court:- The offence the accused has committed is aggravated as he forced the complainant a girl child aged 15 years to walk through bushes throughout the night of 27th to 28th 10-2007 across the Kenya – Tanzania border in circumstances indicating he kidnapped/abducted her. Notwithstanding his mitigation he is sentenced to serve thirty (30) years imprisonment"

I do agree that the offence was aggravated. Added to this the Appellant was a repeat offender. A stiff sentence was called for as the Appellant is in my view a threat to women everywhere. I find the sentence lawful and in the circumstances neither harsh nor excessive. The same is hereby confirmed. Finally, this appeal fails in its entirety.

Dated and Delivered in Mombasa this 28th day of June 2010.

Appellant in person
Mr. Onserio for State

M. ODERO
JUDGE
28/06/2010