REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 8 OF 2009
SIMON KIPKEMOI KOECH…….....
…….. APPELLANT
VERSUS
REPUBLIC
…….....….
RESPONDENT

(Appeal from the judgment of the Senior Resident Magistrate at Bomet, Hon. T. Okello given in Bomet SRM CR. C. NO. 778 of 2008)

JUDGMENT

On 2nd February 2009, the appellant, Simon Kipkemoi Koech, was sentenced to life imprisonment by Hon.T.Okelo in Bomet SRM Criminal Case No.778 of 2007 following his trial and conviction for the offence of defilement of a girl under the age of 11 years contrary to sections 8(1) and 8(2) of the Sexual Offences Act of 2006.

On 2nd March, 2010 the appellant lodged appeal to this against conviction and sentence. It came up for hearing before me on 27th October, 2010. He had no legal representation. The State (Respondent) was represented by State Counsel P.Kiprop who conceded the appeal on the ground that there was no medical evidence and that no investigations were conducted into the matter.

I have perused the record of appeal. The offence is alleged to have been committed on 6/7/2007. The Complainant, A.C, a girl of 5 years in class I who, as the Trial Court found, was of very tender age gave unsworn statement in which she said that the appellant whom she knew had penetrated her within the meaning of the definition in the Sexual Offences Act. She told her father, S.K.G (PW2), who testified in court that he in turn reported the matter to the police. It is not clear where he reported but he seems to have made a report at 6.00am on 14/7/2007 to Daniel Soi, Assistant Chief of K who called the police.

On 15/7/2008, PW2, in company of his daughter, A.C (PW1), and the area Assistant Chief of K went to L. Patrol Base where they found PC Benjamin Kilonzi and reported the matter. The said officer recorded a statement or statements "of witnesses in the case" and issued a P3 Form to the complainant whom he referred to L. District Hospital. No other investigation was conducted. The following day, on 16/7/2007, A.C was examined at L Hospital by a Clinical Officer, Mica Kiptoo Tarus, who found that PW1's hymen had been torn. He concluded that there must have been vaginal penetration, although hymen can be torn otherwise than by penetration. He also found that there was no spermatozoa and he confirmed that after a duration of 10 days, one cannot find spermatozoa.

The appellant was arrested on 14/7/2007 by members of the public ostensibly at the instigation of PW2 and taken to PW3, the Assistant Chief who put him in the AP's Camp at Kemba. He was later taken to L. Police Post and subsequently charged.

The only evidence against the appellant is that of the minor. It has not been corroborated. But the tearing

of PW1's hymen could not have been as a result of anything other than penetration within the meaning of the Sexual Offences Act considering the age of PW1. There is no evidence that the minor was sexually assaulted by another person after 6/7/2007. PW1 stated that the appellant, whose name she gave in court as Simon, assaulted her. She knew that he lived in the house of Rebecca. He was her neighbour. It is not however clear what time of day or night the offence is alleged to have been committed. While this is a case of recognition, there is absence of evidence as to the time of the day or night PW1 saw person who defiled her. Even in cases of recognition, it is accepted that mistakes can occur. It was in **PAUL ETOLE & ANOTHER VS. REPUBLIC** (unreported) ***Criminal Appeal No.24 of 2000*** that the court observed as follows:

"It is true that recognition may be more reliable than identification of a stranger, but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometime made.

All these matters go to quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened but the poorer the quality, the greater the danger. In the present case neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight, its brightness or otherwise or whether it was a full moon or not or its intensity. It was evidential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position vis-a vis the accused would be relevant. In the absence of any inquiry evidence of recognition may not be held to be free from error"

As regards medical evidence, the examination was done after ten days and the clinical officer, PW5, conceded that after 10 days, it was not possible to find spermatozoa. Consequently there was no evidence to connect the appellant with the defilement save for the evidence of PW1 which was not collaborated. The upshot of what emerges raises the question whether the court could convict on the basis of the evidence of the minor (PW1) alone in absence of any other evidence to collaborate it.

There is no doubt that PW1 was defiled. She recognized the appellant. But the circumstances in which she recognized the appellant as the person who defiled her are not clear. If they were, I would not hesitate to find that the offence was proved against the appellant. But this was not the case.

It is regrettable that the police did such a shoddy job in investigating this crime. They did not take it seriously and no attention was given to it. Their conduct must be deplored in the strongest possible terms on account of the unacceptable dereliction of duty. It is a pity that the crime will go unpunished.

In the result, I have no choice but to find that the guilt of the Appellant was not established beyond any reasonable doubt and consequently the appeal is hereby allowed. I quash the conviction and set aside the sentence. Unless otherwise lawfully held, the Appellant shall be released and set free forthwith.

DATED at **KERICHO** this 28th day of October, 2010

G.B.M. KARIUKI, sc
RESIDENT JUDGE

COUNSEL APPEARING
Mr. P. Kiprop State Counsel for the Respondent
Appellant in person