REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO.56 OF 2009

PHILEMON KIPSANG KIRUI …….....……
APPELLANT
VERSUS
REPUBLIC …….....……
RESPONDENT

(Appeal from the judgment of the Resident Magistrate at Kericho, Hon. M.O. Okuche given in Kericho SPM CR. Case NO. 57 of 2009)

JUDGMENT

The Appellant, PHILEMON KIPSANG KIRUI, was on 16th October, 2009 sentenced to 20 years imprisonment in Kericho P.M.CR. Case No. 57 of 2009 by the Hon. M.O. Okuche, Resident Magistrate, after being found guilty and convicted of the offence of "defilement in violation of **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006".** The particulars of the offence were that the Appellant ***"on the 12th day of February, 2008 in Kipkelion District within Rift Valley Province jointly with others not before the court did cause his penis to penetrate the vigina of T.A, a child aged 13 years".***

Aggrieved by the conviction and sentence, the Appellant filed the appeal herein against conviction and sentence. The thrust of the grounds advanced in the Petition of Appeal was that the evidence against the Appellant was insufficient, that the Appellant was not identified, and that the trial court did not take all the circumstances of the case into account and therefore arrived at the wrong conclusion.

The Appellant had no legal representation and when the appeal came up for hearing before me on 14th July, 2010, he adopted the grounds of appeal in his Petition as his arguments and rested his case.

Mr. Kivihya, the learned State Counsel, represented the Respondent/State and opposed the appeal on the grounds that the seven prosecution witnesses who gave testimony proved the guilt of the Appellant. It was his submission that T.A, the complainant and victim, recognized the Appellant and that her evidence was collaborated by PW2 and PW3. He pointed out that the victim was a virgin and that her hymen was torn. In his submission, Mr. Kivihya stated that the evidence was overwhelming against the Appellant.

I have perused the record and considered and evaluated the evidence with a view to giving the Appellant a fresh reconsideration of the case. This is what emerges from the record.

T.A, aged 13 years, was sleeping in her parent's house in Kipkelion District on 12th December, 2008. In the house were her mother, L. A (PW2), and her step-father Z. Z (PW3). At around 11.00p.m, L.A heard dogs barking and people talking outside. She woke her husband up and opened the door. Z.Z testified that he saw many people who had surrounded the house. He saw one Simeon Kipkurui who pulled his wife and hit her and then pulled out his daughter, T.A. He also saw one Joseph Masai, and Philemon Kipsang, the Appellant. They ransacked the house and took grains, bed sheets, and clothes. He saw the Appellant whom he knew pick his daughter and defile her. There was moonlight. L. A (PW2) on her part testified that these people were armed with pangas, rungus and arrows. She and her husband (PW3) saw one

Wilson, son of Marindany and the Appellant. The latter defiled their daughter (PW1). The rape ordeal took five minutes. L. A (PW2) told the trial court that because of moonlight, she was able to recognize the Appellant and Wilson, the son of Marindany. She told the trial court that these were their neighbours and that she knew them. There was little that Z. Z (PW3) could do as the gangsters were armed. He had been forced to kneel down and was being guarded by a person with a panga and a rungu while his step daughter got defiled.

The Appellant was arrested on 8th January, 2009 by AP Vincent Omondi, and his colleagues following the report of the incident by Z.Z that the Appellant had been spotted.

T.A (PW1) knew the Appellant. She saw him and the son of Marindany. It was the Appellant, she said, who raped her while the son of Marindany stood watching. Her mother was raped at the same time by Simeon.

This attack on the home of Z. Z and L.A was part of the post election violence of January and February, 2008. The gangsters asked why the family had voted for the current President and although the latter denied that they had done so so as to save their skins, the gangsters did not believe them.

T.A was examined at Muhoroni Hospital and had extensive medical treatment at Nairobi Women's Hospital where she remained for a month and at Kabete Hospital where she also spent another month.

It was Christopher Ruto (PW6), a Clinical Officer who examined T.A on 12th February, 2008 and filled in her P3 form. He observed that the hymen had been torn. On re-examination on 21st March, 2008, he detected discharge from her private parts which indicated infection. He found that there had been penetration.

When he was put on his defence, the Appellant in his unsworn statement told the trial court that he hailed from Kapkoros location and that he was a casual labourer. He told the court that he had nothing to say in his defence.

The Appellant had no obligation to say anything in defence. The burden was on the prosecution to prove his guilt. The burden never shifted and the standard of proof remained that of proof beyond any reasonable doubt.

This is the first appellate court. The Appellant is entitled to receive a fresh reconsideration of his case. I have duly evaluated the evidence and I have made my own findings and come to my own conclusions. The charge against the Appellant was defilement contrary to **Section 8(1**) as read with **Section 8(3**) of the **Sexual Offences Act No. 3 of 2006.** These sections state:-
"8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
"8(3) a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years".

It was incumbent upon the prosecution to prove that it was the Appellant who defiled T.A. To do so, the prosecution had to show that the Appellant was identified or recognized as the one who penetrated T. A. The incident was at night. PW1, PW2 and PW3 were in agreement that there was moonlight. They saw and recognized the Appellant. They also testified that the Appellant and some of the gangsters in the group that attacked them were their neighbours. They knew them. T,A knew the Appellant and his colleagues who stood by as she got defiled. Her mother too, L. A (PW2) knew the Appellant as did Z.Z (PW3). This was evidence of recognition by three witnesses who were crystal clear about who they saw. It was said in **ANJONONI V. R [1980] Kenya L.R. 89** that evidence of recognition of assailants is more satisfactory, more assuring and more reliable than evidence of identification of a stranger.

In his judgment, the trial magistrate found that PW1 was sexually assaulted and that there was penetration as defined by the Sexual Offences Act. He also found that the Appellant was recognized by PW1, PW2 and PW3 during the ordeal that lasted almost a whole hour. I observe that there was ample time for PW1,

PW2 and PW3 to observe the Appellant and his colleagues in the moonlight and that their recognition of the Appellant was free from the possibility of error. The evidence of the Clinical Officer and Exhibit No. 1 shows that T.A was defiled. The offender was the Appellant who was seen by no less than the complainant and her parents, all of whom knew him as a neighbour and recognized him. The evidence before the trial court was overwhelming and the trial magistrate came to the right conclusion that the offence of defilement was proved against the Appellant beyond any reasonable doubt.

It is my finding that the ingredients of the offence of defilement were proved and that the guilt of the Appellant was established beyond any reasonable doubt.

I therefore find no merit in the appeal which I hereby dismiss.

DATED at **KERICHO** this 27th day of October, 2010

G.B.M. KARIUKI,sc
RESIDENT JUDGE

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