



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 319 of 2005 & 320 of 2005 (Consolidated)**

**MICHAEL RURIGI KIBARA .....1<sup>ST</sup> APPELLANT**

**ISAAC NYORO KIMITA .....2<sup>ND</sup> APPELLANT**

**- AND -**

**REPUBLIC .....RESPONDENT**

*(An appeal from the judgment of Senior Resident Magistrate Mrs. Kasera dated 22<sup>nd</sup> June, 2005 in Criminal Case No. 9071 of 2000 at Kibera Law Courts)*

**JUDGEMENT**

The appellants herein faced the charge of defilement of a girl contrary to s. 145 (1) of the Penal Code (Cap. 63, Laws of Kenya), and an alternative charge of indecent assault on a female contrary to s. 144 (1) of the Penal Code. It was alleged that the appellants jointly with others not before the Court, on divers dated between 1<sup>st</sup> and 16<sup>th</sup> November, 2000, at Kawangware in Nairobi, had carnal knowledge of JW, a girl under the age of fourteen years.

After a first trial, this matter came up on appeal as Criminal Appeal No. 242 of 2002, and the trial proceedings were nullified, *Mr. Justice Makhandia* ordering a retrial on 2<sup>nd</sup> March, 2004.

Jw M (PW1) the complainant gave testimony in the new trial when she was aged 17 years, and said she had been 13 at the time of the material incident of defilement.

PW1’s testimony was that she was living with her father, who was divorced from her mother, at Kawangware. On 1<sup>st</sup> November, 2000 PW1 was in the house with her father, SM (PW2), and her twelve-year-old brother (S N). PW1’s elder brother, T, called PW1 outside but disagreement then arose, and, apprehending a possible chastisement, PW1 went outside the compound, and was endeavouring to seek refuge at her mother’s house, at Waithaka, on the outskirts of Nairobi. As she made her way, now at 8.00 p.m. on a moon-lit night, PW1 met 2<sup>nd</sup> appellant herein who had been known to her. The 2<sup>nd</sup> appellant asked about PW1’s destination, and whether she had the bus fare to get to Waithaka; and after she indicated she had none, he volunteered to escort her: but he soon pulled her into the bush, and held her throat when she tried to raise alarm. PW1 testified:

“He said if I raise alarm he would kill me. He had a knife in his hind pocket. He held me, pulled me to his house. He put me on his bed and [cautioned] me not to raise alarm. He lit a candle and removed my

clothes. He removed my pant and defiled me the whole night. I can't remember how many times he went into me. I felt pain."

It was PW1's testimony that 2<sup>nd</sup> appellant tethered her to the bed on the following morning, before he locked the door and went away. Her hands and legs were tied, and she could not reach the door, and her throat was painful and she could not scream out in alarm. PW1 fell asleep and woke up later only to find the two appellants herein together with another man by the name, *Patrick Thiong'o*. The 2<sup>nd</sup> appellant then untied PW1 and the said *Patrick Thiong'o*, 2<sup>nd</sup> appellant, and 1<sup>st</sup> appellant took turns in defiling her. The three had ready sexual access to PW1, as 2<sup>nd</sup> appellant had on the previous day, kept away her underpant.

The three men who defiled PW1 were known to her; they were in the business of selling water by her father's home, and they were quite familiar.

The three men left the house in the night; and 2<sup>nd</sup> appellant returned alone on the third day, and again defiled PW1. The routine of defilement on PW1 continued every day, for a total of 16 consecutive days. On the last day, when the complainant was unable to walk, and had severe throat pain, 2<sup>nd</sup> appellant took her to a hospital, Mid-Hill Nursing Home. He left her outside the hospital, with persistent bleeding in her private parts, and said "*Kaa hapo*" ? meaning, "You sit there!"; and he went away. PW1 remained at that spot overnight, as nobody came to talk to her; and it was on the following morning that an employee of the nursing home spoke to her. PW1 asked the lady to take her to her mother at Waithaka. The matter was reported to PW1's father, and she was taken to St. Catherine's Clinic before a report was made at Muthangari Police Station. The clinic's doctor had PW1 sent to Kenyatta National Hospital, where she remained admitted for three weeks. PW1 mentioned the names of those who defiled her to the Police, and this led to the arrest of the appellants herein.

On cross-examination by 1<sup>st</sup> appellant herein, PW1 said this appellant had joined 2<sup>nd</sup> appellant and one *Patrick Thiong'o* in defiling her on the second night she spent in 2<sup>nd</sup> appellant's house, and that there was candle-light which enabled her to see 1<sup>st</sup> appellant. PW1 said that 1<sup>st</sup> appellant had penetrated her once, on the said second night.

PW2, *SM N*, testified that on 1<sup>st</sup> November, 2000 at 7.00 p.m. her daughter (PW1) left home fearing she would be punished by the father. When Pw2 saw PW1 after 16 days of her absence, she was dressed in clothes stained with blood. PW2 took the complainant to St. Catherine's Clinic, and made a report at Muthangari Police Station; and he took her to Kenyatta National Hospital, where she was admitted for one month, being discharged on 6<sup>th</sup> December, 2000.

*M W* (PW3), the complainant's mother, testified that a lady from Mid-Hill Medical Centre had brought her ailing daughter home on 16<sup>th</sup> November, 2000 at 7.00 a.m. The complainant then told her how she had been detained and defiled by three men, over a period of sixteen days. The complainant's clothes were stained with blood. The doctor who examined the complainant at St. Catherine's Clinic gave a recommendation for treatment at Kenyatta National Hospital ? and PW1 was then admitted at Kenyatta National Hospital.

*Police Constable Patrick Njoroge* (PW4) of Muthangari Police Station began investigations into the complaint that a child had been defiled. PW4 went to Kawangware and arrested both appellants herein, on 16<sup>th</sup> November, 2000.

The 2<sup>nd</sup> appellant, who made a sworn statement as DW1, said the complainant had only dealt with one *Patrick Thiong'o* on the material days, and that he (DW1) had not dragged the complainant into his room at any time. He denied ever defiling the complainant, and said the charge against him was a frame-up. DW1 asked that the matter be settled out of Court.

The 1<sup>st</sup> appellant in his sworn testimony, denied the charge of defiling the complainant. He denied ever

entering 2<sup>nd</sup> appellant's house on any of the material dates, and said the case was a frame-up on him.

The learned Magistrate's assessment of the evidence was rendered as follows:

"I have considered the evidence on record. PW1 said she was defiled by three persons. Accused 1 [2<sup>nd</sup> appellant herein] defiled her for 15 days and accused 2 [1<sup>st</sup> appellant herein] defiled her once. It is on record that both accused knew [the] complainant before this case was fixed. [The] complainant said she knew the accused persons and she also knew their names which she gave to the Police. It is not only a question of identification but of proper knowledge. The house where the offence took place was lit and the complainant was able to see the accused persons well. No grounds for frame-up are laid before the Court.

"I find both accused persons guilty of the offence charged and convict the accused accordingly under section 215 of the CPC. [The] defence is dismissed accordingly".

The learned Magistrate treated the appellants herein as first offenders; took into account the mitigation given on their behalf by their advocate; took into account the period during which each appellant had been in custody; and sentenced each to 18 years' imprisonment; the effect of being that 2<sup>nd</sup> appellant herein, *Isaac Nyoro Kimita* would serve a jail term of 15 years; and 1<sup>st</sup> appellant herein, *Michael Rurigi Kibara*, would serve a jail term of 13 years.

In the grounds of appeal, 1<sup>st</sup> appellant contended that the prosecution case had not been proved beyond reasonable doubt; that the prosecution witnesses were not truthful; that the defence case was not given due consideration. The 2<sup>nd</sup> appellant's grounds of appeal were identical.

On the occasion of hearing the consolidated appeal, learned respondent's counsel *Mrs. Kagiri* said she would ask the Court to consider enhancing the sentences imposed on the appellants, in view of aggravations in the circumstances of commission of the offences charged.

The 1<sup>st</sup> appellant said he had been in prison for some seven years, and he was ailing; he asked the Court to take that fact into account.

The 2<sup>nd</sup> appellant submitted that the evidence on the basis of which he had been convicted was doubtful, and he should not have been convicted. He urged that no weapon had been recovered from him, and that no DNA tests were conducted to link him to the complainant's injuries.

By contrast, learned counsel *Mrs. Kagiri* submitted that there was truthful evidence showing the appellants as culprits on the defilement charge. The complainant had known the appellants, and had mentioned them by name in her report to the Police. And the best conditions of visibility had prevailed over the many days during which the acts of defilement were committed. Treatment notes from Kenyatta National Hospital had been exhibited, showing the nature of the treatment the complainant had undergone. Counsel noted that the trial Magistrate's assessment of the evidence had shown her belief that the complainant's evidence was credible, detailed, and consistent; and that the trial Court had had the opportunity to observe the demeanor of the complainant as a witness, and found her testimony credible.

*Mrs. Kagiri* urged that the sentences imposed on the appellants herein be enhanced; for they were charged under the old law which does not reflect the position now contained in the *Sexual Offences Act, 2006 (Act No. 3 of 2006)*, which prescribes minimum sentences. In the words of the counsel:

"[The manner in which 2<sup>nd</sup> appellant committed the offence was aggravated .... He used physical violence, holding the complainant's throat; he used a knife to threaten her; he used a rope to confine her; he detained her for 15 days without food; he also brought other men to commit this serious offence on the second day after the abduction. The circumstances in which the offence was committed are not ordinary.... Review of sentence is necessary, especially in relation to 2<sup>nd</sup> appellant".

I have considered the evidence as a whole, and found no fault with the manner in which the learned Magistrate made her assessment of the same. The trial Court had entertained no doubts at all as to the truthfulness of the complainant as a witness, and her demeanour had commended itself as a demeanor of condour. The complainant did not go missing from the view of her parents for nothing; she had been abducted and detained by 2<sup>nd</sup> appellant who held her for some 16 days; during that period the appellants herein committed unrelenting defilement upon her ? particularly so, 2<sup>nd</sup> appellant; after the most severe sexual harm had been occasioned to the complainant, 2<sup>nd</sup> appellant dumped her near a clinic; the complainant very well saw her molesters, these are men she knew, and she gave their names to the Police.

There is no basis for doubting the veracity of the prosecution evidence; and I hold that they proved beyond doubt that the offence charged had been committed by the appellants herein.

Had the offences been committed after the *Sexual Offences Act, 2006* had come into force, it is likely the penalty would have been more severe; and it is on this account learned counsel *Mrs. Kagiri* has asked for enhancement of sentence. It is not possible to make an enhancement on that basis, as the *status quo ante* was the basis of judgment and sentence. I have found nothing improper in the manner in which the learned Magistrate had exercised her discretion.

Consequently, I will dismiss the appeal by both appellants; uphold conviction in each case; and affirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 9<sup>th</sup> day of February, 2009.

**J. B. OJWANG**

**JUDGE**

Coram: Ojwang, J.

Court clerk: Huka

For the Appellant: Mr. Kagiri

Applicants in person