JOSHUA NYAKUNDI ……………….……...……………. APPELLANT

-AND-

REPUBLIC …………………………………………… RESPONDENT

(An appeal from the Judgment of Principal Magistrate Mrs. Murage dated 18th September, 2006 in Criminal Case No. 445 of 2006 at Kikuyu Law Courts)

JUDGMENT

The appellant herein was charged with the offence of defilement of a girl contrary to s.145 of the Penal Code (Cap. 63). The particulars were that, on 13th April, 2006 at Mwimuto Village in Kiambu District, within Central Province, the appellant had carnal knowledge of ***Brenda Kerubo Nyaribo***, a girl under the age of sixteen years. The appellant faced an alternative charge, namely, indecent assault on a female, contrary to s. 144(1) of the Penal Code. The particulars in this respect were that the appellant, on 13th April, 2006 at Mwimuto Village in Kiambu District, unlawfully and indecently assaulted ***Brenda Kerubo Nyaribo*** by removing her inner clothing and touching her private parts.

PW1, ***Brenda Kerubo*** testified that she was a thirteen-year-old pupil, in Standard 6 at Kibichiku Primary School and living with her parents at Mwimuto in Kiambu District. On 13th April, 2006 at 7.00 pm, she was alone, and coming from the house of a friend, where she had gone to borrow a certain magazine. On the way home, a man, whose house was on the same plot as her parents; caught her and dragged her into his house, and, while muzzling her mouth, laid her on his bed, and had sex with her. The man had pulled down his trousers, and stuffed cloth into PW1’s mouth as he sexually assaulted her. She was thus unable to scream, even though she felt much pain and bled. The man made threats at PW1, and admonished her against telling anybody of this incident. But when she got home, PW1 informed her uncles, who went to the suspect’s house, arrested him and delivered him to the Police. PW1 was taken to Nairobi Women’s Hospital that night, given treatment, and discharged. The suspect had spoken to PW1 in Kiswahili at the material time.

On cross-examination, PW1 testified that the appellant’s house was No. 21, whereas her parents’ house was No. 28, and both houses were on the same plot. She had in the past seen the appellant, who lived alone, fetch water. On the material evening, as PW1 walked towards her parents’ house, the appellant was standing by his door. She testified that the appellant had been trying to escape when he was arrested following the incident.

PW2, ***Josephine Kasyoka***, a seamstress at Mwimuto, is the mother of PW1. On 13th April, 2006 she had left PW1 in the house shortly, and when she returned at 7.30 pm she found PW1 crying. PW1 told her she (PW1) had been defiled by the appellant herein. Members of the public then arrested the appellant and took him to Wangige Police Post. PW1 who was bleeding, was taken to Wangige clinic, but was then referred to Nairobi Women’s Hospital, where she was treated. PW2 later took PW1 to ***Dr. Kung’u*** at Kinoo, to examine her and fill in the P3 medical report form. The appellant lived on the same plot, and PW2 used to see him go to fetch water.

On cross-examination, PW2 said the appellant was arrested as he wanted to escape. She testified that

PW1 was bleeding from her private parts following the incident of defilement.

PW3, ***Dr. G.K. Mwaura*** of Kinoo Medical Clinic, testified that he had examined ***Brenda Isaac Nyaribo*** (PW1) on 19th April, 2006. PW1, a girl aged 13, had been defiled, and her hymen membrane and adjacent tissue were torn. She had earlier on experienced bleeding, and had been treated at Nairobi Women's Hospital. PW3 took history, examined PW1 and saw the report from Nairobi Women's Hospital. He concluded that PW1 had been defiled.

PW4, Police Force No. 47624 ***Sgt. Catherine Omollo*** of Kikuyu Police Station, was on duty on 15th April, 2006 when the complainant and her parents came along to report the incident of defilement by a known person. At that time the appellant herein had already been arrested. PW4 charged the appellant, after he was brought by an Administration Police Officer from Mwimuto.

The appellant gave sworn evidence in which he said that on the material evening at 7.00 pm he had gone to buy vegetables at the kiosk, and while there, he met the complainant's parents with other people who arrested him and brought him to the Police Station. The appellant said he had told those who arrested him that he did not know the complainant.

On cross-examination the appellant said he and the complainant live on the same plot, and he had been seeing her in the neighbourhood for barely a month. The appellant said that the complainant's father had had a grudge with the appellant's cousin, on the ground, as alleged, that this cousin had made a daughter of his (PW1's father's) pregnant. The appellant denied that he defiled the complainant.

The learned Magistrate thus summarized the evidence:

"**…. I find that the accused has not challenged the complainant's evidence. The complainant knew the accused prior to [the material] date, as he was a neighbour. She reported the incident immediately. PW3, *Dr. Mwaura* confirmed that she was defiled. The complainant is aged 13 years. She testified with confidence and maturity. I find her evidence credible and not challenged at all. The accused's defence has no basis."**

The trial Court found the appellant herein guilty as charged, convicted him, and sentenced him to 20 years' imprisonment.

M/s. Kang'ethe and Mola, Advocates who acted for the appellant in this appeal contended that the trial Magistrate had erred in law by relying on the sole evidence of the complainant; that the trial Court failed to consider that there had been a grudge between the complainant's and the appellant's families; that the trial Magistrate failed to consider that the doctor who treated the complainant did not testify; that the trial Court shifted the burden of proof on to the appellant herein; that the sentence imposed was extremely harsh.

Learned counsel ***Mrs. Ikinu*** who took up the foregoing contentions, urged that the conviction of the appellant had not been founded on cogent evidence. She dwelt on the claim that there had been a family grudge playing a role in the case; but upon careful consideration of the evidence and of the learned Principal Magistrate's approach to this question, I have formed the clear impression that grudge was not at all a factor in the prosecution of the appellant herein.

Learned State Counsel ***Ms. Gakobo*** submitted that the complainant had properly identified, by way of recognition, the appellant herein as the suspect. She noted that the doctor's (PW3) testimony was clear on the fact that the complainant had been defiled; and this corroborated the complainant's evidence on the circumstances attending the act of defilement. Counsel urged that it was immaterial that the doctors at Nairobi Women's Hospital who attended to the complainant, were not themselves called as witnesses; for PW3 had fully taken into account the report issued at that hospital – and consequently, no prejudice was caused to the appellant by the non-appearance of staff from Nairobi Women's Hospital.

Ms. Gakobo noted that the trial Court had formed the opinion that the complainant was an honest and

credible witness, and her evidence could not now be faulted. The trial Court had at the same time considered and rejected the appellant's evidence.

As regards sentence, Counsel urged that since life imprisonment was the prescribed maximum sentence, twenty years' imprisonment as was ordered by the trial Court, was entirely "legal and sufficient" and was not harsh.

It is quite clear to me that the testimony of PW1, as found by the Court, could not be faulted; and this testimony was further corroborated, particularly by the medical evidence given by PW3. All the evidence taken together, in my opinion, showed beyond reasonable doubt that the appellant herein had committed the offence charged; and consequently he was rightly convicted.

As to the sentence, it is quite true, as learned State Counsel did remark, that the sentence awarded was a lawful one as it fell within the statutory provisions.

But, for purposes of application of the statutory terms of sentence, legality is not, I believe, to be inferred solely from the milestones set out in the penal statute; the task falls upon the Court to ***ensure fairness***, by relating the specified counts of years of jail-term to the circumstances of the case, and to considerations of comparability in different cases. After carefully considering such elements of sentencing, I had in an earlier case, ***Yussuf Dahar Arog v. Republic***, H. Ct. Cr. App. No. 110 of 2006, crystallized my perception in specific terms, as follows:

"**Such is, of course, a maximum sentence and, within that constraint, the Court has a wide discretion which it exercises on judicial principles. Such principles would, I believe, take into account the *ordinary span of life* of a human being; the general *circumstances* surrounding the commission of the offence; the possibility that the culprit may *reform* and become a law-abiding member of the community; the goals of *peace and mutual tolerance* and accommodation among people – those who are injured, and those who have occasioned injury."**

I will be guided by the foregoing principles, in the instant case. On that basis, I hereby reduce the twenty – year prison term imposed by the trial Court to twelve (12) years with effect from the original date of judgment.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 20th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mrs. Ikinu

For the Respondent: Ms. Gakobo