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

Criminal Appeal 648 of 2006

S G K …….....……APPELLANT

VERSUS

REPUBLIC……..…….... RESPONDENT

(From the original conviction and sentence in Criminal Case No. 6055 of 2003 of the Chief Magistrate's Court at Thika – Ms. L. Wachira - RM)

JUDGEMENT

S G K, the appellant, was charged before the subordinate court with defilement contrary to section 145 (i) of the Penal Code. The particulars of the offence were that on 12th August 2003 at **[Particulars Withheld]** village in Maragua District of the Central Province unlawfully had carnal knowledge of B N N a girl under age of 14 years. He was in the alternative charged with indecent assault on a female contrary to section 144 (i) of the Penal Code. The particulars of charge were that on 12th August 2003 at **[Particulars Withheld]** Village in Maragua District of the Central Province unlawfully and indecently assaulted B N N a girl under the age of fourteen years by touching her private parts. After a full trial, he was found guilty. He was convicted and sentenced to serve 10 years imprisonment. Being dissatisfied with the decision of the trial court, he has appealed to this court both against conviction and sentence, through his counsel KAMIRO R. N advocate.

At the hearing of the appeal, Mr. Kamiro, learned Counsel for the appellant submitted that the magistrate merely relied upon the evidence of the complainant (PW 1), a minor aged 9 years I found the conviction. Counsel contended that the evidence of the minor required corroboration, as a matter of practice. Such corroboration was lacking. Counsel contended that, though PW4 (the doctor) examined the complainant only a day after the incident, there were no injuries found. There were also no traces of spermatozoa. Counsel submitted that the only relevant finding was that the hymen was broken. Counsel contended no blood stains were noticed on the clothes worn by the complainant. The clothes, which were said to be blood stained and soiled, were brought later as stated by the doctor. The report of the Government Analyst regarding blood stains on the clothes was negative. Counsel emphasized that there was no evidence that the hymen was broken on the alleged date incident. Counsel pointed out that, through the Investigating Officer (PW 6) caused the blood sample and saliva of the appellant to be taken for matching, the results were negative. Therefore, counsel contended, the allegations against the appellant were fabricated by the parents of the complaints due to an existing land dispute. Counsel reiterated that PW 4, who was one of the children around the scene, did not witness the appellant sexually assault the complainant.

In addition, counsel submitted, the judgement was written in a casual way. It merely made casual inferences and conclusions without analysis of the evidence. Counsel submitted that the reasoning in the

judgement was faulty. Counsel further contended that the magistrate, who wrote the judgement, did not have an opportunity to hear and determined the demeanour of witnesses.

Learned State Counsel, Mrs. Gakobo, opposed the appeal and supported both conviction and sentence. Counsel contended that the evidence on record was sufficient to sustain a conviction.

Counsel emphasized that the complainant stated in the presence of PW2 and PW3, that the appellant had defiled her. PW4 found the hymen broken; vaginal discharge swab had blood stains. Counsel contended that the evidence of PW1 was corroborated by the doctor. Counsel submitted that the defense story that there was a land dispute did not have any merit. PW3, a brother of the appellant, denied the existence of a grudge or a land dispute. There was also no reason why the complainant, a young child of 8 years, could have maliciously implicated the appellant. Counsel however, conceded that the court did not analyse the defence of the appellant. Counsel asked this court to evaluate the evidence. On sentence, counsel submitted that the 10 years prison sentence was not harsh or excessive, as the maximum sentence was life imprisonment. The victim was a young girl, who would be affected by the trauma for life.

In brief the facts are as follows: The complainant (PW 1) is a young girl. On 12/08/2003 she was with other children, including W (PW 5) aged about 9 years. They were called by the appellant (who was a brother of the father of the complaint). They went to his house and he gave them pork to eat. After the children ate the pork, he sent the other children to go out of the house to the shop. According to PW1 (the complainant), the appellant partially undressed her and had carnal knowledge of her on a sofa. This was not the first time he had done so. When she told him that she felt pain, he left her alone. She did not tell anybody. However, in the evening, she vomited. That was when she told her mother about the incident. According to PW2 (E W), the appellant sent them to the shop to buy him cigarettes. When they came back, they found him and the complainant sitting on a sofa outside the house.

After the complainant told her mother about the incident, she was sent to hospital. A report was also made to the police. The complainant was examined by a doctor (PW4) DR. PETER MUU) at Nyeri Hospital. The doctor found that the hymen of the complainant was broken, there were also traces of blood, but no spermatozoa. The examination was done the day after the incident. The pants and skirts of the complainant were later taken the Government Analyst for analysis. The appellant was then arrested and charged.

In his defence, the appellant gave unsworn testimony. His testimony was that the children were called by his mother to eat meat. He was however, arrested in the evening and later released. He was later rearrested and charged. He stated that there was a long standing grudge between with the family of the complainant and himself, because of a boundary dispute. He stated that there was a pending case on the land dispute at the Chief's office.

I have considered the evidence on record as well as the submissions of counsel for the appellant and the learned State Counsel. The primary evidence connecting the appellant with the alleged offence is that of a minor. In accordance with the provision of section 124 of the Evidence Act (cap 80), such evidence of a victim child of tender years in a sexual offence does not need corroboration to sustain a conviction, provided that the trial court believes in the same and records the reasons for so believing the complainant.

When I consider the judgement of the trial court, it was actually very brief and sketchy. The learned magistrate did not consider the issues and make decisions on the same as required under section 169 of the Criminal Procedure Code (cap 75). In failing to comply with Section 169 of the Criminal Procedure Code, the learned magistrate failed to consider the prosecution case against the defence case. In my view, that omission prejudiced the appellant.

The evidence of the complainant was that she was defiled on a sofa in the house.

There is no evidence from any other prosecution witness that there was a sofa in the house. The father of the complainant who was a key witness in the case was not a called to testify in court, to confirm whether

the child did tell him about the defilement. No reason was given by the prosecution for the failure to call this crucial witness. Though the complainant stated that the appellant defiled her until she felt pain, the doctor who examined her the next day, saw no traces of injury. In my view, such injuries would be fresh. An old broken hymen cannot be evidence of the alleged defilement the hymen could have been broken much earlier. On the blood stained pants, these were brought later, a day after the complainant was examined by the doctor. Though they are alleged to have had blood stains, the age of those blood stains was not established, nor was the blood tested by the Government Analyst to find out if the blood stains were from the blood of the complainant. In fact PW6 CPL JOHN MAKUMI, the investigating officer stated:

"**I took blood and saliva from accused for analysis ……..there are the complainant pant and dress. All reports came out negative including specimens"**

From the above, it is apparent that there is no evidence of blood stains on the clothes or paints of the complainant.

After having re-evaluated all the evidence on a record, I find that the prosecution did not prove its case against the appellant beyond any reasonable doubt. They failed to discharge their burden as required in criminal cases. They left many gaps unexplained. I will hold that the complainant, who was a minor victim, should not have been believed by the learned magistrate. There was no tangible reason to do so. I will therefore allow the appeal.

Consequently, I allow the appeal, quash the conviction and set a side the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 14th April 2008.

George Dulu

Judge

In the presence of:-

Appellant

Mr. Kamiro for appellant

Mrs. Gakobo for state

Mwangi - Court clerk