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

Criminal Appeal 343 of 2005

ALLAN MUNGAI GITHONGO..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From the original decision in Kiambu Senior Principal Magistrates criminal case No. 1438 of 2006 – Ms. Wachira SPM)

J U D G M E N T

ALLAN MUNGAI GITHONGO, the appellant, was charged in the subordinate court with 2 counts. Count 1 was for abduction of a girl under sixteen years, contrary to section 143 of the Penal Code. The particulars of the offence were that on 26th June 2006 at BT Centre in Kiambu District of Central Province, abducted MWS, a girl under sixteen years. Count 2 was for defilement of a girl under sixteen years contrary to section 145(1) of the Penal Code. The particulars were that between 26th June 2004 and 8th July 2004 at Kiambaa Village in Kiambu District of Central Province, defiled M W S, a girl under the age of sixteen years. He was also charged in the alternative with indecent assault on a female contrary to section 144(1) of the Penal Code. The particulars of charge were that on diverse dates between 26th June 2004 and 8th July 2004 at PARTICULARS WITHHELD, unlawfully and indecently assaulted MWS by touching her private parts.

After a full trial, he was convicted of count 1 and 2 and acquitted of the alternative count. He was sentenced to serve 12 months imprisonment on count 1, and 7 years imprisonment on count 2. He subsequently filed an appeal to this court through his counsel M/s Ashiruma & Company Advocates.

At the hearing of the appeal, Mr. Ashiruma, appeared for the appellant while Ms Gateru appeared for the State. Mr. Ashiruma for the applicant, submitted that the prosecution did not prove the case against the appellant beyond any reasonable doubt. According to counsel, the evidence of PW1 did not establish the offence of abduction. Counsel observed that there was no evidence that the complainant (PW1) raised any alarm, or asked for assistance from neighbours. On the charge of defilement, counsel argued that the charge was defective, as the word unlawful was not used. Secondly, the trial court failed to assess the age of the complainant. There was also no proof of penetration. Counsel also submitted that the trial court

demonstrated bias when it refused to visit the alleged house of the defilement, in order to understand the circumstances of the alleged crime. Counsel also submitted that the magistrate shifted the burden of proof to the appellant. Counsel cited a number of authorities.

The learned State Counsel, Ms Gateru, opposed the appeal and supported both the convictions and sentences. Counsel submitted that, though the evidence was that of a single witness, it was adequate to sustain a conviction. Counsel relied on the case authorities cited by counsel for the appellant. Counsel conceded to the existence of several contradictions in the evidence of the complainant, PW1, but contended that the contradictions were not material, and did not shake the prosecution case. Counsel submitted that it was necessary to call the doctor. However, though the doctor did not testify, the oral evidence of the complainant was adequate. With specific regard to count 2, the counsel argued that the failure to use the word "*unlawful*" was not fatal to the charge as the appellant understood the charges.

I have evaluated the evidence on record. The evidence that connects the appellant to the alleged offence was that of a single witness. It was the complainant PW1. She was said to be 13 years of age. If that was the age of the complainant, then clearly the complainant was a minor. Therefore there was need for the trial, court to carry a voir dire test to establish whether the child understood the nature of an oath, and whether she was possessed of enough intelligence to tender evidence. Failure to carry out the voir dire test was fatal as the evidence of that witness becomes of no value, as the magistrate was not able to properly determine the value of that evidence, and give reasons for believing that evidence of the minor in terms of the provisal to Section 124 of the Evidence Act (cap 80) – see also **ONSERIO – VS - REPUBLIC (1985) KLR 618**.

The failure in our present case, to carry out the voir dire examinations meant simply that the evidence of the complainant (minor) did not have much probative value and could not be a basis for sustaining a conviction. This applied to both counts on which the appellant was convicted. The convictions cannot stand on that account alone.

On count 1, of abduction contrary to 143 of the Penal Code, my view is that, even assuming that the evidence of PW1 had value, there was no evidence of abduction at all. From the evidence on record, it would appear that the complainant just left the matatu and willingly walked to the house of someone and spent time there. There was no evidence of screaming or any attempt to inform others, even when the same PW1 stated in evidence, that she met other people as they walked to that house. On this, the subordinate out erred in refusing to visit the house in order to understand the locality of the alleged accident, which visit to the scene was requested by the defence. This, together with the fact that the prosecution did not describe the house itself, how far other houses were, and the population density in the area, creates a doubt as to whether, indeed, there could have been the opportunity of the complainant actually being abducted. I give the benefit of the doubt to the appellant. I find no evidence of forceful restraint of the complainant by the appellant, and therefore no evidence of abduction.

The charge of defilement was not proved. Indeed, such a charge can be proved only if there is credible evidence of penetration. It cannot also be proved if the age is in doubt. The allegation was that the complainant was below 16 years of age. In our present case there was no medical evidence that the complainant had any sexual intercourse in her life. Secondly, and more importantly, there is no medical evidence of the age of the complainant. In an offence of defilement, the proof of the age of the victim is a very important piece of evidence. It had to be proved that the victim was less than 16 years of age, otherwise the lack of proof of age meant that the offence was not be proved. As there was no proof that the complainant was below 16 years, even if sexual intercourse had occurred, which is doubtful, the offence of defilement would not have been committed. It is my finding, that the prosecution did not prove the necessary elements to establish the offence of defilement.

For the above reasons, I find that the prosecution did not prove the two charges on which the appellant was convicted. I will therefore allow the appeal and quash the convictions.

Consequently, I allow the appeal, quash the convictions and set aside the sentences. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 5th May 2008.

George Dulu

Judge

In the presence of –

Appellant Mr. Ashiruma for appellant

Ms. Gateru for state

Court clerk: Mwangi