REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 199 of 2006

KARILE KIMANIKI……..……. APPELLANT

VERSUS

REPUBLIC.…… RESPONDENT

(Being an appeal from the conviction and sentence of

R.N. Muriuki Senior Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 428 of 2006 at Nanyuki)

JUDGMENT

The appellant was charged with ***defilement of a girl contrary to section 145(1) of the Penal Code.*** The lower court after hearing the case convicted the appellant and sentenced him to twenty five years imprisonment with hard labour. The appellant has brought this appeal against conviction and sentence. This is the first appeal. In deciding this appeal we are guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

"*As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570).*"

PW 3 was thirteen and half years old. She attended [particulars withheld]primary school standard three. She lived with her sister and her husband. Her sister husband is the appellant herein. On 21st February 2006 the appellant arrived home and told her that he would give her money to take to her parents. He said he would escort her. As they went along the path and reached near a river the appellant told her that he wanted to have sexual intercourse with her. He pushed her to the bush. She began to scream and when appellant removed a knife she kept quiet. The appellant told her that he would kill her if she screamed. After he defiled her the appellant escorted her upto the gate of [particulars withheld]. When she arrived home she informed her parents. The matter was reported to the police and she was referred to the hospital. She had lived with the appellant for almost a year. PW 1 and 2 are parents of PW 3. On arriving home on 21st February 2006 she informed both of them that she had been defiled by their son in law. PW 4 was a doctor at Nanyuki district hospital. After examining her and taking vaginal swab he concluded that since she had a venereal infection that there must have been sexual intercourse. The trial court found that there was a case to answer and put the appellant to his defence. The appellant in an unsworn statement denied that he had defiled PW 3. He also denied that he resides with her. The learned magistrate in assessing the prosecution's case found that the prosecution had adduced sufficient evidence to prove the case against the appellant beyond reasonable doubt. On my part I have reexamined the evidence and I support the finding of the lower court. PW 1 and 2 confirmed that PW 3 their daughter was residing with the appellant for a period of about six months. PW 3 was clear in her evidence of how the appellant lured her to the bush on the pretext that he wanted to send money to her parents. When PW 3 resisted the attack the appellant threatened her with a knife. She therefore kept quiet. The moment she arrived home she reported the matter to her parents. The daughter gave evidence that she had had sexual intercourse. The defence offered by the appellant that his parents in law had brought this case against him because they had wanted their daughter to be married to a rich Maasai was not put in cross examination to PW 1 and 2. In my view that defence was an afterthought and a poor one at that. I therefore find that there is no merit with this appeal and I accordingly do hereby dismiss it.

Dated and delivered at Nyeri this 28th day of October 2008.

MARY KASANGO

JUDGE