

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 72 OF 2007

COSMUS KIPYEGON KIBOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant **Cosmus Kipyegon Kibor** together with another were, jointly charged with the offence of **defilement of a girl under the age of 16 years contrary to section 145(1) of the Penal Code**. The particulars of the offence state that on the nights of 8th and 9th days of April 2006 at Baringo District within Rift Valley Province, jointly had a carnal knowledge of C C a girl under the age of 16 years. They also faced an alternative charge of **indecent assault on females contrary to section 144(1) of the Penal Code**. The particulars of the alternative charge state that on the nights of 8th and 9th days of April 2006 at Baringo District within Rift Valley Province, jointly unlawfully and indecently assaulted C C a girl under the age of 16 years by touching her private parts.

They both pleaded not guilty to both charges. After a full trial they were found guilty, convicted, and sentenced to twenty (20) years imprisonment. Being dissatisfied with the conviction and sentence, the appellant who was the 2nd accused person before the trial court has appealed. During the hearing of this appeal, the State conceded to the appeal on the grounds that the charge was defective. The appellant was charged with another of **jointly** defiling the complainant which is impossible for two men to simultaneously have carnal knowledge of a female.

In the case of **Paul Mwangi Murunga vs Republic, Court of Appeal Criminal Appeal No. 35 of 2006 (Nakuru)** the Court of Appeal held that:

“This court has repeatedly said that two or three men or whatever may be their number cannot jointly at the same time rape one woman. Each one of the men commits the act of rape individually and is followed by the next man. We are unable to appreciate how two or three men can at the same time “jointly” enter or try to enter her genital organ. The act is committed by each one of them alone and if there be two, three or four of them each must be charged on a separate count of rape.”

In view of this defect in the charge sheet, this appeal succeeds. The conviction and sentence imposed by the trial court is hereby set aside unless the appellant is otherwise lawfully held he is to be set at liberty forthwith.

Judgment read and signed on 14th November, 2008

M. KOOME

JUDGE