REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 13 of 2007

JOHN SADERA…….....…….APPELLANT

VERSUS

REPUBLIC…….....……...……RESPONDENT

JUDGMENT

JOHN SADERA, the appellant in this appeal was in Narok SRM Criminal Case No.[....] charged with the offence of defilement of a girl contrary to **Section 145(1)** of the **Penal Code**. It was alleged that on 27th July 2005 at [*particulars withheld pursuant to section 76 (5) of the Children Act, 2001*] he unlawfully had carnal knowledge of **S. W. P.** (the complainant), a girl under the age of 16 years. He was in the alternative charged with indecent assault contrary to **Section 144(1)** of the **Penal Code**. The particulars of that charge were that on the same day and at the same place he unlawfully and indecently assaulted the complainant by touching her private parts. He pleaded not guilty to both charges but upon trial before the Senior Resident Magistrate at Narok he was conticted of the main charge and sentenced to 16 years imprisonment. He has appealed to this court against both the conviction and sentence.

In his four grounds of appeal, the appellant raises two main complaints. They are that the learned trial magistrate erred in failing to seek independent evidence and instead relied on the evidence of the complainant and her relatives and that the learned trial magistrate ignored his defence.

In his written submissions, the Appellant argued that for the prosecution case to have been proved beyond reasonable doubt the evidence adduced should have been watertight. In his view this is not the case here as his conviction was based on the evidence of the complainant and her relatives whom he said were not independent witnesses. He also argued that the trial magistrate erred in failing to see the possibility of his identification having been mistaken. He contended that the offence is alleged to have been committed at about 6.00 p.m. when it was getting dark and the complainant having been terrified by the attack and her father having had a bad eye, there is no proper evidence of his identification as the culprit. He said the police did not bother to have the complainant's clothes examined to see whether or not they had any fiber that could be attributed to his clothes. As regards his defence he said it was not given due consideration.

Having considered these submissions and carefully read the lower court record I find that this is a completely hopeless appeal. The offence was committed at about 6.00 p.m. when it was not yet dark. Both the complainant and her father knew the Appellant very well as they live in the same village and their homes are only about 1 kilometre apart. When the Appellant's father was attracted by her screams and ran to the scene he saw the Appellant with the complainant and on noticing him the Appellant started chasing him with a panga. That is in the father's evidence and that of the complainant.

Besides being identified at the scene the Appellant assembled elders and went to the complainant's home the following day seeking to have the matter discussed and resolved by the elders but PW3 advised against it. Taking all these factors into account I find that the Appellant's identity is not in issue. He was properly identified. I also find that the learned trial magistrate considered the Appellant's defence at length and in my view rightly rejected it. I therefore find that the Appellant's conviction was proper and I accordingly dismiss the appeal against conviction.

The appeal against sentence has also no merit. The offence the appellant committed carries a life sentence but he was sentenced to 16 years imprisonment. I therefore dismiss the appeal against sentence also.

In the circumstances I find no merit in this appeal and it is hereby dismissed in its entirety.

DATED and delivered at Nakuru this 7th day of November, 2008.

D. K. MARAGA

JUDGE.