REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 209 of 2003

(*Appeal from the original conviction and judgment in the Senior Resident Magistrate's Court at Nyeri in Criminal Case Number 593 of 2003 by P.C. Tororey – S.R.M. dated 23rd June 2003)*

JOSEPH KARIUKI KAROBIA…….APPELLANT

VERSUS

REPUBLIC……..……...RESPONDENT

J U D G M E N T

This is a first appeal lodged by Joseph Kariuki Karobia hereinafter referred to as the appellant against his conviction and sentence by the Senior Resident Magistrate Nanyuki for the offence of Defilement Contrary to Section 145 (1) of Penal Code.

The particulars of the charge against the appellant were that on the 11th day of March 2003 at Matanya Trading Centre in Laikipia District within Rift Valley Province he had carnal knowledge of JWM a girl under the age of 14 years.

During the trial in the lower court there were 4 witnesses who testified on behalf of prosecution. These were the minor Complainant JW (P.W.1), an independent witness Thomas Kingori (P.W.2) the arresting officer P.C. Johnson Kimani (P.W.3) and William Miricho Ndonge (P.W.4) a Clinical Officer who examined the complainant after the alleged offence.

The evidence of the witnesses was that on the material day the minor Complainant was on her way home from school when she met with the Appellant. The Appellant held her and took her to his Hotel at Matanya Trading Centre. He took the minor Complainant to a kitchen at the back of the Hotel. He made the minor to lie on the floor, removed her underpants then had sexual intercourse with her.

In the meantime P.W.2 went to the Hotel of the Appellant intending to have lunch there. He did not find the Appellant in the Hotel. He called out but received no response. P.W.2 then heard funny noises coming from the kitchen of the Hotel and decided to go to the kitchen. He found the Appellant lying on top of the minor complainant holding her mouth at the same time sexually assaulting her. P.W.2 confronted the Appellant and the Appellant stood up. He had no trouser and his penis was erected. P.W.2 raised an alarm and members of the public came to his assistance. They apprehended the Appellant and escorted him to Matanya Police Station where He was re-arrested by P.W.3.

On the same day the minor complainant was taken to Nanyuki District Hospital where she was examined by P.W.4 who found her panty torn. P.W.4 also noted bruises on the complainant's vagina as well as

white smear on her private parts. Laboratory examination revealed that sperms, pus cells and bacteria were found in the smear. It was confirmed that the minor complainant had been sexually assaulted and infected with a venereal disease.

In his defence the appellant gave a sworn defence in which He denied having committed the offence and maintained that He was at his cousin's home. He claimed that P.W.2 lied against him because he owed the appellant. Having considered the evidence the trial magistrate found the case against the appellant proved beyond reasonable doubt she therefore rejected the appellant's defence and found him guilty and convicted him of the offence.

In his memorandum of appeal the appellant complained that the evidence adduced by the prosecution was not sufficient to sustain his conviction. He maintained that He was not subjected to any medical examination, He further contended that since the minor Complainant was retarded her evidence was not reliable. Finally He maintained that the incident having occurred at a trading centre, more people other than P.W.2 ought to have witnessed the incident. As regards the sentence the appellant lamented that it was so harsh as to result in his spending the rest of his life in prison.

This being a first appeal it is incumbent upon this court to reconsider and evaluate all the evidence which was adduced before the lower court and come to its own conclusion and came to its own conclusion. In considering the evidence which was adduced before the lower court, I note three issues of concern, one, relating to the charge sheet, and two, relating to procedure adopted by the trial magistrate in taking the evidence of the minor complainant.

First, as concerns the charge, the particulars did not indicate that the Accused person had "unlawful" carnal knowledge of the complainant. I find however that this omission did not occasion any failure of justice as the Accused did not at any stage concede to having carnal knowledge of the minor complainant lawfully or otherwise. I am satisfied that the omission, in the particulars of the charge to include the word "unlawful" is curable under ***Section 382*** of the Criminal Procedure Code.

Secondly, before taking the evidence of the minor complainant, the trial magistrate carried out what was presumably a *voir dire* examination. The record reads as follows: -

"**P.W.1 Female minor states in Kikuyu: -**

I am called JW. I come from Matanya. I go to TPS. I am in Standard 1. I do not know the Bible. I am 13 years. I have never seen a Bible.

Court: Child does not know the meaning of oath. To be affirmed."

Section 19 of the Oaths and Statutory Declarations Act (Cap 15) which deals with the taking of evidence of Children of tender years states as follows: -

19 (1) "where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received though not given upon oath, if in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."

This means that in this case the trial magistrate before accepting the evidence of the minor as a witness had first to satisfy herself of the following: -

1) That the minor was a child of tender years.

2) That the minor understands the nature of an oath.

3) If the minor does not understand the nature of an oath, that the minor is possessed of sufficient intelligence to testify and understands the importance of speaking the truth.

In this case the trial magistrate appears to have made a finding from her ***voir dire*** examination that the child did not understand the nature of an oath. Although no specific finding was made on whether she was a child of tender years Her age of 13 years is sufficient to justify the conclusion that she was a child of tender years. Nevertheless having concluded that the child did not understand the nature of an oath the trial magistrate did not go further to examine the child so as to establish whether she was possessed of sufficient intelligence to enable her testify and whether she understood the importance of speaking the truth. This was crucial not only in compliance with Section 19 of the Oaths and Statutory Declarations Act but also given that the child as per the evidence of the Clinical Officer (P.W.4) was said to be mentally retarded. Under ***Section 125 (2)*** of the Evidence Act it was necessary for the court to satisfy itself that she could understand questions put to her and give rational answers before her evidence could be accepted.

Further the trial magistrate having made a finding that the child could not understand the nature of an oath, concluded that she should be affirmed. This was wrong as affirmation is akin to giving evidence on oath except that it is reserved for those who either do not ascribe to any religion or those who by virtue of their religious beliefs cannot swear using the religious Books.

In this case the minor could only give unsworn evidence and even then only after it was established that she was possessed of sufficient intelligence to testify and that she understood the importance of speaking the truth.

The trial magistrate therefore erred in failing to comply with ***Section 19*** of the Oaths and Statutory Declarations Act Cap 15.

Thirdly it is apparent from the record that the Appellant was never given an opportunity to cross examine the minor complainant after she had given evidence. This being a criminal trial the appellant was entitled to cross examine the minor Complainant whether her evidence was given on oath or not, and the trial Magistrate was obliged under ***Section 208 (3)*** of the Criminal Procedure Code to give the Appellant that opportunity.

Notwithstanding the above, I have reconsidered and evaluated the evidence. There was clear evidence from P.W.2 that He found the Appellant person in the process of having sexual intercourse with the minor Complainant. The Appellant was lying on the young girl. He had no trouser and when He stood up his penis was erected, leaving no doubt as to what He was doing. There was therefore no doubt as to the identity of the person.

The evidence of P.W.2 was corroborated in material particular by that of the clinical officer (P.W.4) who examined the minor complainant and confirmed that she had bruises on her vagina as well as white smears which were confirmed to contain sperms, pus cells and bacteria indicative of sexual activity. The Appellant's defence appeared to be an *alibi* that He was at his cousin's home, however the *alibi* cannot not stand in the light of clear evidence of P.W.2 that He found the Appellant in the kitchen of his Hotel sexually assaulting the minor. The allegation of the Appellant that P.W.2. had a grudge against him cannot also stand as the evidence of P.W.2 was consistent with that of P.W.3 and was corroborated by that of P.W.4 none of whom had any connection with the Appellant.

I note that even if the evidence of the minor complainant were to be ignored, there was overwhelming evidence adduced by the other 3 witnesses, which proved beyond reasonable doubt that Appellant did have unlawful carnal knowledge of the minor complainant. I therefore come to the conclusion that no substantial miscarriage of justice was occasioned by the irregular reception of the minor complainant's evidence or the failure to accord the Appellant an opportunity to cross-examine the minor complainant. His conviction was therefore safe.

As for the sentence of 14 years imprisonment, the offence committed by the Appellant is not only serious but now prevalent in our society. The maximum sentence for the offence is life imprisonment. The sentence imposed of 14 years was therefore neither harsh nor excessive and I therefore find no justification to interfere.

The upshot of the above is that I uphold the appellant's conviction and sentence and do therefore dismiss his appeal in its entirety.

Dated, signed and delivered this 25th day of January 2007.

H. M. OKWENGU

JUDGE