**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**
**Criminal Appeal 329 of 2005**

**ANTHONY KIARIE KARIUKI..……..…….……. APPELLANT**

**-AND-**

**REPUBLIC……..…….……...RESPONDENT**

***(An appeal from Judgement of Senior Resident Magistrate Ms. Muchira dated***

***6th October, 2004 in Crim. Case No. 8794 of 2004, at the Kibera Law Courts)***

**JUDGEMENT**

The appellant had been charged with the offence of defilement of a girl under the age of 14 years, contrary to s.145(1) of the Penal Code. The particulars were that on 6th December, 2003 at Kawangware, within Nairobi Province, he unlawfully had carnal knowledge of *J N*, a girl under the age of 14 years. He faced an alternative charge, that on 6th December, 2003 at Kawangware, within Nairobi Province, he unlawfully and indecently assaulted *J N* by touching her private parts.

The complainant, PW1, testified that she was aged 13 years and was a pupil in primary school, Standard Seven, at the time of the incident. On 6th December, 2003, at 8.00p.m. she was walking home from her friend's house, where she had gone to pick up some books. Her said friend was not at home, and after waiting for some time for the friend, she left for home, taking a route which took her through a market. She covered part of the distance running and, while on her way, she met the accused who caught her, gagged her and dragged her into a stall in the market. While holding the complainant with one hand, the appellant brought out a condom from his pocket with the other hand, removed her underwear, slipped on the condom, and went on to have carnal knowledge of the complainant. PW1 testified that this sexual act caused her much pain. When the appellant finished his business, he took the complainant to his brother's house, which was nearby. In the said house, PW1 found a girl who was about her age, a young boy, and the accused's brother. The appellant left the complainant in the said house, where she spent the night. She escaped the following morning and as she was walking home, she met her mother, who was in the company of the complainant's grandmother (PW4). As the complainant did not answer her mother's question on where she had spent the night, her grandmother decided to take her to the Chief's Camp at Kawangware, for the purpose of having he incident inquired into. After the complainant talked to the Police officers at the Chief's Camp, they asked her to take them to the house where she had spent the night. She did; and the appellant was found in that house, asleep. The appellant was then arrested.

PW1 testified that she had identified the appellant when he defiled her with the aid of electric lights which were switched on, at the next market stall. And in the house where the appellant had taken her, there had been a candle burning, and so she was able to see the appellant's face.

PW1 was treated at Nairobi Women's Hospital, and later issued with a P3 form showing the nature of the

injuries she sustained.

PW2, the mother of PW1 testified that on 6th December, 2003 her daughter (PW1) had not spent the night at home. On the following day, PW2 and her aunt began a search for PW1. They met PW1 at the market, but she would not speak about the previous night. After the two took PW1 to the Chief's Camp, she opened up and told of her ordeal the previous evening. The two, together with the appellant, and Police officers, then went to the appellant's house, and there, PW1 pointed out the man who had defiled her; and the appellant was thereupon arrested.

PW3, *Dr. Zephania Kamau* testified that on 10th December, 2003 (four days after the alleged defilement), he had examined PW1 at Nairobi Women's Hospital, and a vaginal swab had shown no spermatozoa. PW3 saw no hymen, though no recent tear of hymen was noticeable. He produced the P3 form as an exhibit on the medical examination which he had conducted on PW1. PW3 could not say with certainty if PW1 had been defiled.

PW4, who is PW1's grandmother, testified that PW1 had left her house at 6.00 p.m., on 6th December, 2003 to return to her mother's house. She did not arrive at her mother's house, and on the following day PW4 went to PW2's mother, in connection with this matter. As PW2 and PW4 searched for PW1 in the neighbourhood, they met her at the market, and they took her to the Chief's Camp as part of their investigation of the previous evening's incident. PW1 took them to the house where she had spent the night, and she pointed out the appellant as the man who had defiled her. PW4 testified that she did a physical check of PW1's body and found her vaginal area to be swollen.

The appellant made an unsworn statement in defence. He said that on the day he was arrested, he was working at a certain Kwa-Ngotho Hotel, when two men and a lady entered; he served them with food, and after they paid for their food they complained that they had been overcharged, dragged the appellant outside, and announced that they were Police officers; and the appellant was then arrested, and the defilement charge brought against him. He denied the charge.

The learned Magistrate defined the issue in this case: "to determine…whether the [appellant] unlawfully had carnal knowledge of PW1."

The critical portion of the judgement, in the determination of the question, was as follows:

"*PW1 told the Court vividly how she was walking home and the [appellant] accosted her and [defiled] her. PW1 consistently described how the accused [dragged] her –[into] the stall and without her consent, had sexual intercourse with her. The place where the [appellant] attacked her, PW1 said, was well lit with security electric bulbs. She said she clearly identified the accused. PW1 said the accused then took her to his brother's house and she slept there. There was candle light in the house and she [properly] identified the accused. PW1 was able to know her bearings so that the following day after she escaped, she led the Police back to the house and pointed out [the appellant] to the Police. PW2 and PW4 tell a similar story of how PW1 did not spend the night in…[the house of] the mother or the grandmother…I find that these two prosecution witnesses' evidence corroborates PW1's evidence, rendering the same weighty [enough]…*"

The learned Magistrate expressed his belief that the testimony given by PW1, PW2 and PW4 was not at all part of a frame-up on the appellant. He noted that the appellant, in his cross-examination, and in his defence, had not rebutted the complainant's allegations, and had given no alibi in respect of the material night. The Court formed the view that the prosecution case had been proved beyond reasonable doubt. The accused was convicted of the offence as charged, and sentenced to a six-year term of imprisonment.

The appellant had the following grounds of appeal:

(1) that the learned Magistrate erred in law and fact by attaching undue weight to the complainant's evidence;

(2) that the complainant had not known her defiler prior to the day the offence was committed, and so her identification of the appellant as the suspect was only dock identification;

(3) that scientific proof had not been undertaken, confirming the appellant as the man who had committed the offence;

(4) that the complainant's evidence was uncorroborated;

(5) that the trial Magistrate failed to consider the appellant's defence;

(6) that the sentence imposed was harsh and excessive, and contrary to the weight of the evidence adduced.

In his oral presentation, the appellant said he had suffered much on account of his imprisonment, and his specific prayer was this: "I pray for reduction of sentence."

Learned counsel *Ms. Gateru* opposed the appeal, and urged that the sentence imposed against the appellant, of six years' imprisonment, was not harsh or excessive – as under the law then in force, a sentence could have been imposed of as much as life imprisonment. Learned counsel urged that the trial Magistrate, in meting out sentence, had taken into account all the relevant circumstances including the mitigation address, as well as the fact that the appellant was a first offender.

Although in the petition of appeal the appellant disputes the conviction, on basic elements such as identification, in Court he gave the clear impression that all he wanted was to have the sentence of imprisonment shortened.

This Court, however, in the discharge of its obligation as a first appellate Court, to review all the evidence adduced in the trial Court, has come to the conclusion that the appellant had been properly identified as the offender, and had been tried and found guilty on overwhelming evidence, so that the verdict arrived at by the learned trial Magistrate must be upheld. Firstly, the complainant had had a full opportunity, twice in the night – and not for fleeting moments – to set her eyes upon the appellant, in well-lit conditions. Secondly, the very act of defiling the complainant, a young girl, had brought her face-to-face, as she continuously experienced physical pain, with her assaulter. Thirdly, the complainant had been so visually alert she was able to perceive all the preparatory handiwork the appellant performed before invading her person. All this was first-hand visual identification which admitted of no fault, such as the appellant has alleged in his petition of appeal. But in addition, the complainant very well remembered the house to which she had been taken in the night after being sexually assaulted; she was able to take the Police officers as well as her mother and relatives to that house on the following day; and on that day the appellant was found sleeping in the said house and was arrested and then charged in Court. This chain of events amounts, in my judgement, to a substantial amount of corroboration for the complainant's evidence of identification; indeed, at the time of arresting the appellant when he was pointed out by the complainant, it was no longer a process of identification, but was that of *recognition.*

I hold that the appellant was properly identified as the offender who, on the night of 6th December, 2003 defiled the complainant. He was properly convicted, and I now uphold that conviction. I am not in agreement that a sentence of six years' imprisonment, as was awarded by the trial Court, was in any way harsh or excessive; indeed the appellant should be thankful the learned Magistrate had exercised her discretion as she did. I confirm that sentence, and dismiss this appeal.

*Orders accordingly.*

**DATED and DELIVERED at Nairobi this 4th day of June, 2007.**

**J.B. OJWANG**

**JUDGE**

Coram:  Ojwang, J

Court Clerk:  Tabitha Wanjiku

For the Respondent:  Ms. Gateru

Appellant in person