REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 122 of 2006

BERNARD ADAWA MUNIARO……..…….…….. APPELLANT

-AND-

REPUBLIC……..……...RESPONDENT

(An appeal from the Judgement of Principal Magistrate Mrs. M.W. Murage dated 2nd

March, 2006 in Criminal Case No. 987 of 2005 at the Kikuyu Law Courts)

JUDGEMENT

The main charge brought against the appellant, *Bernard Adawa Muniaro,* was defilement of a girl under 16 years of age, contrary to s.145(1) of the Penal Code (Cap.63, Laws of Kenya

e particulars were that the appellant, on *29th of July, 2005* at Kikuyu Township, in Kiambu District within Central Province, had carnal knowledge of "**[*Particulars withheld pursuant to section 76(5) of the Children Act, 2001]".***, a girl under the age of 16 years.

Alternatively the appellant was charged with the offence of indecent assault on a female contrary to s.144(1) of the Penal Code (Cap.63). And the particulars were that the appellant, on 29th July, 2005 at Kikuyu Township in Kiambu District, within Central Province, unlawfully and indecently assaulted a girl under 16 years of age, *B M*, by touching her private parts.

PW1, whose name is recorded as *B M*, testified that she was 15 years old, lived with her brother at ***[particulars withheld]***, and did not attend school. She took a bus to Kikuyu, on 29th July, 2005, for the purpose of visiting an aunt. After she alighted at the bus stage, PW1 inquired around if anyone would know where the aunt lived; and it is the appellant herein who came forward, said he knew the said aunt well, and offered to take PW1 to the aunt. The appellant walked around with PW1 for some time, up to a place called Zambezi, and then told her that he was unable to find her aunt. The time was about 10.00 a.m. PW1 asked the appellant to take her back to the bus stage at Kikuyu, where the two had come from; but the appellant responded that he wanted to see his brother first, and sought to enter a house which was locked. It was raining at the time, and the two entered the said house after *somebody came along and opened its door*. PW1 and the appellant stayed in the said house until *12.00 noon*, when the person who had opened the door returned, looked in, and left. At this point, the appellant herein closed the door, and was inside the house with PW1. He then pushed PW1 to the bed, and removed her underpants and petticoat, and had sexual intercourse with PW1. She thus states her experience during that encounter: "He then raped me. I could not scream. I had not had sex before. I bled. I started itching." Soon thereafter *the man who had opened the door to the house returned.* PW1 left with the appellant herein,

and on the way, met an old man who had been at the Kikuyu bus stage. It is that old man who had requested the appellant to take PW1 to her aunt. The appellant disappeared when the two met the old man. While PW1 was in the company of the old man, the old man's wife came along, and took PW1 to her home, where PW1 stayed for one week. PW1 did not tell the old man's family what had happened to her on 29th July, 2005.

Apparently, the appellant had not vanished altogether; he seemed to have some relationship with the said old man, for the old man asked the appellant to find a job for PW1. And the appellant returned to the old man's home, and took PW1, saying he had found somebody who would employ PW1. And indeed, the appellant took PW1 to a place where she got a job as a housegirl. But PW1's working arrangements fell through, and the said old man took her back, to give her accommodation. In the course of time PW1's aunt was found, and PW1 went to her. At this stage PW1 had wounds in her private parts, and was experiencing discharges, something which she told her aunt about. PW1's aunt acted on the information she received from the complainant, by taking PW1 to a clinic at Kinoo on 14th August, 2005 – i.e. 16 days since the recorded sexual assault had taken place. This matter was then reported to the Police, who issued PW1 with a P3 form for a medical report on her status.

On cross-examination by the appellant himself, PW1 said [referring to the appellant] as follows:

"You said you know my aunt and that she sells potatoes. We did not find her. You said that was your brother's house. You came with somebody who had a key. He opened and left. It was raining. A lady told me to enter the house. I did not scream. I was lost. I did not know what else you would do to me."

PW2, ***Albert Wekesa Waswa***, testified that he lives in the neighbourhood of the Steel Rolling Mills. He was familiar with the appellant, whom he used to see at his place of work. PW2 went out of his place of work at 10.00 a.m. on 29th July, 2005 (the material date when the offence herein took place) and, at the gate, he met the appellant who was asking for PW2's fellow-employee, by name ***Alex*** (PW5). ***Alex***, at the time, had just began his work-shift, so apparently he could not readily be accessed by an outsider (like the appellant herein). The appellant told PW2 that he wanted to talk to ***Alex;*** and he asked PW2 to tell Alex that he (the appellant) had brought Alex's television. Alex, however, could not leave his place of work; and so he handed over the keys to his house, which PW2 took and escorted PW2 to that house. But PW2 did not see the said television, and he asked where it was. As there was no response to this question, PW2 called a lady to keep watch on the appellant; and in the meantime, PW2 saw a girl who she did not know (the complainant herein, PW1), outside Alex's house. PW2 returned to his place of work, and reported the situation to Alex, telling him also that the appellant wanted to talk to him. So Alex went to his house, to see to the matter. Subsequently PW2 was called by the Police to record a statement.

On cross-examination by the appellant, PW2 testified that when he took the appellant to Alex's house, he had opened, and entered the house, waiting for the appellant to bring in the television which the appellant had said he was bringing to ***Alex***; but that PW2 had then realised that there was no television for ***Alex,*** after all! PW2 had left the appellant inside the house, and he had reported the same to Alex at the place of work.

PW3, ***James Njagi*** (apparently the "old man" in PW1's account) testified that he lives at Gitaru, near Kikuyu, and works as a security guard. He had stopped at the Kikuyu/Gitaru bus stage and found the complainant sitting there, and the complainant told him she had lost her way and was looking for her aunt. PW3 asked the complainant to keep waiting, and to be patient, as she would probably find her aunt later; and he left and later took his wife to hospital. At about 3.00 p.m. on the same day, 29th July, 2005 he met the complainant, in the company of the appellant herein. The complainant said she had not found her aunt yet, and the appellant was helping her to trace the aunt. When PW3 learned that the complainant had no accommodation, he asked his wife to take in the girl. But the appellant said he wanted to take the complainant to sleep in his mother's place. PW3's wife took in the complainant, but she disappeared six days later, on 4th August, 2005, only to return on 6th August, 2005. Her explanation was that the appellant had taken her to some place, to take up employment. That day the complainant remained in the company of PW3's wife, went to Church with her, and met people well known to her. On 8th August,

2005 a lady came who said she knew the complainant's aunt; and PW3 and his family and the complainant went over to the Steel Rolling Mills and met the complainant's aunt. On 9th August, 2005 the complainant's aunt told PW3 that the complainant was sick, without giving particulars of the sickness; and the Police thereafter took PW3's statement.

On cross-examination by the appellant, PW3 said that on the material day, the appellant had found the complainant at the bus stage at Kikuyu. PW3 had left the said bus stage after seeing the appellant and telling him that the complainant was tracing a relative who she had been unable to find. PW3 also testified that the appellant had then taken charge of the complainant, and taken her to a lady who turned out not to be the aunt she was seeking. The appellant had offered to get employment for the complainant at his own mother's place. For some time, PW3 testified, the complainant would sleep at the appellant's mother's place, but then come to PW3's home for breakfast.

PW4, ***Dr. G.K. Mwaura*** testified that on 20th August, 2005 at the request of officers of the Kikuyu Police Station, he examined the complainant. PW4 found her to have been sexually assaulted; her genitals were painful and tender, and she could not walk properly; she had a fresh tear of hymen; she had a foul-smelling discharge; laboratory tests showed her to have a venereal disease infection; the features were consistent with a case of sexual assault. The witness produced the P3 form on which the findings were recorded.

On cross-examination, PW4 testified that the complainant had been treated at Kinoo clinic on 14th August, 2005 for a sexually-transmitted disease, and she had been found to have private-part wounds, with a tear of hymen which was painful and tender.

PW5, ***Alex Shikuku Wanyama*** testified that he worked at the Steel Mill. He was on duty on 29th July, 2005 at 10.00 a.m., when ***Waswa*** (PW2) asked him if he knew the appellant herein; and he said "Yes." ***Waswa*** told him that ***Bernard*** (appellant) had brought him a television; and so he gave ***Waswa*** the key to his house – to be used in putting in the television. Later on, ***Waswa*** went and told ***Alex*** (PW5) that the appellant had a girl in his company. At that moment ***Alex*** nipped into his house, where he found the appellant with a girl, the complainant. ***Alex*** did not find the television, and he got no answer when he asked for it; so he asked the appellant to leave, with the girl in the appellant's company. ***Alex's*** house key had been given out at 10.00 a.m.; and he went to check if the television had truly been put in at 12.00 noon. The television was to be brought as an element in debt-repayment to PW5, by the appellant. PW5 did not know the girl in the appellant's company.

On cross-examination by the appellant, PW5 testified that he had found the appellant sitting in his house, with the complainant. When PW5 asked the appellant about the television, the appellant burst out in mirthless laughter, and, annoyed, PW5 asked him to leave. A neighbour, at the time, had asked who the girl in the appellant's company was, and the appellant's answer was: "she is my customer."

PW6, Police Force No. 60106 ***Police Constable Isaac Ngugi*** testified that he was on duty on 14th August, 2006 when the complainant reported that the appellant herein had taken her upto the Steel Rolling Mills and there, defiled her. The accused was later arrested and charged, on the basis that the offence was committed during a dupery ruse in which a strayed girl in search of relatives was sexually assaulted.

On cross-examination, PW6 testified that the appellant, after being arrested, was not taken to hospital for any medical tests – as there was no need.

On the testimonies of the six witnesses, the trial Court found that there was a case to answer, whereupon the appellant elected to give unsworn evidence as DW1.

The appellant testified that he works at Gitaru as a watchman; that his neighbours had told him the complainant had lost her way in town, and he should now take her to her aunt's place; that he failed to find the complainant's aunt; that his neighbours asked him to give the complainant accommodation; that the complainant stayed with him (the appellant) for two days; that on the third day the complainant

escaped; that he later learned that the complainant was sick and was alleging that he had defiled her.

DW2, ***Emily Odawa***, testified that she was a housewife living at Gitaru. It was her testimony that on 29.7.2005, at 8.00 a.m., the complainant was at the Kikuyu/Gitaru bus stage, searching for her aunt, when she (DW2) was asked to give the complainant accommodation, DW2 refused, and so the complainant slept in DW2's mother-in-law's house; but after two days the complainant slept in DW2's place, where the complainant was, when ***Alex*** (PW5) came looking for her (the complainant). ***Alex*** spoke to the complainant and left; and the complainant herself disappeared from DW2's house the following day. Later, DW2 learned that the complainant was sick.

On cross-examination, DW2 said the appellant herein is her husband. She did not know whether the appellant had met the complainant on the material day; and on that day the appellant had come home at about 12.00 noon.

DW3, ***Josephine Nekesa*** testified that she came from her school, Rungiri Primary School, in the evening of the material day, 29th July, 2005 and was shown the complainant, as a girl who was lost and needed accommodation. The complainant stayed overnight with DW3, and then left. DW3 testified that she had no knowledge where the complainant was, during the earlier hours of the material day.

The learned Magistrate found as a fact that the appellant had obtained the keys to ***Alex's*** (PW5) house by falsely pretending that he had a television for ***Alex,*** and he wanted to put it in the house while ***Alex*** was himself away at work. She found the testimonies of PW2 and PW5 to corroborate the complainant's evidence, that the appellant had taken the complainant to PW5's house and he was for some time (between 10.00 a.m. and 12.00 noon on the material day) alone with the complainant in that house. Of this fact, the learned Magistrate held, the appellant herein had said nothing. The learned Magistrate accepted PW4's testimony as confirming the complainant's evidence: that she had been defiled; she had also been infected with a venereal disease. The Court held that the testimonies of PW2 and PW5 corroborated the complainant's evidence that the appellant had taken her to PW5's house where she was defiled. The learned Magistrate held that the unsworn defence offered by the appellant, taken together with the testimonies of DW2 and DW3, by no means weakened the prosecution case especially in relation to what had transpired at PW5's house on the material day, at the material time. The verdict was arrived at, as follows: "***Having considered the evidence in its entirety, I find that the prosecution has proved the case of defilement against the accused. I find him guilty and convict him accordingly***."

For the purpose of this appeal, the appellant appointed advocates, M/s. Kiarie Njuguna & Co. Advocates, to prosecute his cause.

Mr. Njuguna submitted before this Court that the conviction of the appellant had been in error, because there were contradictions in the testimonies of prosecution witnesses: that the testimony of PW3 was inconsistent with other accounts on how the complainant met the appellant, and how the appellant ended up escorting the complainant to look for her aunt. Learned counsel doubted the complainant's veracity on the place where she had been staying following the alleged defilement attack on her, since PW3, contrary to her testimony, had testified that it was only on 7th August, 2005 that the complainant spent the night at his home.

Learned counsel contended that no defilement could have taken place in PW5's house, on the material date and time, because PW5 had not testified that when he saw the appellant and the complainant in that house at 12.00 noon there were any signs of distress on the complainant's face. From the evidence, however, it is clear that PW5 was utterly fed up with the appellant herein, when he returned to his house at 12.00 noon and found that the story about a debt-repayment television being brought to his house was but a ruse, and that the reality of the moment was that the appellant was ensconced in his house with a girl by his side, a girl the appellant was introducing as his customer; PW5 ordered them to leave his house. I think in these circumstances, PW5 could not be expected to preoccupy himself with possible signs of distress on the face of a girl he had never-before met. I did not, therefore, regard the point taken by ***Mr. Njuguna*** in this regard as a vital one signalling a weak prosecution case.

Learned counsel also urged that no defilement had taken place on the material date; because the first person the complainant saw after the alleged defilement was PW5, but the complainant didn't raise the matter with him. Again I would not regard this as a valid point, in the light of the circumstances described in the foregoing paragraph. It is clear that PW5 essentially regarded the girl (the complainant) as an intruder; and she and the appellant were asked to leave, without any ado.

Mr. Njuguna urges too that when the complainant, in the company of the appellant, met PW3 along the road at 3.00 p.m. on the material day, she ought to have straightaway extricated herself from the appellant, and lodged with PW3 complaints about a defilement which is said to have taken place several hours earlier. It is not evident to me that what learned counsel proposes is what human nature would have dictated; and therefore the scenario being suggested would not, I think, go to weaken the prosecution case.

Of the same class of submissions, is the contention that the complainant told lies in Court, because, how could she fail to report to *somebody* about the alleged defilement, for an entire period of two weeks? This contention, I think, is not necessarily valid, in view of the fact that this very delicate, personal complaint touching on a lady's privacy, was only reported to *her aunt*, and not to anyone else. It was only on the 14th of August, 2005 when she had found her aunt, that the complainant felt able to report the sexual assault; there is, besides, the evidence that she was, at that stage, in real pain occasioned by a festering onset of venereal disease. It may no longer have been possible for the complainant to suppress her agony. I am guided by these considerations as I reject the contention of learned counsel that: "The conduct of the complainant was not consistent with the allegation that the appellant had attacked her.."

Learned counsel also contested the testimony of PW4, ***Dr. G.K. Mwaura.*** He disputes PW4's typification of the vaginal wounds found on the complainant as "fresh tear", on the ground that PW4 examined the complainant only some three weeks after the material date, and so as at that date, the wounds could not be fresh.

The word "fresh" is a general term of the English language, and the meaning it would connote, as employed by PW4, I think, is the following (taken from ***Concise Oxford English Dictionary***, 11th ed. Revised (2006), at p. 567): "***(of food) recently made or obtained; not tinned, frozen, or otherwise preserved***." I do not understand PW4 to have been suggesting that the wounds and injuries he found on the complainant's private parts had only just been made; they might have been made some days, or even some weeks, prior to the doctor's examination.

Mr. Njuguna urged that the trial Court had paid scant regard to the defence testimonies; and if the same had been taken into account, alongside the weaknesses in the prosecution case which he had canvassed, then the learned Magistrate would have found that "the conviction is in all the circumstances unsafe." Counsel argued as well that since there was no independent testimony as to the age of the complainant, the sentence imposed, on the basis that this was a case of defilement, was manifestly excessive.

Learned counsel ***Ms. Gateru*** contested the appeal, and made submissions in support of both conviction and sentence. She noted that the testimony of PW1 was *detailed* on *how* the act of defilement had been committed, and was *clear* on the identity of the culprit. Although neither PW2 nor PW5 had been present at the time of the defilement, their evidence served to *corroborate* that of the complainant. The complainant was in the company of the appellant on the day the offence was committed; the offence took place in the house of PW5; PW5 confirmed he gave his house keys to PW2 to take to the appellant who was to put a television in that house; PW5 found the appellant and the complainant in his house; the complainant had a *reason* for being, with the complainant, in PW5's house which was different from the one given to PW5. Counsel urged: "The circumstantial evidence of the appellant being found with the complainant in the house where [the complainant] said she was defiled, offers some corroboration to the complainant's claim that she was defiled by the appellant." Learned counsel submitted that the complainant's evidence of defilement was corroborated by the doctor's (PW4's) evidence. The doctor did confirm that "features found [on 14th August, 2005] on the complainant during examination were consistent with sexual assault."

As regards possible contradictions in the prosecution evidence, learned counsel submitted that the evidence is overwhelmingly consistent and that any such contradictions as may be found, are minor and should not be taken to affect the case against the appellant. ***Ms. Gateru*** submitted that the appellant's unsworn statement had been duly considered by the trial Magistrate, but found to have no merit.

Upon careful consideration of all the evidence, I have found myself in agreement with the analysis thereof, and the findings made by the learned Magistrate.

There is no doubt at all that the complainant, whose age at the time of the incident, the record shows, was 15 years, lost her way in the Kikuyu-Gitaru area, as she tried to find the home of her aunt. It was broad daylight, and no difficulty of identification of a person ever arose, and none has been claimed to have arisen. The first person to meet and to talk to the complainant, on the material day, in the morning, was PW3; and PW3 is the one who told the appellant that the complainant had difficulties in finding her aunt. It is at that moment that the appellant, fully knowing of the difficulty facing the complainant, took charge of her, before the very eyes of PW3; and the appellant went away with the complainant on the avowal that he was taking the complainant to her aunt. So it must be quite clear at this point that, the appellant had seen an opportunity to take charge of the complainant, and he had by his conduct, indeed taken that opportunity; it is equally clear that the appellant did know at the time that, in truth, he knew not the place where the complainant's aunt was to be found; so, when he went away with the complainant, he could not have had the intention of taking the complainant to her aunt. So, what purpose did the appellant have when he led the complainant away? That purpose becomes evident when the happenings at the residence of PW5 are considered. Firstly the appellant took the complainant to an unknown place, and then told her that, before returning her to the but stage where he had found her, he would *look into the house of his "brother"*; that house was the house of *PW5;* PW5 was not his brother; he used a ruse to obtain the key to PW5's house; he tricked PW5 and got PW5's house opened for him; he entered PW5's house with the complainant; and for all these, there is lots of evidence which is well corroborated – especially from PW1, PW2 and PW5. Once he locked himself with the complainant, in PW5's house, the question is *what did he do*? The evidence that the appellant locked himself with the complainant in PW5's house, at about 10.00 a.m. on the material date, is entirely unassailable, and it was not at all shaken by the defence evidence.

From that point, the crucial testimony is that of the c*omplainant* though corroborated by the doctor's (PW4's) evidence. She says the appellant peeled off her clothes, and had sexual intercourse with her, an experience that was very painful. She says she ended up with bleeding in her private parts, and felt a burning kind of sensation.

Although this evidence emanates essentially from *one witnes*s, does the Court *consider it to be true*? The learned Magistrate, exercising all due caution, found the complainant's testimony to be true. This Court agrees with that position. All the *opportunities*, *preparations and ruses* deployed by the appellant prior to the alleged act of defilement, in the very nature of things, could not have been for no purpose; the purpose, I find and hold, was to achieve the sex act already described. The fact that the sex act did take place, is fully corroborated by the doctor's testimony.

It was contended for the appellant that the complainant has not been truthful, because she had not promptly complained about the sexual attack on her. But, as I have determined in the course of this judgment, the prevailing conditions are unlikely to have favoured immediate protestations of having been defiled; and so the complainant reserved this to the time when she had traced her aunt, and was now under the care and charge of her aunt.

Interestingly, the evidence adduced by defence witnesses has not at all cast doubts that during the material hours of the material date, it was not known if the appellant could have been in the company of the complainant; and there is clear evidence that it is precisely *during those material hours*, that the complainant was defiled.

The evidence as a whole in this case, therefore, proves beyond reasonable doubt that the appellant, on the material date, *defiled* the complainant. Thus the trial Court had quite properly found the appellant herein

guilty as charged. I will, therefore, dismiss the appeal against conviction.

The applicable law, at the time the offence was committed, is s.145(1) of the Penal Code (Cap.63) which thus provided:

"***Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life."***

The learned Magistrate had taken into account the fact that the appellant was a *first offender*, and had heard the appellant's *mitigation statement*, and on that basis she had imposed a sentence of 20 years' imprisonment. As a matter of law, that is a quite proper sentence for the offence which had been proved to have been committed. Such a sentence, moreover, expresses the trial Court's exercise of judicial discretion. Discretion once exercised in such a manner, is in principle, to be sustained by this Court. This Court can only intervene where the trial Court has exercised a discretion in sentencing, if it can be shown that such exercise of discretion *overlooked a legal principle*, or a *recognised judicial practice*. Counsel for the appellant did not, with respect, place before this Court any considerations of principle which would show the trial Court's sentence to have been mistaken.

Consequently, I hereby dismiss the appellant's appeal, uphold the conviction, and affirm the sentence meted out by the learned Principal Magistrate.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 30th day of July, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: G. Ndung'u

For the Respondent: Mr. Njuguna

For the Respondent: Ms. Gateru