



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**Criminal Appeal 455 Of 2003**

**SIMON GATUGI KARANJA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant Simon, Gatugi Karanja was charged with the offence of **defilement of a girl contrary to Section 145(1) of the Penal Code**. The particulars of the offence were that on diverse dates between the 1<sup>st</sup> of August 2002 and the 21<sup>st</sup> of August 2002 at [*particulars withheld*] Nakuru, the appellant unlawfully had carnal knowledge of GW a girl under the age of fourteen years (6 years). He was alternatively charged with **indecent assault of a female contrary to Section 144(1) of Penal Code**. The particulars of the offence were that between the same dates at the same area, the appellant unlawfully and indecently assaulted GW by touching her private parts. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge and after a full trial he found guilty as charged on the main charge and duly convicted. He was sentenced to serve fourteen years imprisonment. Being aggrieved by his conviction and sentence, the appellant filed appeal to this court.

In his petition of appeal, the appellant raises several grounds of appeal. He faults the trial magistrate for finding him guilty of the charge on insufficient prosecution evidence. He was aggrieved that the trial magistrate had convicted him on the evidence of child which evidence was not corroborated. He was further aggrieved that he was not allowed to cross-examine the complainant to test the veracity of her evidence. He was aggrieved that he was convicted by the trial magistrate against the weight of evidence. Finally he stated that the sentence that was meted out on him was excessive and harsh in the circumstances. He urged the court to allow his appeal.

At the hearing of appeal, the appellant with the leave of the court presented written submissions in support of his appeal. He urged the court to consider the said submissions and allow his appeal. He submitted that the prosecution had not adduced evidence to connect him to the infection of the complainant with a venereal disease since he was not examined by a doctor on being arrested. Mr Koech for the State made oral submissions urging this court to uphold the conviction and the sentence imposed upon the appellant by the trial magistrate. He submitted that there were no grounds to enable this court interfere with the decision reached by the trial magistrate. He urged this court to dismiss the appeal. I will consider the arguments made at length after briefly setting out the facts of this case.

PW1 GW, a girl aged six years at the time of the incident, testified that at the material time she lived with the appellant who is her father. It appears from the evidence that the appellant had separated from the mother of PW1 (*the complainant*). The complainant and the appellant lived together alone in her house

within the [*particulars withheld*] Estate. The complainant testified that the appellant on several occasions had sexual intercourse with her until it reached a point where she could not take it no more. When the appellant had sexual intercourse with her and she felt pain. She would scream but would be beaten by the appellant and told to keep quiet.

PW2 Nahashon Njoroge Mwangi, a businessman at [*particulars withheld*] and a neighbour to the appellant testified that the complainant told him that the appellant used to have sexual intercourse with her. At first, PW2 did not believe what the complainant told him. However three days later the complainant again went to him and told him the same story. This time PW2 took action because the complainant had refused to go back to the appellant's house. PW2 reported the incident to the Area Chief. The Area Chief took action and reported the incident to the police and thereafter the complainant was taken to Nakuru Provincial General hospital where Dr Bargoret examined her and indeed confirmed that the complainant had been defiled. Other than being defiled, the complainant had been infected with a venereal disease known as gonorrhoea. The P3 form duly filled by Dr Bargoret was produced in evidence by PW6 Dr Vitalis Kogutu a colleague of the said Dr Bargoret.

PW3 Margaret Njambi a neighbour of the appellant at [*particulars withheld*] Estate testified that the complainant told her that the appellant used to have sexual intercourse with her. PW3 did not believe the story, until when the complainant told her that she used to feel pain when she passed urine. PW4 Administration Police Constable Harrison Wanga arrested the appellant and took him to the police where he was detained and later charged. PW7 PC Margaret Kariuki received the report of the defilement of the complainant investigated the case and then came to the conclusion that indeed it was the appellant who was the perpetrator of the crime. She charged the appellant with the offence of defilement of the complainant. PW5 also produced the report prepared by the Government Analyst of the blood samples which were taken from the complainant's blood stained dress. When the appellant was put on his defence he denied that he had defiled the complainant. He testified that he was arrested by the Area Chief for having 'disciplined' the complainant. He denied that he could have defiled the complainant his daughter.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced by the witnesses before the trial magistrate's court so as to arrive at an independent decision whether or not to uphold the conviction of the appellant. In reaching its determination this court is mandated to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any finding as to the demeanour of witnesses (*See Njoroge –vs- Republic 1987 KLR 19*). In the instant appeal, the issue for determination by this court is whether the prosecution adduced evidence that proved the charge against the appellant to the required standard of beyond reasonable doubt.

I have considered the evidence that was adduced before the trial magistrate's court including the appellant's defence. I have also considered the written submissions which were presented to me by the appellant and the oral submissions made by Mr Koech on behalf of the State. The evidence against the appellant essentially was that of a child of minor and tender years. Her evidence required to be corroborated. In this case the complainant gave lucid evidence which in view of this court appears to be the truth. The complainant lived alone in the same house with the appellant. No one else lived with them. PW2 and PW3 testified how the complainant told them that the appellant was having sexual intercourse with her. The two witnesses did not believe the complainant at first. But later the complainant after being repeatedly defiled by the appellant, refused to go home and insisted on staying with PW2. That is when PW2 believed what he had been told by the complainant. It is then that he took action and reported the matter to the Area Chief.

Upon being examined by a Doctor, after the complainant had been escorted to the Nakuru Provincial General Hospital, it was established that indeed the complainant had been defiled. Infact she had been infected with gonorrhoea. The issue for determination by this court is whether this evidence sufficiently connects the appellant to the offence. In my opinion since no one else lived with the complainant apart from the appellant, no one else could have had an opportunity of defiling the complainant. The complainant appears to be an intelligent girl. She told her two neighbours (*PW2 and PW3*) the ordeal that she had undergone in the hands of the appellant. There is no reason why the complainant could implicate the appellant who is her father. The complainant did not have any one else to complain to since her

mother was not living with them.

Upon re-evaluating the evidence adduced by the prosecution witnesses, I do hold that the prosecution proved to the required standard of beyond reasonable doubt that it is only the appellant who could have defiled the complainant and no one else. The fact that the appellant was not taken to hospital to establish if he suffered from gonorrhoea does not dent the otherwise strong prosecution evidence against him. I have considered the defence offered by the appellant and I find that it gives no explanation to the otherwise watertight prosecution case against him. I have considered the written submissions made by the appellant. The said submissions do not raise any issues that would make this court reach a decision contrary to that of the trial magistrate. The upshot of the above is that I do find the appeal herein to lack merit and the same is dismissed.

On sentence, I see no reason to interfere with the exercise of discretion by the trial magistrate in sentencing the appellant to serve fourteen (14) years imprisonment for the offence. Although the appellant would like this court to consider his mitigation, the fact that the appellant abused the trust placed on him by the society to take care and guide his young and vulnerable daughter, makes this court reluctant to review the sentence that was meted on the appellant by the trial magistrate.

In the circumstances of this case the sentence fits the crime. I will not interfere with it. I therefore dismiss the appeal on sentence. The sum total of the judgment of this court is that the appeal filed by the appellant lacking in merit, is hereby dismissed in its entirety. The conviction of the appellant by the trial magistrate is hereby confirmed. The sentence imposed is likewise confirmed.

It is so ordered.

**DATED at NAKURU this 3<sup>rd</sup> day of February 2006.**

**L. KIMARU**

**JUDGE**