REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 128 of 2004

PHILLIP KIPKOECH CHEPKWONY…….....……APPELLANT

VERSUS

REPUBLIC…….....……..…….RESPONDENT

JUDGMENT

The appellant, Phillip Kipkoech Chepkwony was charged with **defilement of a girl contrary to Section 145(1)** of the **Penal Code**. The particulars of the offence were that on the 9th of March 2004 at *[particulars withheld pursuant to section 76(5) of the Children Act, 2001]*, the appellant unlawfully had carnal knowledge of *[particulars withheld pursuant to section 76(5) of the Children Act, 2001]* a girl under the age of sixteen years. The appellant was alternatively charged with **indecently assaulting the complainant contrary to Section 144(1) of the Penal Code**. The particulars of the offence were that on the same day and in the same place, the appellant unlawfully and indecently assaulted the complainant by touching her private parts. The appellant pleaded not guilty to the charges and after a full trial was convicted on the main charge of rape. He was sentenced to serve a life imprisonment. He was aggrieved by his conviction and sentence and has appealed to this court.

The appellant has raised three grounds of appeal challenging his conviction by the trial magistrate. He was aggrieved that he had been convicted based on the prosecution evidence which had not establish his guilt to the required standard of proof. He was aggrieved that the trial magistrate had convicted him whereas no evidence was adduced by the prosecution that he had violently or forcefully had sexual intercourse with the complainant. In this regard, the appellant was aggrieved that no exhibits of torn pants with blood stains were produced in evidence to establish the allegation by the prosecution that the complainant had bled after the sexual intercourse. The appellant was aggrieved that the trial magistrate had convicted him even after he had stated in his defence that the complainant was his girlfriend and had on the material day consented to having sex with him.

At the hearing of the appeal, the appellant submitted that the complainant was his girlfriend. On the material day they had made arrangements to meet and have sex. He met the complainant with her two friends while they were going to school. He submitted that they went into the forest and had sex. He submitted that he gave the complainant the sum of Kshs 100/= which she had requested to purchase soap and body oil. He submitted that while they were having sex, they were found by the forest guards who arrested them. According to him, the complainant being shy and feeling ashamed, disowned him and failed to tell the forest guards that they had been having consensual sex. He submitted that the

prosecution had not adduced any evidence to establish that he had used force or violence when he had sex with the complainant.

He took issue with the allegation by the prosecution that he had been tested and found to be HIV positive and therefore had infected the complainant with the AIDS virus during the said sexual intercourse. He submitted that no evidence was adduced by the prosecution to establish that indeed he had infected the complainant with the AIDS virus. He reiterated that the complainant was his girlfriend and stated further that the trial magistrate had failed to consider his evidence to the said effect. He submitted that the sentence of life imprisonment which was imposed on him was harsh in the circumstances and should be reviewed by this court. He further submitted that the police prosecutor who was in court when plea was taken was incompetent and therefore the entire trial before the subordinate court should be declared a nullity. He urged the court to allow the appeal.

Mr Gumo for the State submitted that the conviction and the sentence imposed on the appellant by the trial magistrate's court should be upheld. He submitted that all the material facts were uncontroverted. The appellant had admitted that he was caught in the act. It was immaterial that the complainant had given consent because she was below the statutory age of sixteen years. He submitted that the fact that the complainant and the appellant were lovers was immaterial. He submitted that the prosecution had proved that the complainant had been forcefully defiled by the appellant by the evidence adduced by the doctor who found that the complainant's private parts had been bruised. He submitted that the appellant had been examined by a doctor who established that he was HIV positive. He consequently submitted that the appellant was properly convicted and appropriately sentenced. He urged this court to disallow the appeal.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required 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 decision as to the demeanour of the witnesses (*See* **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case against the appellant on the charge of defilement of a minor to the required standard of proof beyond reasonable doubt. I have considered the submissions made by the appellant and the response made thereto by Mr Gumo on behalf of the State. I have re-evaluated the evidence adduced by the prosecution and the defence offered by the appellant before the trial magistrate's court.

Certain facts are not in dispute in this case. It is not disputed that the appellant had sexual intercourse with the complainant. The appellant has admitted this fact. What is in dispute is the circumstances under which the appellant had sex with the complainant. Whereas the prosecution has put a case that the appellant defiled the complainant, on his part the appellant has alleged that the complainant was his girlfriend and on the material day had agreed to have consensual sex with him. What was the prosecution's evidence to support its case? The prosecution called the complainant who testified that she was twelve years old at time of the incident.

They also called PW3 Ester Munyinyi and PW4 Agnes Bosibori who all testified that on the material day as they were walking to school at 2.00 p.m., they met with the appellant who told them that he had been instructed by the headmaster of their school to ask them to assist him to carry some books from the *[particulars withheld pursuant to section 76(5) of the Children Act, 2001]* to their school. The three girls who were all aged less than thirteen years were hesitant at first but were persuaded by the appellant. While they were walking towards the *[particulars withheld pursuant to section 76(5) of the Children Act, 2001]*, PW3 and PW4 changed their minds and ran back to school.

The appellant however detained the complainant and took her to the forest where he forcefully removed her underpants and had sexual intercourse with her. The complainant screamed and attracted the attention of the forest guards who came to her rescue. They found the appellant in the act and arrested him. The appellant was taken to the police station while the complainant was taken to *[particulars withheld pursuant to section 76(5) of the Children Act, 2001]* where she was examined by PW1 Monica

Cheboi Keiyu, a clinical officer who established that the complainant has sustained an injury on her left eyelid and had bruises on her left leg. She further established that the complainant's labia majora had been bruised and further established that there was a whitish discharge from her vulva.

On the 10th of March 2004, PW1 took the blood samples of the accused and when the blood was screened, it was established that the appellant was HIV positive. PW1 testified that there was a possibility that the appellant had infected the complainant with the AIDS virus. She however testified that it could not be established before the expiry of three months if indeed the appellant had infected the complainant with the AIDS virus. PW5 Daniel Meli and PW6 John Tarus testified that they were forest guards and on the material day saw the complainant having sexual intercourse with the complainant who was wearing school uniform. They testified that when the appellant saw them, he attempted to run away but they managed to chase and apprehend him.

Having carefully re-evaluated the evidence adduced by the prosecution witnesses and also having considered the submissions made by the appellant and Mr Gumo on this appeal, it is clear that the prosecution established that the appellant did defile the complainant. As was submitted by Mr Gumo, in cases of defilement it is no defence by an accused person that a girl who is aged less than sixteen years consented to sexual intercourse. **Section 145 of the Penal Code** is clear. Sex with a girl aged less than sixteen years is unlawful. It is immaterial whether or not such girl consented to the sexual intercourse. The only defence available to an accused person is if he can establish that he had a reasonable belief that the girl was above the age of sixteen years. In this case the appellant has not raised the defence that he believed the complainant to be aged more than sixteen years.

From the evidence adduced by the prosecution, it is clear that the appellant was aware that the complainant was a girl aged less than sixteen years. This fact is supported by the fact that evidence was adduced to the effect that the appellant met the complainant with her two friends when they were going to a nearby primary school. They were in school uniforms. The charge of defilement was therefore proved. Further, the prosecution proved to the required standard of proof beyond reasonable doubt that indeed the appellant used force to defile the complainant. The P3 form which was admitted in evidence established that the complainant sustained injuries both on her body and on her private parts which was consistent to the forceful sexual assault that she was subjected to by the appellant.

The appellant would like this court to believe that he had consensual sexual intercourse with the complainant. If indeed the appellant had consensual sex with the complainant, why did the complainant sustain the said injuries on the private parts? It is obvious that the complainant had no sexual experience at the time she was defiled by the appellant. She could not therefore have consented to have sexual intercourse with the appellant. The evidence of the two forest guards who found the appellant *in flagrante delicto* established that indeed the appellant attempted to ran away when he was found defiling the complainant. In the circumstances of this case, I do hold that the prosecution proved its case against the appellant on the charge of defilement to the required standard of proof beyond reasonable doubt. The defence that was raised by the appellant is not recognized by the law and the same was rightly dismissed by the trial magistrate. I therefore dismiss the appeal on conviction.

On sentence, evidence was adduced that the appellant was tested and found to be HIV positive. The appellant defiled the complainant in the full knowledge that there was a possibility that he could infect her with the said AIDS virus. Although the prosecution did not establish that the appellant had indeed infected the complainant with the AIDS virus, this court cannot ignore the fact that the appellant was armed with a lethal weapon which weapon he used to potentially inflict a fatal injury on an innocent girl child.

The appellant is a danger to the children in the society and should therefore be put away so that he may not pose any more threat to the innocent children of this nation. This court is aware that sometimes justice has to be tempered with mercy. In this case, this court does not see how it can exercise mercy on the appellant who deliberately and without due regard to an innocent girl, sexually assaulted her and potentially infected her with the AIDS virus. The complainant did nothing to deserve the treatment that was meted out to her by the appellant. The appellant did not show mercy to the complainant. The dreams

of the complainant of having a bright future and may be having a family was shattered by the singularly beastly and brutal act of the appellant.

The appellant wants this court to ignore all these facts and exercise mercy on him. I think it would be travesty of justice if this court were to release the appellant to the society so that he could prey on other innocent and vulnerable young girls. I will not grant him wish. He should remain where he is for the rest of his life. The appellant should not be given another opportunity to cause misery to innocent young girls. I decline to review the life imprisonment imposed by the trial magistrate. His appeal on sentence is therefore dismissed. He shall serve the sentence imposed by the trial magistrate.

DATED at NAKURU this 9th day of March 2006.

L. KIMARU

JUDGE