**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT MOMBASA**

**CRIMINAL APPEAL NO. 298 OF 2003**

**MURIITHI MUGWERU NJIRU…….. …… APPELLANT**

**=V E R S U S=**

**REPUBLIC ……..…… RESPONDENT**

**J U D G E M E N T**

The appellant was charged tried and sentenced for the offence of defilement of M.D.K a girl under the age of 16 years. On 17.8.2003. He was found guilty and sentenced to a term for 13 years imprisonment. He now complains that the evidence was not sufficient to support conviction in that the girl never screamed, her friend who saw the event did not seek for help, the investigating officer never investigated the case and all evidence was what the witnesses were told by the complainant, he was never examined to prove he was the one who did it and orally he pleaded that he had 2 wives who depend on him with 7 children and that he was first offender, the court should quash conviction and set him free. According to evidence the girl was 8 years old attending nursery school. She gave unsworn evidence. On 17.8.03 she was going to the shop to purchase some honey and tea leaves. She was accompanied by her friend F who was younger – 5 years old. On the way they met the appellant whom she knew by name and physically. It was about 6.00 p.m. Appellant talked to her first. He got hold of her, put her down on the ground. He told her not to cry and not to talk. She never cried out and he had carnal knowledge of her.That she was subjected to this ordeal was confirmed by medical evidence. See the evidence of PW 3 and the P3 Form he completed. She was found bleeding with ruptured hymen proving that there was penetration into her private parts. This evidence was not challenged by Appellant in crossexamination. There is also the evidence of R PW.2 who examined the complainant immediately after the event and saw that the girl had her vagina sexually interfered with. This evidence of PW.2 and PW.3 was not hearsay. They saw with their own eyes that the complainant body had been subjected to sexual act.

As to whether the act was committed by the Appellant there is the evidence of the complainant who knew him by name and the small girl, F, who saw the Appellant have sex with complainant. She ran away and told her mother. Also the evidence of PW.6 shows that the Appellant was walking with the two girls at the material time and on the following day after being told that the complainant was defiled by Appellant he and his brother got hold of the Appellant. He was identified by complainant and when the witness (PW.6) passed the spot where the act was performed he saw spilt honey. The Appellant was arrested by police.

When the Appellant was given a chance to defend himself he offered no evidence. This is in accordance with the provisions of law. After conviction the Appellant said in mitigation:- “I have a wife and five children. *My parents depend on me.”*

In his petition of appeal he now says he had 2 wives and 7 children. No one can believe him with this

kind of stories. The law has been amended. Section 124 Evidence Act which prevented a court to convict on evidence of a child of tender years without corroboration by virtue of the recent Criminal Amendment Act :-

*"It is provided that where in a criminal case involving a sexual offence*

*the only evidence is that of a child of tender years who is the alleged*

*victim of the offence, the court shall receive the evidence of the child*

*and proceed to convict the accused person if for reasons to be recorded*

*in the proceedings the court is satisfied that the child is telling the truth."*

In this case the complainant was supported by surrounding circumstances the appellant was well known in the area and by the complainant. The incident occurred at 6.00 p.m. when it was easy to see and identify the Appellant and PW.6 M saw the Appellant with the complainant around that time. This evidence was not controvered. The Trial Magistrate addressed her mind to Section 124 of Evidence Act and sought evidence of corroboration of the complainant's statement.

Upon considering all this I find that the Trial Magistrate convicted on sound evidence. The prosecution case was well presented and the case was proved beyond reasonable doubt. Although the Appellant says he was not examined I find that to insist on this would greatly aggravate the injury. There is no doubt here that he did it.

On sentence it is to be noted that for a man who is married with children no mercy should be shown to him. He must face full force of the law. He has betrayed his wife in seeking sex outside marriage. He has also not any respect for his children by committing such offence as if he would tolerate his young children being defiled by men. Again subjecting women to sexual activities is nowadays a serious matter. It puts a woman and in this case a young girl to the risk of HIV/AIDS infection which is a death sentence.

The maximum sentence for this offence has been enhanced. It is now life imprisonment with hard labour. Therefore 13 years is not excessive or harsh.

I do not find any reason to interfere with the jurisdiction of Trial Magistrate in imposing sentence.

I therefore do not see any merit in this appeal and the same is dismissed.

**Dated at Mombasa this 29th day of January, 2004.**

**JOYCE KHAMINWA**

**J U D G E**

Read in open court in presence of Applicant and Ms Kwena.

JOYCE KHAMINWA

J U D G E