REPUBLIC OF KENYA

KENYA LAW

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 329 OF 2011

MICHAEL MUNEN JENGA Alias KARAITI…….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case Number 1158 of 2009 by D. G. Karani (SRM) in the Senior Resident Magistrate's Court at Gatundu on 21st November 2011)

JUDGMENT

1. **Michael Mune Njenga *alias* Karaiti** the appellant herein, faced two counts of defilement. In count I he was charged with defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** while in count II he was charged under **Section 8(1)** as read with **Section 8(3)** both of the **Sexual Offences Act No. 3 of 2006**.

2. The particulars contained in the charge sheet were that on the night of 4th and 5th July 2009 at Gakoe location, ***[particulars withheld]*** Village, he intentionally and unlawfully committed an act which caused penetration with his genital organ into the genital organ of D. W, a girl aged (10) ten years in count I. On the same night and at the same place he intentionally and unlawfully committed an act which caused penetration with his genital organ into the genital organ of D. N, a girl aged 12 years.

3. In the alternative counts to the two charges, the appellant was charged with indecent assault on each of the two girls contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3** of **2006**. It was alleged that he unlawfully and indecently assaulted by touching their private parts.

Synopsis of The Case

4. In a nut shell the prosecution's case was that on 4th July 2009 **PW1** and **PW2** went to the appellant's home. He was a neighbor who lived near the home, of **PW1** and was known by the nickname of "Karaiti". The minors found the appellant at home and he instructed them to get into bed. He locked the door and got into bed with them. The appellant removed the underpants of both minors and defiled them in turns. He detained them for the night and released them the following morning.

5. The minors took refuge in a forest where they were found. They informed their grandmother what had happened and she called their mother who came and took the minors to Igegania Dispensary and also made a report at Gakoe Police Post. They were issued with P3 forms. The appellant was subsequently traced and arrested and charged.

6. The appellant, in his unsworn defence denied the charge and said he was contracted by one D W, in June 2009 to provide some casual labour on the promise of being paid in October of the same year. In October she refused to pay him and instead framed him for the present offence. Further that he was arrested as he fetched grass from Kieni Forest and was not given the reason therefor.

7. Following a full trial, the appellant was convicted on the first count and sentenced to life imprisonment, whereupon he appealed to the superior court against both conviction and sentence on three grounds. First he complained that the prosecution's case was not proved to the required standard. Second, he asserted that there was no evidence from the investigations officer to show that he absconded. Third, he maintained that the medical evidence was not conclusive and did not support the act of penetration against **PW1**.

8. The state opposed the appeal through learned counsel Miss Ndombi who stated that the prosecution had proved their case to the required standard and that the girl was aged 10 years according to the immunization card produced by **PW5** her mother. Miss Ndombi asserted that the evidence of **PW3** confirmed that there had been virginal penetration and the hymen was broken, although **PW1** was examined a few days after the act and blood could therefore not be found. Miss Ndombi further submitted that the appellant was known to **PW1** and he did not complain about the allegations of **PW1**'s mother that he went underground during the trial before. In her view this was not a crucial factor since the rest of the evidence proved the appellant's guilt.

9. Lastly, on the ground that the medical evidence was inconclusive and did not support an act of penetration, Miss Ndombi contended that the evidence was sufficient since the minor's hymen was broken. Further, that there was no evidence that **PW1** or **PW5** framed the appellant. She therefore urged the court to dismiss the appeal for lack of merit.
10. I subjected the proceedings to the fresh and exhaustive scrutiny to which the appellant is entitled in a first appeal. In so doing I was cognisant of the fact that I neither saw nor heard the witness as they testified and gave due allowance therefor.

11. From the evidence there was no dispute that **PW1** was a minor at the time of the incident. **PW5**, her mother produced her health care card which indicated that she was born on 13th May 1999 and was therefore aged 10 years at the material time. The evidence was not challenged. There was also proof of penetration from the evidence of **PW3**, Dr. Chemwei contrary to the appellant's assertions. The doctor found a broken hymen upon examination, together with features suggestive of penetration. She examined the minor some days after the assault and it was unlikely that she would still present with virginal discharge and bleeding at that time.

12. The more vexatious question is however one of the identity of the perpetrator. From the evidence the two minors knew their assailant very well. They stated that he was a neighbour who lived within their village and whom they knew by the nick name of "Karaiti" or "Ka-light". They went to his house voluntarily. The evidence on the reasons why they went to his house is contradictory, but whether it was at the behest of the appellant who wished to send them to the shops, or it was to give them chapatti, or to marry **PW2** as stated by **PW1**. What is important is that **PW1** was a minor and had no capacity to consent to his sexual advances.

13. The two witnesses narrated what transpired at the appellant's house and that he detained them overnight with threats of killing them if they did not do as told. The evidence of **PW1** and **PW2** was in agreement that when they got to the appellant's house they got into his bed as instructed. **PW1** lay next to the wall, while the appellant lay at the other end. In between them was **PW2**.

14. Both witnesses testified that the appellant first had intercourse with **PW2**. He then had intercourse with **PW1** before returning to **PW2** once again. PW1 did not mention what time of the night she was sexually assaulted. PW2 stated that it was in the morning. It is immaterial what time of the night the appellant ravished **PW1**. What is material is that both girls named the appellant as the perpetrator and both girls had torn hymens with features suggesting penetration, according to the medical evidence.

15. I am alive to the fact that this being a criminal trial the appellant bore no burden to explain his innocence. That burden lay unshiftingly upon the prosecution to prove his guilt beyond reasonable doubt. Since however he gave a statement in his defence it must be considered alongside the rest of the evidence on record.

16. Indeed, as observed by the learned trial magistrate it is not clear what relationship the woman named D W had with **PW1** and **PW2**, that she should use them to frame him for such a serious offence instead of paying him his dues as stated by the appellant. Further, to believe his version would leave the medical findings by **PW3** unexplained, unless the court is made to believe that **PW3** was also in on the conspiracy to frame the appellant.

17. The appellant did not pose any questions concerning a revenge scheme to any of the witnesses and I am convinced that coming so late in the proceedings during his defence, it was a mere afterthought intended to throw him a life line. I reject it as did the trial court.

18. In another ground the appellant complained of lack of evidence to show that he went underground after the incident herein. This in my view was not a crucial factor in proving his guilt. The fact of the matter is that he was arrested some months after the incident. I only observe that a trial court should desist from employing language that goes to suggest that the appellant was under some duty to explain his whereabouts before his arrest.

19. After subjecting the evidence to a fresh and careful analysis I must conclude, as did the trial court, that the prosecution did prove its case against the appellant to the required standard and that he was properly convicted.

The appeal is therefore found to be lacking in merit and is dismissed accordingly.

SIGNED DATED and DELIVERED in open court this 15th day of October 2014.

L. A. ACHODE

JUDGE