FESTUS KIPRONO CHEPKWONY……..……1ST APPELLANT

GEOFFREY KIPNGETICH KORIR……..…….……...……..2ND APPELLANT

VERSUS

REPUBLIC…….……..…….……..RESPONDENT

JUDGMENT

Festus Kiprono Chepkwony and **Geoffrey Kipngetich Korir** *(1st and 2nd appellant respectively)* were charged with the offence of **defilement of a girl contrary to section 8(3) of the Sexual Offences Act No. 3 of 2006.** The particulars of offence, as stated in the charge sheet, were that on the 22nd day of August 2006 at Gomesia village Kirenget in Nakuru District of the Rift Valley Province the appellants had unlawful carnal knowledge of CMN, a girl under the age of 16 years. Both appellants were convicted of the offence and sentenced to 20 years imprisonment.

Being dissatisfied with both the conviction and sentence they filed the subject appeals which were consolidated on the 6th of February 2009 and heard together. The 1st appellant's appeal is based on the grounds:

1. That the charge was not proved beyond reasonable doubt.

2. That the learned trial magistrate erred in basing reliance on the evidence of PW1 and PW2 which evidence, according to the appellant, was contradictory.

3. That the testimonies of PW1, PW2 and PW3 were mere fabrications.

4. That the sentence of 20 years imprisonment was inhuman, harsh, oppressive and manifestly excessive.

5. That the appellant's defence was wrongly rejected without any reasons being given for so doing, contrary to the requirements of the Criminal Procedure Code (Cap 75 of the Laws of Kenya).

The 2nd appellant's grounds of appeal were that:

1. The charge against him was not proved beyond doubt.

2. The evidence of PW1 and PW2 was contradictory and substandard.

3. That his defence (which according to the appellant, was weighty enough to shake the prosecution's entire evidence) was rejected without cogent reasons being given for the rejection.

The two appellants filed written submissions which I have duly considered. Filed alongside the submissions were amended grounds of appeal to the effect that:

1. The language used at the "re-trial" was not specified after proceedings commenced de-novo before a new magistrate.

2. The age of the complainant was not confirmed through medical evidence.

3. The investigating officer was not called to testify.

4. The doctor did not testify afresh.

The State, represented by the learned State Counsel Mr. Mugambi opposed both appeals on the grounds that the two appellants were convicted on sound evidence and that there was no doubt that both of them abducted the complainant who was then 13 years old, took her to the 1st appellant's house where they both defiled her and locked her up. Mr. Mugambi submitted also that the act of defilement was proved by medical evidence. Expounding on his written submissions the 1st appellant asked this court to consider the evidence of **PW3, EG** who stated that he was the father of the complainant and also her step-brother. He also pointed out that the doctor who examined the complainant did not note any pregnancy yet the complainant testified that she gave birth as a consequence of the sexual act. The 1st appellant further challenged the complainant's testimony to the effect that she gave birth 11 months after the incident. He complains also that the doctor's testimony was not recalled when the trial was conducted afresh before the Hon. J. Oseko. He argued further that the trial court ought to have inquired into the allegation that the complainant had been married to the 1st appellant and took issue with the fact that the arresting officer was not called to testify at the trial. According to him this must have been done to conceal the truth.

The 2nd appellant adopted the oral submissions of the 1st appellant to back his written submissions and asked the court to examine and weigh the evidence adduced by both sides at the trial.

I have studied the entire record of proceedings before the trial court, re-considered, re-evaluated and analyzed the evidence tendered thereat. **PW1 Robinson Kepsit** a Clinical Officer Keringet Hospital *(health centre)* testified that he examined the complainant CM aged 13 years on 23rd August 2006. The complainant had reported to the clinic complaining of having been defiled. **PW1** found that there was swelling in the complainant's labia majora. A Specimen swab was taken and examined. The laboratory results showed evidence of spermatozoa. Based on those findings, **PW1** completed and signed the P3 form which was produced at the trial as Exhibit 1.

PW2 CM N, the complainant was duly examined by the court under Cap 79 and was found to be capable of testifying under oath, the meaning of which she was found to understand. She testified that she was 14 years old and that she was aged 13 years at the time of the offence. She stated that she was no longer in school having dropped out '*to give birth*'. She testified that on 22nd August 2006, at about 6.00 p.m., her mother sent her to buy some groceries which she did. On her way home she met the1st and 2nd Appellants at a bridge. The 2nd Appellant drew out a knife and threatened her with it, telling the complainant not to scream. The two forced her to accompany them to a 2 roomed house where a wicker lamp was burning. They put her on bed. The 1st appellant removed all her clothes after complainant refused to do so herself. The 1st appellant then proceeded to defile the complainant after the light had been put out. The 2nd appellant did the same. The complainant stayed the night at the house since the appellants refused her to leave. The following day the two appellants took her to a house in a homestead within a forest. There she found an old couple who refused to heed the complainant's plea for help. The appellants then left. At 10.00 a.m. a Chief whom the complainant referred to as Samuel and one Dickson came in company of 2nd appellant who pointed out where complainant was and opened the door for her to come out.

After the complainant came out the group went to the Chief's office where the Assistant Chief was instructed to escort them to the Police Station. The complainant found her mother at the Chief's office. The latter joined them as they proceeded to the Police Station. At the station PW2 was issued with a P3

from. Witness statements were also recorded. The complainant was then taken to hospital where she was examined. It was PW2's testimony that the two appellants were the ones who defiled her and as a consequence of which she conceived and gave birth to a baby girl. She testified that although she used to see them in the vicinity of her home she never talked with them and none of the two was her boyfriend. Under cross-examination she categorically denied that the 1st appellant was her husband.

The village elder, **rKipkurui Meli** was the prosecution's third witness *(although the record erroneously refer to him as PW2)*. For the purposes of this judgment he will be referred to as PW3. He testified that on 23rd August 2006 at 8.00 a.m. the Chief called him and told him that a neighbour had reported the loss of a child. The Chief gave PW3 names of the suspects. Accompanied by the Chief, PW3 went to the appellants' home where they were told that the appellants had gone to the forest with a girl. They followed the lead given and laid an ambush. The appellants came to the scene at about 4.00 p.m. and on spotting them the 1st appellant ran away. The 2nd appellant then led to search team to a homestead in the forest said by 2nd appellant to have been the home of Arap Towett. The girl was retrieved from there and the 2nd appellant arrested. The 1st appellant was arrested from him home on 25th May 2006. Under cross-examination PW3 was categorical that he knew both the appellants quite well and denied that he held any grudge towards them.

EG *(who is erroneously listed as PW3)* testified as PW4. He stated that the complainant (PW2) was his step sister. That her mother reported her having not returned home from the shops at 8.00 p.m. on 22nd August 2006. The following day other children were asked if they had seen her and they said they had not. The owner of the kiosk where the complainant had gone to buy groceries the previous evening was asked about her and he confirmed that indeed she had done her shopping there and had left. That the kiosk vendor gave the names of the appellants saying they had gone towards the direction taken by the complainant after she had done her shopping. PW4 testified that when PW2 was found she told him she had been abducted by the two appellants and that they had defiled her. PW4 identified the two as people he knew well, stating that the 2nd appellant had a kiosk and the 1st appellant ran a "*barber shop"*. He denied the 1st appellant's claim that the family had married PW2 off or that they took her away as a result of his failure to pay dowry.

After several adjournments, granted to enable the prosecution call the investigating officer, he did not attend court to testify and the prosecution was forced to close its case without him testifying.

The 1st appellant made an unsworn statement in his defence. He testified that he had married the complainant after befriending her since 2005. He stated also that on 18th August 2008 the complainant came and took her away. That he was arrested after he and his family had made plans to pay the dowry, accusing the complainant of having turned against. Him. He testified further that he believed the complainant was 18 years old when he *(allegedly)* married her and that he was shocked to learn she was a juvenile.

Similarly the 2nd appellant gave an unsworn testimony in his defence. He said only that the 1st appellant was his workmate and that he saw him when he was brought into the cells at Molo Police Station where the 2nd appellant had been locked up on 20th August 2006. That he had been arrested without being told why and was locked up after he failed to bribe the Chief and Police Officers with Shs 10,000/=. He was surprised at learning of the charge preferred against him and the 1st appellant. The 2nd appellant did not revisit the defences he had attempted to put up during his cross-examination of the various witnesses, particularly as relates to the alleged marriage between the 1st appellant and the complainant.

In her judgment, the learned trial magistrate properly set out the facts of the case and the points for consideration. She found as a fact that the 1st appellant did not deny that he had had sexual intercourse with the complainant who according to the learned trial magistrate "*obviously looked tender on years"* and who was actually examined as regards her capacity to testify on oath. The learned trial magistrate found also that there was no dispute that the complainant was found at the 1st appellant's home, with the

latter claiming that she was his wife, a defence that the learned trial magistrate rejected as being a sham, while believing the evidence of the complainant. The learned trial magistrate described the complainant's evidence as a clear and consistent narrative of what the two appellants did to her, which evidence was not discredited at all but corroborated by medical evidence. The learned trial magistrate found that there was no reason for her to disbelieve the appellant's testimony that both the appellants, whom the complainant identified positively, had committed the offence.

In my view, the learned trial magistrate was quite right in arriving at the conclusions she did. The facts of the case were clear and simple. The complainant had been sent by her mother to buy groceries and on her way home she was waylaid by the two appellants who abducted her, defiled her and kept her captive until she was discovered in the 1st appellant's home which was pointed out to the search party by the 2nd appellant. The allegation of a marriage between the complainant and the 1st accused is clearly a fabricated tale without any evidential support. In his cross-examination of the complainant 2nd appellant, attempted to suggest that the complainant had voluntary accompanied the two appellants to the homestead where she was found. This again was just a story without any foundation. The Prosecution evidence clearly point to the guilt of the two appellants. The 1st appellant's mitigation was in the nature of an apology, based on his allegation that he did not know the complainant's age when he "*married her*". It would appear to me that this forms the basis for the appellants stating as a ground herein that the complainant's age was not proved by medical evidence. I do not consider it a valid ground since same was never raised with the doctor or other witnesses but appears to have been admitted, albeit indirectly, by both appellants. It is clearly an afterthought that the Doctor did not testify when the trial commenced de novo, I find that he did on the 23rd May, 2007 and was cross-examined by both appellants.

As regards the language used, I find that Kiswahili was used by all the witnesses including the appellants in their cross-examination of the various witnesses and also when stating their defence. That the Investigating officer was not called did not in any way reduce the weight of the testimonies of other prosecution witnesses, nor did it cause the appellants any prejudice. Under **Section 8(3)** of the **Sexual Offences Act** a person who defiles a girl aged between 12 and 15 years is liable to imprisonment for not less than 20 years upon conviction. That being the case, this court cannot therefore interfere with the sentence, which in my view was well deserved in any event. I find therefore that the appeals by the appellants herein lack merit and cannot succeed. Accordingly the same are hereby dismissed. The appellants have the right to appeal to the Court of Appeal within 14 days of this judgment.

Orders accordingly.

Dated, signed and delivered at Nakuru this 3rd day of June 2009

M. G. MUGO

JUDGE

In the Presence of:

N/A - For State

Both appellants - In person