IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 239 of 2008

BETWEEN

K.K……..……..……APPELLANT
AND
REPUBLIC ……...……..…RESPONDENT

(An Appeal from a judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 28th October, 2008
in

H.C.CR.A. NO. 199 OF 2006)
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JUDGMENT OF THE COURT

This is a second and final appeal by ***Karile Kimaniki*** (*"the appellant"*), who was convicted on 22nd July, 2006 by Nanyuki Senior Resident Magistrate, R.N. Muriuki, for the offence of defilement of a girl contrary to ***section 145 (1)*** of the Penal Code. It had been alleged in the charge sheet laid before the trial court that on the 21st day of February, 2006 within Rift Valley Province, he unlawfully had carnal knowledge of **N. L**, a girl under the age of sixteen years. There was an alternative charge of indecent assault based on the same facts but no finding was made thereon after conviction on the main count. Upon his conviction, the appellant was sentenced to serve 25 years imprisonment with hard labour. His first appeal to the superior court (Kasango, J.) was dismissed, hence the appeal before us.

The appellant has been unrepresented by counsel throughout and it is understandable therefore that the three grounds of appeal raised in his memorandum do not strictly raise issues of law, which are the ones open for consideration in a second appeal. As this Court has stated times without number, it will pay homage to concurrent findings of fact by the two courts below unless such findings are made on no evidence at all, or on a misapprehension or perversion of the evidence, or it is apparent on the evidence that no tribunal, properly directing itself, could have made such findings – see for example **M'Riungu v Republic (1983) KLR 455** and **Kaingo v Republic [1982] KLR 213**.

The concurrent facts established by the two courts below were that the complainant ***N.I*** *("the complainant"*) was a 13 ½ year-old girl attending […] Primary School in Standard three. The appellant was a watchman in [….] Ranch and was

married to the complainant's elder sister. The sister was educating the complainant and so the complainant moved from her home to live with the appellant's family in […] Ranch. Her stay with the family was uneventful for almost one year, until 21st February, 2006. On that day, the complainant was left alone with the appellant. The appellant told her he would give her some money to take to her parents, and offered to escort her. Along the way near some river, the appellant pulled her and told her that he wanted to have sex with her. He pushed her into the bush and removed a knife when she wanted to scream. She kept quiet. He threatened to kill her if she screamed and proceeded to defile her. Thereafter he escorted her upto the gate of […] Ranch and left.

The complainant then went home and reported the incident to her mother, ***S.L*** (PW1) and her father, ***S.L*** (PW2). They in turn reported the matter at N Police Station where ***Pc. Paul Kariuki*** (PW5) organized for the examination and treatment of the complainant the following day. The medical examination and treatment was carried out by ***Dr. Walter Kayaywa*** (PW4) at Nanyuki District Hospital. On medical examination the doctor found a whitish vaginal discharge and also lacerations on the labia. A vaginal swab was taken and it revealed yeast cells and pus cells which contained *gram positive cocci*. It was proof that the complainant had a venereal infection and his opinion was that she had sexual intercourse. The appellant was arrested on the same day and charged with the offence stated earlier.

When the appellant was put on his defence he denied the offence *in toto* and specifically denied that the complainant had ever lived with him in […] Ranch. He blamed PW2, the complainant's mother, for framing up the false charges since there was a grudge between them, arising out of the mother's desire to marry off her daughter, the appellant's wife, to another rich Maasai. That story was, however, not put to PW2 in cross-examination and the superior court observed that it was *"an afterthought and a poor one at that"*.

The trial court fully appreciated that there was no eye witness to the offence charged and that the case rested on the credibility of the complainant and the medical evidence adduced in corroboration of her evidence. The trial court believed the complainant's evidence that she knew the appellant very well as he was married to her sister; that she lived with them in […] Ranch where she was attending school; and that she was defiled in the manner she explained. The learned magistrate stated in part: -

> **"The complainant was defiled. She gave a consistent account of what the accused did and how he threatened her if she screamed.**
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> **I was satisfied that this evidence by the complainant was consistent and cogent. She did not report anyone else had defiled her and insisted it was the accused. I had no reason to doubt her and I was satisfied that she was speaking the truth. She knew the accused well. Her evidence that she was defiled was corroborated by the doctor's findings. I did not find any evidence to prove that the accused was framed up because of any grudge and I dismissed his defence as untenable."**

The superior court similarly accepted the complainant's evidence and the medical evidence as supportive of it, thus rendering the appellant's defence false and useless.

As stated earlier, the three grounds of appeal raised by the appellant in his home-made memorandum generally complain about the findings being against the weight the evidence which the appellant contended was conflicting and

incomplete since he was not medically examined. In view of the concurrent findings of fact by two courts below, which we have no reason to disturb, those complaints cannot avail the appellant. He did however raise the issue, which is one of law, that the trial was conducted in a language that he did not understand contrary to ***section 198*** of the Criminal Procedure code.

We have examined the record and confirmed that indeed the trial court did not record the language used when the appellant first appeared in court for plea on 24th February, 2006. The appellant, however, pleaded not guilty to the charges and his trial was set after his release on bond. It was desirable, as the law requires it, that the language used in taking the plea be shown on record, but the saving grace was that a plea of not guilty was recorded. There was no prejudice caused by that omission since the appellant had an opportunity to contest the charges in a full trial. But that was the only flaw in the trial. The record is clear that when the trial commenced on 6th April, 2006 there was an interpreter in Maasai language, one *"Margaret"* in addition to the court clerk, one *"Munene"*. The trial court further recorded clearly what language was used by each of the five prosecution witnesses which was Kiswahili/Maasai, and the language used by the appellant which was Kiswahili. There is no merit in the complaint raised about language and we reject it.

Finally the appellant asked this Court to look at the issue of sentence which in his view was harsh and excessive. On the other hand learned Principal State Counsel Mr. Kaigai submitted that it was a lawful sentence which this Court had no jurisdiction to re-examine.

Mr. Kaigai is, of course, right that this Court, on a second appeal, has no jurisdiction to re-examine a lawful sentence on the complaint of an appellant that it was harsh and excessive. That is the import of ***section 361 (1) (a)*** of the Criminal Procedure Code which declares sentence a matter of fact. Nevertheless, where the legality of the sentence is open to challenge this court will have the jurisdiction to re-open the matter. ***Sub-section (b)*** of the same section provides the jurisdictional basis for that intervention.

The same issue arose before this Court in the case of **Fred Michael Bwayo v Republic**, **Criminal Appeal No. 130/2007 (ur)** where the appellant was charged under similar provisions of the Penal Code for defiling a child girl under the age of 16 years. We may reproduce *in extenso* what this Court stated in that appeal:-

> **"The offence of defilement under *section 145(1)* of the Penal Code as amended by Legal Notice No. 5/2003 attracts a maximum sentence of life imprisonment with hard labour. That is the same sentence (save for hard labour) provided for committing the offence *"with a child aged eleven years or less"* under *section 8(2)* of the Sexual Offences Act 2006 which came into effect on 21st July, 2006. The section states as follows:-**
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> > **"8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**
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> **The tenor of the section is mandatory and therefore provides for life imprisonment as the minimum sentence. That must logically be so since the succeeding *subsections (3)* and *(4)* which provide for punishment for defiling much older children of *"between the age of twelve and fifteen years"* and *"between the age of sixteen and eighteen years"* respectively provide for minimum sentences of imprisonment for a term of *"not less than twenty years"* and *"not less than fifteen years"*, respectively. In our view, Parliament intended that the defilement of a younger child was a more serious offence and did not envisage the punishment under *section 8(2)* of the Act to be other than life imprisonment. Those provisions would be consonant with the prime objective of the Act which is "*prevention and protection of all persons from harm from sexual acts*".**

The provisions of the Sexual Offences Act however, do not apply to the matter before us. The offence here was committed one year before the Sexual Offences Act 2006 came into force. The law governing the offence was in *section 145(1)* of the Penal Code as amended by the Criminal Law (Amendment) Act, NO. 5/2003 to read as follows:-

> **"145. (1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life."**

The difference between the original section and the amendment is that the age of the girl was increased from 14 to 16 and the sentence was increased from 14 years imprisonment to life. It should be noted, however, that the punishment provided for the offence is not mandatory and there is clear discretion for the court to consider the appropriate sentence depending on the circumstances and antecedents of each case and accused person. The appellant in this case was thus "liable to imprisonment with hard labour for life."

After examining the legal debate in various jurisdictions relating to *"life imprisonment"* and *"minimum sentences"* and noting the diversity in their application, the Court continued:

> **"As far as we can tell, Kenya's highest court has not defined *"life imprisonment."* There is also considerable inconsistency on the terms of imprisonment meted out in substitution for *"life sentence"*. Nevertheless, what is exceedingly rare, as we are unable to find any, is a sentence of twenty years or more in substitution for life imprisonment even in sexual offences as the law stood before July 2006. If the ends of justice were served by imposing lesser sentences at the time, it would be unjust to the appellant in this case to depart so fundamentally from the principles of sentencing which obtained when the offence was committed. That view in no way diminishes the gravity of such offences but pays homage to certainty and consistency in the law. We think the learned trial magistrate and the Judge of the superior court were unduly influenced by the new Act and applied sentencing standards which did not apply to the case before them. This reflects on the lawful nature of the sentence and thus entitles this court to intervene."**

We respectfully adopt that reasoning in this case with the result that we interfere with the sentence of *"25 years with hard labour"* which was imposed on the appellant, and order that it be and is hereby set aside. We substitute therefor a term of imprisonment of fifteen (15) years with hard labour, from the date of the appellant's conviction by the trial court on 27th July, 2006. To that extent only, this appeal succeeds, but is otherwise dismissed.

Orders accordingly.

Dated and delivered at Nyeri this 25th day of June, 2010.

J.E. GICHERU

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CHIEF JUSTICE

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR