IN THE COURT OF APPEAL
AT NYERI

(CORAM: OMOLO, KEIWUA & VISRAM, JJ.A.)

CRIMINAL APPEAL NO. 426 OF 2009

BETWEEN

ANTHONY KIAMA MUCHIRI ……..…. APPELLANT

AND

REPUBLIC ……..……..…….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Makhandia, J.) dated 13th March, 2009

in

H.C.CR.A. NO. 40 OF 2008)
****

JUDGMENT OF THE COURT

The appellant, ***Antony Kiama Muchiri***, was alleged to have defiled ***A.W*** (A) on two occasions, first on *28th May, 2007* and secondly on *14th July, 2007*. The two counts of defilement were laid against the appellant under ***section 8(1) (2)*** of the Sexual Offences Act, No. 3 of 2006. The appellant pleaded not guilty to the two charges and between *31st July, 2007* and *22nd January, 2008,* he was tried before an acting Senior Resident Magistrate at Mukurweini who found him guilty of the two charges, convicted him thereon and sentenced him to life imprisonment on each charge. The magistrate was silent on the issue of whether the sentences were to run concurrently or consecutively, with the result that when the appellant appealed to the superior court against the conviction and sentence, Makhandia, J. who heard the appeal rightly assumed that the two sentences were to run consecutively. The learned Judge thought it was not possible for the appellant to serve two consecutive life sentences and, therefore, ordered that the sentence on the second count would be held in abeyance. That was really not the correct order to make in the circumstances of the case. Sentences of imprisonment can be served concurrently and the Judge ought to have made such an order instead of suspending the second sentence. It is only sentences of death which cannot be carried out one after the other.

The appellant now comes before this Court by way of a second appeal. That being the position, the Court can

only deal with matters of law. The appellant did not really raise any matter of law before us. It is true that **A** (PW1) and her brother ***L.G***, (PW2), were minors, A being eleven and L being nine and, therefore, could not corroborate each other but on the first occasion when the appellant assaulted A, she did report the matter to her mother ***A.W*** *(PW4)* and A did testify that when she examined her daughter's private parts, she thought she noticed what she thought were semen. She did not report the matter anywhere because she feared the appellant who is said to have a violent disposition and was alleged even to have murdered his wife. On the second occasion, L came upon the appellant lying on top of A who was naked. On seeing L, the appellant got up and went away. The two children once again reported the matter to their mother and this time round the matter was reported to the relevant local authorities who took their sweet time before taking action on the matter. By the time the appellant was being arrested, he was already on his way to Nairobi.

Dr. Munyua examined A and filled the P3 Form which was produced by ***Dr. Charles Njenga*** *(PW3)*. The P3 was filled by Dr. Munyua on *30th July, 2007* and found that A's hymen had been torn. The appellant in an unsworn statement alleged that he could not have defiled A due to the fact that in 2006, he had been involved in a traffic accident as a consequence of which he had become impotent. He called his wife ***Jeniffer Wanjira*** *(D.W.2.)* to support that contention.

The trial magistrate who saw and heard all these people testify in his court accepted the evidence of the two children supported as it was by that of their mother and the medical evidence. The magistrate rejected the unsworn statement of the appellant and the supporting evidence of his wife.

On first appeal to the superior court, the learned Judge was also in no doubt that the truth of the matter was to be found with A, L and their mother A.W and that the medical report produced by Dr. Njenga on behalf of Dr. Munyua supported their side of the story.

Before us, the appellant merely repeated the story that he never had anything to do with A and her family and that he was merely framed-up in the charge. We have viewed the recorded evidence and with respect to the appellant there is nothing from that record which would warrant our interfering with the concurrent findings of facts by the two courts below. The recorded evidence fully supported their conclusions. Accordingly, the appeal against the two convictions fails and we order that it be and is hereby dismissed.

On sentence, A's age was given as being eleven years. ***Section 8(2)*** of the Sexual Offences Act provides:-

> ***"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life imprisonment."***

The prosecution proved that A was eleven years old on both occasions when the appellant defiled her. The sentence of life was accordingly inevitable. We must set aside the order of the Judge suspending the sentence on count two and we restore the magistrate's sentence of life imprisonment on that count but direct that the two sentences shall run concurrently. Those shall be our orders in the appeal.

Dated and delivered at Nyeri this 29th day of October, 2010.

R.S.C. OMOLO

…….
JUDGE OF APPEAL

M. OLE KEIWUA

……..
JUDGE OF APPEAL

ALNASHIR VISRAM

……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR