



# IN THE COURT OF APPEAL OF KENYA

## AT ELDORET

## CRIMINAL APPEAL 8 OF2008

**DAVID KUNDU SIMIYU …….. APPELLANT**

**AND**

**REPUBLIC …….. RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Kitale (Ochieng, J.) dated 29th January, 2008***

**in**

**H.C.CR.A. NO. 70 OF 2006**

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**JUDGMENT OF THE COURT**

***David Kundu Simiyu***, the appellant herein, comes before this Court by way of a second appeal, his first appeal having been dismissed by the superior court (Ochieng, J.) on *29th January, 2008*. The appellant was originally charged with one count of defilement of a girl contrary to ***section 145(1)*** of the Penal Code and on an alternative charge of indecent assault on a female contrary to ***section 144(1)*** of the Penal Code. The particulars of the offence in respect of the main charge on which he was eventually convicted and sentenced were that:-

***"On the 12th day of December, 2004 at Miti Moja area in Trans Nzoia District within Rift Valley Province he unlawfully had carnal knowledge of EC a girl under the age of sixteen years without her consent."***

After a full trial in which the prosecution called four witnesses, the learned Resident Magistrate *(Mrs. H.M. Wandere)* found that the prosecution had proved its case against the appellant beyond reasonable doubt and consequently convicted him on the main count of defilement of a girl contrary to ***section 145(1)*** of the Penal Code. The learned Resident Magistrate referred the appellant's case to the Senior Principal Magistrate *(Mrs. W.A. Juma)* for sentence. The appellant's file was placed before the

learned Senior Principal Magistrate on *5th July, 2006* who made the following order:-

"***Case was referred to my court by the learned trial magistrate Mrs. Wandere, a Resident Magistrate for purposes of sentencing. I have gone through the judgment to acquaint myself with the circumstances of the offence. I sentence the accused person in the main count to serve forty years imprisonment."***

The appellant was, naturally, aggrieved by both conviction and sentence. He therefore lodged an appeal in the superior court which appeal was dismissed by that court, as already stated earlier in this judgment.

The facts as accepted by the two courts below were that the complainant, ***EC*** *(PW1)* a girl aged about 13 years at the time of the incident, was asleep in her parents house during the night of *12th December, 2004*. She was with her younger sisters *L*and l *& S*. Their parents had left them alone and gone to their rural home in Kolongolo. Suddenly, the door was pushed open and someone entered. The intruder had a knife and he told the complainant that he would stab her with the knife if she screamed. The intruder covered the complainant's mouth and tore her underpants, lay on top of her and had unlawful carnal knowledge of her. The complainant told the trial court that the intruder inserted his genitals into hers. At that moment, the complaint's father ***PC*** *(PW2)* arrived and with the aid of his torch saw a person on top of her daughter**!** This person was the appellant. The complainant was with the aid of torch light able to see him clearly. ***PC*** decided to lock the complainant and the appellant in the house as he called for assistance, and indeed, a crowd gathered outside the hut. The appellant was apprehended and escorted to Kitale Police Station where he was handed over to ***Pc Jane Lagat*** *(PW4)* who re-arrested him and took possession of a yellow torn underpant as an exhibit. The complainant was then escorted to *Kitale District Hospital* where she was examined by a clinical Officer ***Linus Ligare*** *(PW3)* who filled the P3 form which was produced in evidence. According to the complainant, she was able to see the appellant very well as he lay on top of her. She told the trial court that when her father entered the house and flashed a torch, she was able to see the face of the appellant clearly.

In his defence the appellant denied having committed the offence maintaining that he was arrested along the way as he came from a circumcision ceremony.

In convicting the appellant the learned trial magistrate concluded her judgment thus:-

"***In this case the complainant was emphatic and told the court that it was the accused who lay on top of her and had unlawful carnal knowledge of her after tearing her panty she had on*** *(which was exhibited in court)**. I saw her as she testified. She was clear, and told the court in detail all that transpired that night. As the accused did this he had a knife which he used to threaten the complainant. The accused was found right in the act by PW11. Both PW1 and PW11 were honest and candid witnesses. They had no reason to lie. PW11 said he found this accused lying on top of the complainant, in between her legs, blissfully asleep. It was inside PW11's house and that is where the accused was arrested from and taken to the police station. PW11 was therefore an eye witness to the incident. PW1's evidence was therefore well corroborated by that of PW11 who found this accused actually defiling the complainant.***

***When I weigh the defence case against the prosecution case I come to the conclusion that the defence case's tainted with lies. It is incredible and I reject it. In conclusion therefore I find that PW1 was a girl aged 13 years old. She was unlawfully defiled and the prosecution has proved that this accused had carnal knowledge of her on that material day which was unlawful. The prosecution has proved so against the accused which was unlawful.***

***The accused is therefore found guilty of defilement of a girl contrary to*** *section 145(1)* ***of the Penal Code as charged herein under*** *section 215* ***of the Criminal Procedure Code. I convict him accordingly."***

As already stated, the appellant's appeal to the High Court was dismissed and hence the appellant now comes to this Court by way of second and final appeal.

When the appeal came up for hearing before us on *23rd April, 2009*, the appellant appeared in person while Mr. J.K. Chirchir, *(Senior State Counsel),* appeared for the State. In addressing this Court the appellant asked us to consider his grounds of appeal. He complained that he was given excessive sentence. He further complained that during the trial there was a witness called "***Mama Boy"*** but the said witness was not called to testify.

In opposing the appeal, Mr. Chirchir submitted that the appellant was positively identified and the he was found red handed by the complainant's father. As regards the sentence of forty years imprisonment, Mr. Chirchir maintained that it was a lawful sentence and that the maximum sentence provided was life imprisonment.

This being a second appeal, only points of law fall for our consideration by dint of ***section 361(1)*** of the *Criminal Procedure Code*. That being so, this Court would not interfere with concurrent findings of facts of the two courts below unless they are shown to have been based on no evidence – see ***KAINGO V. R. (1982) KLR 213***. There were concurrent findings of fact. The learned trial magistrate who had the advantage of seeing and hearing the witnesses found that the prosecution witnesses told the truth and rejected the appellant's defence. The superior court found no reason to differ with that assessment of the learned trial magistrate.

The appellant put forward several grounds to challenge the findings of the two courts below. He however did not address us specifically on those grounds as he has merely asked us to consider those grounds. We have considered them and we find that his main complaint touched on findings of fact and the sentence meted out. As already pointed out, this is a second appeal hence we cannot indulge in fresh evaluation of evidence. That was done by the first appellate court. The appeal on conviction, as correctly submitted by Mr. Chirchir, was unmeritorious and we reject it.

As already stated the appellant complained that the sentence imposed on him was harsh and excessive. That ground of appeal would have been summarily rejected since, on the face of it, relates to severity of sentence and therefore a factual matter – see ***section 361(1)(a)*** of the *Criminal Procedure Code*. But the issue has caused us some anxiety and concern because it is not clear to us that the principles of sentencing that obtained when the offence was committed were applied in sentencing the appellant to ***forty (40) years*** imprisonment. It seems to us that by the time the appellant was sentenced i.e. on *5th July, 2006* different considerations might have influenced the sentencing. The offence was committed on *12th December, 2004*. This was long before the ***Sexual Offences Act*** of ***2006*** came into force to provide for minimum sentences for several offences including defilement under **section 8**. The section now provides in part:-

"***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.***

*(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.*

*(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."*

Those are minimum sentences and Parliament appears to give no discretion to the courts to impose sentences below those specified as minimum. The provisions accord with the prime objectives of the act which is "***prevention and protection of all persons from harm from unlawful sexual acts"***. Those provisions, however, could not have been applied in the trial of the

appellant. At the time the appellant committed the offence, ***section 145(1)*** of the Penal Code gave judicial discretion in sentencing depending on the circumstances of each particular case. In ***FRED MICHAEL BWAYO V. REPUBLIC*** – ***Criminal Appeal No. 130 of 2007*** (unreported) this Court discussed at some length a similar issue and came to the conclusion that the principles of sentencing, were erroneously applied, and reduced the sentence. In this case the sentence meted out on the appellant has no sound legal basis. We must therefore interfere with it as the lawfulness of it is called to question. In ***AMOLO V. R. [1991] KLR 392*** at p. 397 this Court stated:-

"***As a matter of law we have, as learned principal state counsel submitted, jurisdiction to restore a sentence which has been altered on wrong principles which, we are satisfied, occurred in this case. To do so does not, we think, infringe the principles set out in section 361(1)(a) of the Criminal Procedure Code, which otherwise takes away our powers to reduce a sentence which is manifestly too severe."***

In view of the foregoing, we think, it is within our mandate to set aside the sentence of ***forty (40) years*** imposed on the appellant. Accordingly, we set aside the sentence of ***forty (40) years*** imprisonment and substitute therefor a sentence of *fifteen years imprisonment* with *hard labour* from the date of conviction by the trial court. To that extent only shall we interfere. The appeal is, otherwise, dismissed.

***Dated and delivered at ELDORET this 29th day of May, 2009.***

***E.O. O'KUBASU***

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***JUDGE OF APPEAL***

***P.N. WAKI***

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***JUDGE OF APPEAL***

***ALNASHIR VISRAM***

…….....

***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***