IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 67 OF 2006

SHIMAYAMANA JEANE CLAUDE ……...……. APPELLANT

AND

REPUBLIC ……..…….…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Karanja, J) dated 15th February, 2006

in

H.C. Criminal Appeal No. 33 of 2004)

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JUDGMENT OF THE COURT

SHIMAYAMANA JEANE CLAUDE, the appellant herein, was on 16th March, 2004 arraigned before the Senior Resident Magistrate's Court at Kakuma on two counts of defilement of a girl under the age of 16 years contrary to section 144(1) of the Penal Code. The particulars of the first count read as follows:-

"SHIMIYAMANA JEAN CLAUDE.

On the 7th day of March 2004, at Kakuma Refugee camp in Turkana District within Rift Valley Province, unlawfully had carnal knowledge of K I, a girl under the age of sixteen years."

As regards the second count the particulars were as follows:-

"SHIMIYAMANA JEAN CLAUDE:- On the 7th day of March, 2004, at Kakuma Refugee Camp in Turkana District within Rift Valley Province, unlawfully had carnal knowledge of J A, a girl under the age of sixteen years."

The appellant's trial commenced on 20th May, 2005 before Mrs. H. Ong'udi (Senior Principal Magistrate) when K I (PW 1) a minor aged 6 years testified by way of unsworn statement in her mother tongue – Kinyarwanda. The second girl aged 8 years was J A E (PW 2). The two girls narrated to the court how the appellant herein lured them to his house with a promise of some sweets. When the two girls responded positively to the appellant's advances, the appellant had sex with them in turns. Before

the learned trial Magistrate the young girl K (PW 1) said:-

"Accused came and called me and said that he will buy me a sweet. Accused is a neighbour. He took me to his home. I went with my sister J. He told Janet he he'd (sic) give her money. I remained at the door. J and accused were in the house. I was seing (sic) them. J clothes were removed by accused, then accused removed his shorts and slept on J. The father of J came and found accused on top of J. Accused first slept with J. He just removed my pants he never slept with me. When J father came we all went to the police station, then hospital then home."

And the second young girl J (PW 2) told the learned trial Magistrate the following:-

"On the date of incident it was around 7 p.m. I was at home playing with Kwize (PW 1) and other children. Claude the accused called me and PW 1. I had not known him. I and PW 1 followed him. The other children went at their homes. When we reached his house he told us to remove clothes. PW 1 removed and I refused. He slapped me on the cheeck (sic) and I removed the clothes. He told us to lie on the mat. We obeyed. He then told us he'd buy us sweets and give us money. He then slept on PW 1. PW 1 used to go to his house daily. I had been to accused's twice only. He told PW 1 to go to the door to check if somebody was coming. PW 1 was just normal and went to the door. When he was sleeping with PW 1 I was outside behind the house. Accused then came for me. He told me to remove clothes. I refused and he slapped me. I then removed them. He never removed his clothes. He then lay on me. My father came and asked accused what he was doing. Accused came out and went to another house. My father screamed and called PW 1's father who came. Accused started pleading for mercy saying it was the 3rd time he was doing so. Accused was then taken to police, then the hospital. We slept at the hospital then went home. The doctor examined me. I was given no medicine."

Dr. Kuraru (PW 3) testified to the effect that his colleague, Dr. Owida, examined the two young girls and produced the P3 forms signed by Dr. Owida.

J E (PW 4) was the father of J (PW 1) and it was his evidence that on 7th March, 2004 at about 7.00 p.m. he reached home but did not find his daughter J. He started looking for her and ended up in the house of the appellant where there was some light. As E (PW 4) entered the house he found the appellant with his shorts at the knee joint and he was actually on top of the young girl. In the course of his evidence El stated, *inter alia*:-

"I went to accused house (sic). There was light. I entered and checked. I found accused with his shorts at the knee joint and he was sleeping on a child. I called him. In his position he had not seen me. I passed PW 1 at the door. The child he was making love to was J my daughter. I asked accused why he was doing so. He jumped up and wore his trouser. I screamed, accused pushed me and I fell down injuring my left hand. He escaped to the neighbours. A neighbour came, and others too. The (sic) arrested him. He started pleading for mercy saying this was not the first time. We took him to the station and the children were taken to the hospital."

As a result of the foregoing the appellant was arrested, taken to the police station and subsequently charged before the trial court.

In defending himself the appellant in his unsworn statement stated that on the material day he came back from duty and lit the *jiko* to prepare food when E came to collect the two young girls who were in his house. El started beating the girls and later it was said that the appellant had defiled the children. He was arrested and taken to the police station.

The learned trial Magistrate carefully considered the evidence before her and came to the conclusion that the appellant was guilty on both counts. She accordingly convicted the appellant and sentenced him to 15 years imprisonment with hard labour on each count. The sentences were ordered to run concurrently.

In concluding her judgment the learned trial Magistrate stated:-

"This is case of defilement of (2) girls whose age is below 16 years. The children gave unsworn and affirmed evidence respectively. PW 2 was cross examined by the accused.

The doctor's evidence confirm that these children had been defiled. From PW 2's evidence the accused had been doing this to them prior to this incident. Accused has confirmed that PW 1 and PW 2 were in his house when PW 4 arrived. He also confirmed that this was not the first time that they were coming to this house. PW 5 responded to PW 4's screams and he saw accused escaping from the house. PW 4 is an old man. He has told this court what he saw. PW 1 has also said that PW 4 came and found accused having sex with PW 2. Accused was arrested the same evening.

I am convinced beyond doubt that the accused did to these children what they say he did. The medical evidence (EXB1) and EXB2 supports the evidence. For my part I found the accused guilty in both counts and convict him accordingly."

Being aggrieved by the foregoing, the appellant filed an appeal to the High Court where Karanja J. re-evaluated the evidence and came to the same conclusion as did the trial Magistrate that the appellant was indeed guilty. The learned Judge, however, was of the view that the appellant should not have been found guilty of defilement but attempted defilement under **section 145(2)** of the Penal Code. In her judgment the learned Judge stated, *inter alia*:-

"As the learned trial Magistrate found, and as rightly submitted by the learned State counsel, the evidence against the appellant was indeed overwhelming. My view however is that the medical evidence does not indicate that there was any penetration by the appellant into the girls.

This could have been established if a high vaginal swab had been taken to establish the presence of semen inside the vagina. In my considered view also, had there been any penetration, given the ages of these two girls, they would have suffered more serious injuries than the bruises and inflammation found on them by the doctor.

The appellant should not therefore have been found guilty of defilement but of attempted defilement under section 145(2) of the Penal Code. This now brings me to the technical issue of the charge being defective. The appellant is charged with defilement contrary to section 144(1) of the Penal Code. That charge should have been preferred under section 145(1) of the Penal Code and not section 144(1) which deals with indecent assault on females. The learned trial Magistrate should have noticed that anomaly and asked the prosecution to amend the charge sheet, or resolve it herself under section 382 of the Criminal Procedure Code. This irregularity did not nonetheless cause any prejudice to the appellant. Indeed, he did not even notice it and did not raise the issue himself. Accordingly, I find that the defect in the charge sheet is curable and invoke the provisions of section 382 of the Criminal Procedure Code to substitute section 144(1) with section 145(1) of the Penal Code.

Further, I find that the evidence adduced before the trial court supports a charge of attempted defilement contrary to section 145(2) of the Penal Code. The sentence for attempted defilement is still life imprisonment and so my substitution does not change anything much. Accordingly, I invoke the provisions of section 186 of the Criminal Procedure Code and find the appellant guilty of 2 counts of attempted defilement under section 145(2) of the Penal Code.

I hereby set aside the conviction on the charges of defilement of a girl under 16 years of age and substitute the same thereof with a conviction on both counts for the offence of attempted defilement of a girl under 16 years of age. I nonetheless uphold the sentences of 15 years imprisonment on each count plus hard labour. I also uphold the order that the sentences do run concurrently. This appeal has no merit and the same is hereby dismissed."

Still aggrieved by the foregoing, the appellant now comes to this Court by way of second and final

appeal. That being so, only matters of law fall for consideration – see **section 361(1)** of the Criminal Procedure Code.

The learned trial Magistrate accepted the evidence of the two young girls (PW 1 and PW 2) as corroborated by that of Elias (PW 4). The learned trial Magistrate was satisfied beyond doubt that the appellant was guilty. The learned Judge on first appeal confirmed this position only that the evidence adduced proved attempted defilement rather than defilement.

This Court will only interfere with concurrent findings of facts where it is demonstrated either that there was absolutely no evidence on the record upon which such findings could have been made or that the evidence that was there was so unreasonable that no reasonable tribunal, properly directing itself to that evidence and the applicable law, could have come to the conclusions made – see **CHEMAGONG V R**. **[1984] KLR 611** and **OGETO V R [2004] 2 KLR 14**. Neither of the two factors is applicable in this case and that being so, there is no basis upon which we could possibly interfere. We have looked at the elaborate written submissions handed to us by the appellant during the hearing of this appeal but there is nothing in those submissions to warrant our interfering with the findings of facts and law arrived at by the two courts below. The sentence imposed upon the appellant was lawful.

That being our view, this appeal fails and we order that it be and is hereby dismissed both as to conviction and sentence.

Dated and delivered at Eldoret this 11th day of April, 2008.

R.S.C OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR