REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 5 OF 2010

EZEKIEL CHERUIYOT KOROS……APPELLANT

VERSUS

REPUBLIC .....…..... RESPONDENT

(Appeal from the judgment of the Principal Magistrate at Sotik, Hon. S.R. Rotich given in Sotik SRM CR. C. NO. 458 of 2006)

JUDGMENT

The Appellant, **EZEKIEL CHERUIYOT KOROS**, was convicted on 17th February, 2010 and sentenced to imprisonment for a period of five (5) years by the Senior Resident Magistrate at Sotik in Criminal Case No. 458 of 2006 of the offence of Defilement of a girl under the age of sixteen(16) years contrary to the repealed **Section 145(1)** of the Penal Code, **Chapter 63** of the Laws of Kenya. The Appellant's conviction followed a full fledged hearing.

It is against that conviction and sentence that the Appellant appealed on 1st March, 2010 to this court. He proffered five (5) grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact in convicting the accused when there was insufficient evidence to sustain the conviction.

2. That the learned trial magistrate erred in law and in fact in that he gave undue weight to the prosecution's case and least weight to the Defence case.

3. That the learned trial magistrate erred in law in that he failed to adhere to the rules of Criminal Procedure by proceeding with a trial that had proceeded before another court without giving the Appellant an opportunity to recall the witnesses if he so wished.

4. That the learned trial magistrate erred in law and in fact in that he placed the burden of proof on the Appellant and not on the prosecution.

5. That the sentence imposed against the Appellant was inordinately harsh and excessive in the entire circumstances of the case.

The appeal came up for hearing before me on 3rd November, 2010. Miss. N.M. Idagwa, State Counsel, appeared for the Respondent while Advocate Bett(Mrs) appeared for the Appellant.

Mrs. Bett, the learned counsel for the Appellant attacked the conviction and sentence on the grounds that (1) the charge sheet was defective in that it omitted the word ***"unlawfully"*** and (2) that the evidence before the trial court was insufficient to prove the offence and (3) that the age of the complainant was not proved and (5) that the sentence was excessive in the circumstances.

The particulars of the offence of ***"defilement of a girl under the age of sixteen (16) years contrary to Section 145(1) of the Penal Code",*** now repealed, were that the Appellant, ***"Ezekiel Cheruiyot Koros: On the 21st day of February, 2006 in Bureti District of the Rift Valley Province, had carnal knowledge of S.C a girl under the age of sixteen years".***

Section 145(1) of the Penal Code under which the Appellant was convicted stipulates;-

Section 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."

Section 145(1) (supra) made it an offence for one to carnally know a girl of sixteen (16) years where this was done unlawfully. The legislature recognized that there may be situations in which carnal knowledge with a girl of under the age of sixteen (16) years may not be unlawful. This might perhaps be in situations where the girl is married to the person or where the girl is mistaken on reasonable grounds for or poses as an adult woman or leads the accused to believe that she is above sixteen (16) years on account of her size and demeanour and/or other manifestations. This is why it was incumbent to state in

the charge that the carnal knowledge was ***"unlawful"***. In any case, the repealed section required it to be ***"unlawful"*** so as to amount to an offence. Perhaps that is why the Hon. Lady Justice Jessie Lesiit emphasized in her judgment in NKU H.C. Cr. Appeal No. 407 of 2000 (**Alfred Kiptanui Kangogo v. Republic** that ***"the definition makes it clear that it is the act of carnally knowing a girl unlawfully that is very vital to the charge".*** The Judge went on to hold in that case (where the charge was framed before **Section 145(1)** was repealed and replaced by **Act 5 of 2003** which put up the age from 14 years to 16 years) that ***"the charge of defilement must allege in its particulars that the Sexual Act was unlawful. The particulars of the offence of defilement the Appellant was charged with and convicted of did not state that the defilement was unlawful. That charge did not disclose an offence known to law and the Appellant was wrongly convicted on it".***

The charge was clearly defective as it failed to state that the Appellant had ***"unlawfully"*** had carnal knowledge…. On this ground alone, the appeal would be bound to succeed.

But even if the charge had been properly framed and did not suffer from that defect, was there sufficient evidence on the strength of which the Appellant could be convicted under the repealed **Section 145(1)** of the Penal Code" For starters, was the complainant a girl under the age of 16 years" In her evidence, the complainant, **S.C,** told the trial court on 25th October, 2006 that she was born in 1990 but did not mention the month of birth. This means that she was either a little above or a little under the age of 16 years as at the date of commission of the alleged offence on 21st February, 2006. The Clinical Officer who examined her on 22nd February, 2006 **(George Ouma PW4)** testified that the complainant told him that she was 13 years. He did not carry out any age assessment. The area assistant chief of Getarwet sub-location where the complainant came from gave evidence as PW4 and stated that the complainant was 15 years and that she was born in 1991. No birth certificate was ever produced to verify the age. It is clear that there was insufficient evidence to prove that the complainant was a girl under the age of 16 years when the offence is alleged to have been committed.

The learned State Counsel, Miss N.M. Idagwa, rightly conceded this appeal. The provisions of **Section 145** of the Penal Code relating to defilement were repealed by **Section 49** of the **Sexual Offences Act No. 3 of 2006** as shown in the second schedule to that Act. The said Act contained transitional provisions to the effect that ***"any proceedings commenced under any written law or part thereof repealed by the Sexual Offences Act No. 3 of 2006 shall continue to their logical conclusion under those written laws"***

Defilement is today defined in **Section 8** of the **Sexual Offences Act, No. 3 of 2006.** The Section states:

Section 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

Section 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.

Section 8(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.

Section 8(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.

It may be observed that **Section 2** of the **Sexual Offences Act No. 3 of 2006** has assigned the meaning of the word ***"child"*** to the meaning in the Children's Act**. Section 2** of the latter Act defines ***"a child"*** as ***"any human being under the age of 18 years".***

It may be observed that **Section 5** of the **Sexual Offences Act** makes it a defence to defilement if there is proof that the child deceived the accused into believing that she or he was over the age of 18 years at the time of the alleged commission of the offence providing that the accused reasonably believed that the child was over the age of 18 years.

Thankfully the age of the child has overtime continually been raised and now stands at 18 years. This has been in realization that in our society, a girl of under the age of 18 years is either not fully mature to consent to and/or engage in sexual intercourse and/or is too vulnerable and/or requires protection of the law from those bent on engaging in immoral sexual acts.

In this appeal, the charge was as fatally defective as the evidence was insufficient to support the conviction. I hereby quash the conviction and set aside the sentence. Unless otherwise lawfully held, the Appellant shall be set free forthwith.

DATED at **KERICHO** this 1st day of December. 2010

G.B.M. KARIUKI, sc

RESIDENT JUDGE

COUNSEL APPEARING

Mrs. Bett advocate for the Appellant

Mr. P. Kiprop State Counsel for the Respondent

Court Clerk – Mr. Bett