REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL 60 OF 2009

PHILIP KIPKURUI KITUR
……APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(From the judgment of the Principal Magistrate at Bomet, T. Okelo Esq.,

given in Bomet SRM CR. C. NO. 2061 of 2005)

JUDGMENT

On 12th November, 2009, the Appellant, **PHILLIP KIPKURUI KITUR**, was sentenced to imprisonment for a period of six (6) years after being found guilty and convicted in Bomet Senior Resident Magistrate Court Criminal Case No. 2061 of 2005 by Hon. T. Okelo, a Principal Magistrate, on two counts, one of defilement and the other of indecent assault contrary to **Section 145(1)** and **144(1)** of the Penal Code respectively.

Criminal Case No. 2061 of 2005 was commenced before the commencement of the **Sexual Offences Act No. 3 of 2006.** The Sexual offences Act has transitional provisions to the effect that any proceedings commenced under any written law repealed by the Sexual Offences Act shall continue to their logical conclusion under those (repealed) written laws.

Aggrieved by the conviction and sentence, the Appellant filed the appeal herein in which he proffered the following grounds which were the main thrust of his appeal:-

1. *That the trial court erred in relying on the evidence of PW1.*

2. *That the evidence adduced by the prosecution fell short of the standard required.*

3. *That the trial court did not duly consider the Appellant's defence in the case.*

The particulars of the charges were that the Appellant;

Count I

"On the 5th day of December, 2005 in Bomet District within Rift Valley Province, defiled V. C, a girl aged 6 years".

Count II

On the 5th day of December, 2005 in Bomet District within Rift Valley Province, unlawfully and indecently assaulted V.C by touching her private parts"

In his judgment, the learned trial magistrate found the guilt of the Appellant proved by the evidence of the two minors, **V.C**(PW1) who was defiled contrary to **section 145(1)** of the Penal Code and **Sharon Chepkorir** (PW2) who was indecently assaulted contrary to **section 144(1)** of the Penal Code. Both saw and recognized the Appellant.

In his judgment, the trial magistrate found that ***"the complainants, PW1 and PW2, both knew the accused well. They called him by name. They said the accused had a spot light and each was defiled by the accused"*** while the other watched….

The evidence adduced during the trial shows that both PW1 and PW2 were sleeping together on 5th December, 2005. It was at night. The defiler went to their bed. He had a torch. He shone it. PW1 and PW2 saw the defiler through the torch light. They recognized him as Philip whom they knew. This is the report they gave to their mother, **W.N,** (PW3), when she returned home the same night at midnight. PW3 found that the defiler had gained access to the house by breaking into the house. PW6, **A.C,** a Clinical Officer at Bomet Health Centre, produced the P3 of PW1 which had been filled by **Dr. Kipsang** who had examined PW1. PW6 knew the handwriting of Dr. Kipsang who was her Medical Officer of Health (MOH) from 2005 to 2007. The evidence in the P3 was admissible under the Evidence Act. It showed that PW1 had bruises on labia minora and majora and viginal discharge. When viginal swab was done, it revealed presence of spermatozoa. Defilement was deduced. As regards PW2, her evidence showed that the person she recognized as the Appellant tried to defile her and that when she felt pain and screamed, he

moved onto PW1. PW2's evidence shows that she was indecently assaulted but the Appellant was never charged with indecent assault of Sharon Chepkorir (PW2).

As this is the first appellate court, I have duly perused the evidence adduced in the trial court and made my own conclusions and inferences with a view to giving the Appellant a fresh reconsideration of the case.

It is my finding that the evidence of the two girls (PW1 and PW2) is reliable and cogent. It does not leave room for doubt as to the true identity of the person they saw. Although it was at night, the Appellant provided torch light through which PW1 and PW2 saw him. They recognized him as Philip. PW2 even knew him as the man who came from a place called Kapalwo. PW1 and PW2 had no grudge against the Appellant and there was no reason why they would pick on him if they had not seen and recognized him. It is accepted in law that evidence of recognition is more reliable than evidence of identification. I have considered whether there is any danger of error in relying on the evidence of PW1 and PW2 and I am satisfied that it is reliable. It is my finding that there is no evidence to suggest that the two witnesses might have mistaken somebody else for the Appellant. No doubt exists as to whether the Appellant was the defiler.

I find no merit in the appeal on conviction. I dismiss it. As regards sentence, it was neither harsh nor excessive. I shall not interfere with it. I dismiss the appeal also as it relates to sentence.

In the result, the appeal fails. I dismiss it in its entirety.

The Appellant shall serve the sentence meted out to him by the trial court.

DATED at **KERICHO** this 24th day of November, 2010

G.B.M. KARIUKI,sc

RESIDENT JUDGE

COUNSEL APPEARING

Mr. P. Kiprop State Counsel for the Respondent

Appellant in person