Case Number:	Criminal Appeal 122 of 2010
Date Delivered:	07 Oct 2011
Case Class:	Criminal
Court:	High Court at Malindi
Case Action:	Judgment
Judge:	Hellen Amolo Omondi
Citation:	JAMES KARIUKI KABARI v REPUBLIC [2011] eKLR
Advocates:	-
Case Summary:	..
Court Division:	Criminal
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 122 OF 2010

(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO. 585 OF 2009 SENTENCE OF THE

SENIOR RESIDENT MAGISTRATE COURT AT LAMU BEFORE KITHINJI A.R SRM)

JAMES KARIUKI KABARI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

JAMES KARIUKI KABARI (the appellant) was convicted of defilement contrary to section 8 (2) of the Sexual Offences Act of 2006 that on diverse dates between 18th and 20th of October 2009 at Nairobi area, in Lamu District within the Coast Province, unlawfully committed an act which caused penetration with **J. W. M**, a child between the age of twelve and thirteen years.

The appellant pleaded guilty to the charge and was sentenced to serve 21 years imprisonment. The facts as narrated to the trial court were that the complainant **J.W**, a girl aged 13 years was walking form **M** market to their home at **NAIROBI** area when she met the appellant who convinced her to accompany him to his home so that he could send her to her mother.

Appellant detained her and defiled her throughout the night. He retained her the following day, and continued defiling her. Police got information and visited the appellant`s home and found him and the young girl together. Both were arrested and taken to the police station, then taken to hospital for examination. Examination revealed that complainant had been defiled. Appellant was also examined – the P3 forms in respect of both of them were produced as exhibit in court.

Appellant confirmed the facts as being true saying they had agreed to have sex. The prosecution informed the court that appellant was a first offender. Appellant`s mitigation was that the complainant was his girlfriend who used to sleep with him and the only snag was that he did not inform her parents but she loved him.

The Trial Magistrate considered the circumstances of the offence and noted that it was a serious one calling for a deterrent sentence. He also noted the apparent age of the accused before meting sentence. Appellant in his grounds of appeal stated that plea was equivocal and unconditional. Secondly that there was no interpretation so he did not understand the language of the court. (3)The Trial Magistrate did not give him adequate time to reflect on the plea he was about to make. (4) The Trial Magistrate did not explain to him the nature of the offence he was facing. (5) he is elderly and was coached by the prosecution at the basement cells to plead guilty so that the court would forgive him – he is 68 years.

The appellant sought to rely on his written submissions in which he states that the Trial Magistrate finding was based on a section which does not reveal any prohibited act recognized by the Sexual Offences Act, saying there was no proper charge as he was only charged with the penalty section of the Act and this therefore rendered the charge defective. The charge sheet indicates appellant was charged under section 8 (1) as read with section 8 (2).

Section 8 (1) provides;-

“***A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”***

This provision creates the offence. The penalty to this offence is found under section 8 (2);-

"A person who commits an offence of defilement with a child aged eleven years or less, shall upon conviction be sentenced for life"

It is therefore not correct for appellant to say he was charged only with the penalty, the charge sheet had both the offence and the penalty thus had no defect to that extent and the decision in **MUTINDA MWAI MUTINDA V R CR APP NO. 282 OF 2006** (unreported) which he cites is not applicable in this instance.

Appellant also argues that the P3 form refers to sexual assault whilst he is charged with the offence of defilement, and that those two terms are totally different as provided under the sexual Offences Act. While I concur with that argument in terms of terminology under the Act, it would be myopic to restrict the trial court to the phrases used in the P3 form without paying regard to the findings made by the medical personnel in that document – the findings disclosed an act defined under the Act as defilement.

Appellant also contends that, although he pleaded guilty to the offence, the Trial Magistrate ought to have given him time to reflect on the nature of the charge since he is an old man and had been misled by the prosecution that if he pleaded guilty he would be forgiven as he was a first offender. In this regard, **MR KEMO** (for the State) opposed the appeal and submitted that the plea was unequivocal and the trial court record reflects that appellant`s plea was unequivocal and interpretation was in Kiswahili/English (the appellant never raised language concerns then). It is further pointed out that appellant indeed had time to reflect on what he had pleaded guilty to because after the charge was read, facts were narrated to the trial court two weeks later, and so his contention of not being given time to reflect on the charge does not hold. I concur.

It is also drawn to this court`s attention that the complainant was a girl aged 13 years and the appellant admitted the facts as being true, and the court recorded exactly what he admitted in Kiswahili language. **MR KEMO** wanted the court to consider what appellant said in mitigation regarding his relationship with the girl and pointed out that a girl of 13 years cannot give consent, so his grounds of appeal are a mere afterthought intended to exonerate him from what he did.

I perused the trial court`s record, the plea was unequivocal and infact appellant explained to the Trial magistrate in his admission that they had agreed to have sex. In mitigation he explained further on this relationship saying the girl was his girl friend who used to sleep with him and loved him. If the appellant had a language problem in the lower court, then the genuiness of this claim is defeated by the very response he gave in this court during the appeal which he elected to conduct in Kikuyu and which was

similar to what he had told the trial court that;-

"The girl used to spend time at my place. She was a good friend, she was like a wife to me and we lived together"

This then demonstrates that appellant had understood the proceedings conducted in Kiswahili in the lower court, the Trial Magistrate did not make up his responses which have remained the same even though who he has elected to use his mother tongue. His claim that his rights were prejudiced because the trial court used a language he did not understand is a gimmick which holds no basis and is merely intended to extricate himself. My finding is that the conviction was proper – the girl had no capacity to consent.

Although the penalty section cited related to age 11 years or less, I note that the Trial Magistrate was diligent enough to take that into account when passing sentence which is why instead of passing life sentence as contemplated under section 8 (2), he imposed a penalty of 21 years which is contemplated under section 8 (3) where the victim is aged 13 years - the provision is as follows;-

"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 not less than twenty years"

The upshot then is that the sentence meted out was legal and proper and I have no reason whatsoever to interfere with it – it is confirmed. The sum total of my finding is that the appeal has no merit and is dismissed.

Delivered and dated this 7th day of October 2011

H.A.OMONDI

JUDGE