REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 9 OF 2018

MARGARET WANJIKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Nyeri Chief Magistrate's Court Criminal Case No. 20 of 2017 delivered by R. Kefa Senior Resident Magistrate on 12th April 2018.

JUDGMENT

1. **Margaret Wanjiku** the appellant herein was charged with the offence of sexual assault contrary to section 5(1)(a)(i) as read with section 5(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that the appellant on the 6th day of July 2017 in Nyeri county within the Republic of Kenya unlawfully used her fingers to penetrate the vagina of FNW a child aged 2 years and 2 months.

2. She also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars being that on the 6th day of July 2017 in Nyeri county within the Republic of Kenya intentionally touched the vagina of FNW a child aged 2 years, 2 months.

3. The case proceeded to full hearing at the end of which the Appellant was found guilty and convicted on the main count of sexual assault and sentenced to twenty (20) years imprisonment. Being aggrieved by the judgment she filed this appeal citing the following grounds:

> *(i) That the trial magistrate erred in both law and fact by failing to assess the vulnerability of the complainant before court, before allowing an intermediary on behalf of the complainant.*
>
> *(ii) That the trial magistrate erred in both law and fact by erroneously relying on circumstance evidence which was compatible with the innocence of the Appellant.*
>
> *(iii) That the trial magistrate erred in both law and fact when she made a finding that she was trying to conceal the Exhibited materials.*
>
> *(iv) That the trial court erred in both law and fact by conducting the trial un procedurally.*
>
> *(v) That the trial magistrate erred in both law and fact by rejecting her defence without any cogent reason.*

4. As summary of the prosecution case is that the complainant FNW was a minor aged 2 years and 2 months at the time of incident. Her speech had not developed at the time. PW1 **HWM** is the mother of the minor. She had employed the Appellant as her house help, who had worked for her for 3-4 months before the incident.

5. PW1 has another child aged who was 9 years then and was attending [particulars withheld] Primary School std 3. He would leave school at 5pm and arrive home at 6 pm. PW1 is a teacher at [particulars withheld] secondary school and she lived in [particulars withheld] with her two children and the Appellant. On 6th July 2017 at around 4pm as she left school for home, the Appellant called her using a number other than her own. PW1 disconnected and called her on the number she knew.

6. Its then that the Appellant informed her that the minor (FNW) had defecated and the stool was blood stained. She explained this to a colleague who gave her a lift and she instructed her to come with the child to the main road which she did. She took her to Nyeri General hospital but the pediatric section was full. She then proceeded to Mathari Mission Hospital.

7. On checking the child's pampers on the instructions of the doctor she found the pampers filled with blood. Upon examining the child the

doctor discovered that FNW was profusely bleeding from the vagina. She was taken to the ward where she was admitted for 3 days. A Gynecologist attended to her in theatre and confirmed that the child had been defiled but the uterus was intact. The matter was reported to the police.

8. PW2 **Dr Frances Maina** from Consolata Hospital Mathari Nyeri filled the P3 (**EXB1**) in respect of FNW His findings were:

- Bleeding from vagina. Pampers, clothes were soiled with blood.
- Injuries on vagina, which was torn on the right
- Vagina orifix was swollen
- Broken hymen.
- The tear was repaired

9. **Dr Moses Gichu Mwenda** (PW3) a consultant Psychiatrist from Nyeri Referral examined FNW and found that she had not developed her speech yet. He produced his report (**EXB9)**

10. PW4 **No. 89188 P.C. Caroline Kiptoo** is the investigating officer. She confirmed receiving the report on 7th July 2017 morning hours. She accompanied PW1 to the hospital then to her home at [particulars withheld]. She found the appellant and upon interrogating her she managed to recover a blood stained cushion cover(**EXB4**), bed sheet(**EXB5**), two baby clothe (**EXB 6)**, stocking(**EXB7)** and blood stained pampers (**EXB 8.)** She also produced FNW's birth certificate (**EXB3**).

11. In her unsworn defence she stated that she was a house help for PW1. On the material day at around Noon she took clothes to a tailor at the shopping centre, but forgot to close the main door. Upon her return she found FNW crying and she refused to eat and was seated on the sofa. She then called PW1 using her newly acquired line and explained to her what was happening. The next day she was arrested.

12. When the appeal came for hearing the appellant relied on her written submissions. The main points she has raised are that

(i) An intermediary ought to have been appointed for the minor as provided for under the Sexual Offences Act.

(ii) That the evidence of PW3 should never have been taken.

(iii) That there wasn't sufficient evidence to sustain a conviction.

(iv) That her defence was unfairly rejected by the trial court.

13. Mr Njue for the State opposed the appeal. He submitted that the minor FNW had not developed her speech. That FNW could not be declared vulnerable as she did not give any evidence. Further that PW3 was not an intermediary as he never gathered anything.

14. He submitted that the Appellant was a Nanny to FNW and she was the only person at home with the child then. Found in the house were several items with blood stains, some of which were hidden. He submitted that she did nothing between 12 noon and 3 pm as the child bled and that her defence was rightfully rejected.

15. This being a first appeal, this court has a duty of considering the evidence afresh and arrive at its own conclusions. Always bearing in mind that the court did not see or hear the witnesses. See **Okeno v R 1972 EA; Mwangi v R [2004] 2KLR 28**

16. I have duly considered the evidence on record, the grounds of appeal and the submissions by both parties. I find the following issues to fall for determination:

(i) Whether FNW was sexually assaulted

(ii) Whether the appellant is the one who assaulted her.

17. **Issue No (i)**

Whether FNW was sexually assaulted

The appellant called PW1 on 6th July 2017 informing her that FNW had passed stool that was blood stained. She later informed her that she had cleaned FNW and flushed the faeces. However, when the child FNW was taken to hospital it was found that she was bleeding profusely from her vagina.

18. Further examination revealed that FNW had injuries inside her vagina which was bleeding and part of it was swollen. The P3 form (PEXB.1) confirms it. PW2 explained that a high vaginal swab (HVS) and urine test were done. Both of them tested negative for

spermatozoa and bacteria. An HIV test was equally done.

19. Section 5(1)(a)(ii) Sexual Offences Act under which the appellant was charged provides:

> **(1) Any person who unlawfully-**
>
> **(a) penetrates the genital organs of another person with-**
>
> **(i) any part of the body of another or that person; or**
>
> **(ii) any object manipulated by another or that persons except when penetration is carried out for proper and professional hygiene/medical purposes;**
>
> **is guilty of an offence named sexual assault"**

From the evidence above I find that the minor F.N.W's vagina was penetrated by an object.

(ii) **Issue No (ii)**

Whether the appellant is the one who assaulted her

20. The Appellant is hanging so much on her report to PW1 to show her sincerity and faithfulness to her employer. She was the one taking care of this baby. She has raised issue with the fact that the child was not declared vulnerable under section 31(1) of the Sexual Offences Act. She further stated that PW3 was not procedurally appointed as an intermediary.

21. First and foremost the Appellant does not dispute the fact that FNW had not developed her speech and so could not explain anything. As her Nanny she knew this very well. All that PW3 who is a Medical Doctor told the court was that FNW could not speak and only uttered noises/sounds since her speech had not developed. He did not therefore give any evidence in respect of what happened to her and neither did he act as her intermediary. There was therefore no provision of the Sexual Offences Act that was breached.

22. The Appellant reported to PW1 that the child was defacating blood stained stool which she had flushed away. At no time was such stool shown to Pw1 by the Appellant. As an adult woman taking care of this child the Appellant could not pretend not to know where the blood was oozing from. The medical examination shows FNW was profusely bleeding from her vagina.

23. She therefore lied to PW1 about the condition of the child. Her lies are however appreciated because they enabled PW1 urgently to take the child for treatment.

24. The Minor FNW was under the sole care of the Appellant, in the absence of PW1. The brother to the minor was away in school. In her evidence, the Appellant says she left the child under nobody's care with the main door to the house open. She allegedly left at around Noon to take her clothes to the tailor at the shopping centre. She does not say what time she returned. The investigating officer (PW4) asked her to show her the clothes she had taken to tailor or even the tailor, but she declined.

25. Her defence therefore is that it was someone else unknown to her who sexually assaulted the child. This was not a case of defilement as no spermatozoa or bacteria were found in the HVS and or the child's urine. This is a case of an object having been inserted into the child's vagina.

26. It is true that there was no eye witness to this incident. The evidence before the court is purely circumstantial. How does the court treat such evidence? In the case of **Ndurya R 2008 KLR 135** the Court of Appeal stated this of such evidence:

> **"Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilty from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may have been committed by a person other than the appellant"**

Further in **Wambua and 3 Others v R 2008 KLR 142** it was held:-

> **" In order to justify an inference of guilt from circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of this inference is always on the prosecution which is required to establish its case beyond reasonable doubt.**
>
> **It is also necessary, before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

27. A scrutiny of the evidence reveals that FNW had been left under the sole care of the Appellant. She cannot run away from that

responsibility and place it on an unknown person. Her refusal to show what clothes she had allegedly taken to a tailor or even identify the tailor she went to see; how long she had been away; and why she could leave a child under her care unattended with an open door all go a long way to show her lack of sincerity. The record further shows she never asked PW1, PW2 and PW3 any question in cross examination. Their evidence remains unchallenged.

28. All evidence including the defence analysed reveals no route of escape for the Appellant. Her role as the Nanny to FNW and her conduct in lying to PW1 about FNW's illness, the blood stained clothes hidden under the bed; her lies about going to the shopping centre and leaving the door open all point to none other than the Appellant as the person responsible for what happened to FNW. I have no reason to fault the findings by the learned trial Magistrate, and therefore uphold the conviction.

29. On sentence, the minimum sentence under section 5(2) Sexual Offences Act for this offence is ten (10) years which may be enhanced. I believe in the event of enhancement the court ought to give reasons for the same. The Appellant was a first offender and she mitigated. The child was treated and the injury repaired.

30. In the circumstances, I set aside the sentence of twenty (20) years and substitute it with ten (10) years imprisonment. I therefore make the following orders:

(i) Appeal on conviction is dismissed.

(ii) Appeal on sentence is allowed, the appellant to serve ten (10) years imprisonment from date of conviction.

Orders accordingly.

Signed and dated this 27th day of November 2018 in open court at Nyeri.

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HEDWIG I ONG'UDI

JUDGE