



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 171 OF 2012**

**BETWEEN**

**NICHOAS WAMAE WACHIRA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against conviction and sentence of 15 years imprisonment dated***

***2<sup>nd</sup> October, 2012 by Hon. L. K. Mutai in Karatina Senior Resident Magistrate's Cr. Case No. 527 of 2011 (S.O.))***

**JUDGMENT**

**Introduction**

1. On 22<sup>nd</sup> June, 2011, the appellant herein appeared before the Resident Magistrate's Court at Karatin and pleaded not guilty to the charge of **defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No. 3 of 2006**. The particulars of the offence are that on the 7<sup>th</sup> day of March 2008 within Mathira West District in Nyeri County, he intentionally caused his penis to penetrate the vagina of ANM., a child aged 7 years.

2. In the alternative he was charged with **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 7<sup>th</sup> day of March, 2008 in Mathira West District within Nyeri County did commit an indecent act with ANM., a child of seven years by rubbing his penis against the said ANM's vagina.

3. The case proceeded to hearing during which the prosecution called 6 witnesses. At the close of the prosecution case, the appellant was found to have a case to answer so he was put on his defence. He gave sworn evidence. He did not call any witnesses.

**Judgment of the Learned Trial Court**

4. After a careful analysis of all the evidence on record, the Learned Trial Magistrate was satisfied that though the prosecution had not proved the main charge of defilement, the alternative charge had been proved to the required standard. The appellant was accordingly found guilty and convicted on the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. He was sentenced to fifteen (15) years imprisonment.

**The Appeal**

5. Being dissatisfied with both conviction and sentence, the appellant brought this appeal premised on 6 grounds of appeal. The appellant contends in the petition of appeal that the judgment is flawed because it was based on the evidence of a single identifying witness; that the entire evidence is both contradictory and inconsistent and that the medical evidence in particular and the entire evidence in general did not support the charge against him. The appellant has also complained that his defence was rejected for no good reasons. It is the appellants' plea that his appeal be allowed in its entirety.

6. As this is a first appeal, this court required to evaluate and consider the evidence as if it was being adduced before it with a view to reaching its own conclusions in the matter. The only thing the court has to remember is that it has neither seen nor heard the witnesses who testified during the trial, and to make an allowance for the same. The Court of Appeal in **Gabriel Njoroge -vs- Republic (1982 – 88) IKAR** held that **“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court**

are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya –vs- Republic [1957] EA 336, Ruwala –vs- Republic [1957] EA 570).”

### The Prosecution Case

7. The prosecution case is that on 7<sup>th</sup> March, 2008 at about 6.00 p.m., MW, PW2 (M) sent her daughter ANM to the shopping centre to buy credit. After buying the credit ANM made her way back but before she left the shopping centre, Karuri Ngare, PW3 offered to buy her a local sausage. He bought her the sausage and as she enjoyed the sausage on the way home, the appellant emerged from the rear door of the butchery, grabbed ANM’s hand while warning her that if she screamed, he would stab her with a knife or shoot her or even slaughter her. The appellant then pulled ANM to the nappier grass, removed her pant and biker, removed his own clothes and inserted his penis into her private parts before proceeding to put his penis in her mouth. He then told ANM never to say anything to anyone.

8. As ANM fled home, her mother MW was frantically looking for her because she had taken a long time to return home. As she left for her house for the second search for ANM. MW met ANM who explained what had befallen her. They left together for the market. On seeing ANM. with her mother, the appellant fled. MW raised an alarm and police who were on patrol came to the scene and advised MW to report the matter to Kiamachambi police station. She did so, and then took ANM to hospital. The child was seen by one Maina Ndirangu, a clinical officer based at Karatina Hospital.

9. The clinical officer testified that on examining ANM he established that the inner wear the girl wore had a brownish stain and her head was also dirty at the rear. Though she had no bruises on her labia majora her hymen was broken. There were pus cells in the vagina. In his opinion, ANM had signs of venereal infection. The treatment notes and the duly signed P3 form were produced as Pexhibits 1 and 2 respectively. He confirmed that ANM had suffered penal penetration.

10. Karuri Ngare, PW3 confirmed he was the one who had bought sausage worth Kshs 10/= for ANM. He told the court that the child was her relative. Daniel Maina PW4, the operator of the butchery confirmed that Karuri Ngare bought a sausage for ANM, and that Karuri had left the butchery with ANM. He also testified that after about 20 or so minutes ANM and MW entered the butchery but when the appellant saw them he fled.

11. The investigating officer, number 14585 PC James Ngatia testified as PW6. He received the report of the incident and recorded it in the OB. He issued MW and ANM with the P3 form which was produced as Pexhibit 2. The letter dated 22<sup>nd</sup> November, 2011 from ANM’s school confirming she was a pupil at the said school, together with ANM’s notification of birth were produced as Pexhibits 3 and 4 respectively.

12. The appellant was eventually arrested four years after commission of the offence. He had disappeared from the area and was charged when he was arrested in connection with the commission of another offence.

### Defence Case

13. In his sworn defence, the appellant stated that he was a businessman at Marwa market, and that he was arrested sometime on the night of 15<sup>th</sup>/16<sup>th</sup> May, 2011. He was then escorted to the police station where he was interrogated in connection with a theft charge. When he appeared in court on 21<sup>st</sup> June, 2012 for the hearing of the theft case he was charged with this offence of defilement. He averred that he knew nothing about it.

### Hearing of the Appeal

14. At the hearing of the appeal, the appellant abandoned his appeal on conviction and urged the court to reduce sentence to the period he has already spent in prison.

15. From the record, the appellant was sentenced to fifteen (15) years imprisonment although the alternative count of which he was convicted carries with it a sentence of not less than 10 years.

### Analysis and Determination

16. Section 11 (1) of the Sexual Offences Act provides that **“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than 10 years.”** This means that the minimum sentence for the offence is 10 years. It could go up to any length of time that a Trial Magistrate deems appropriate depending on the gravity of the circumstances.

17. In the instant case this court finds that the sentence of 15 years is reasonable. Though the minimum sentence is 10 years, the Trial Court exercised its discretion in imposing the 15 years. Only the Trial Magistrate appreciated the gravity of the circumstances of the case as the case proceeded. I do not think that the appellant has given any reason why the sentence should be reduced to the period already served. He has shown no remorse for what he did. His only concern is that he has been in prison for a long time.

### Conclusion

18. The appeal on both conviction and sentence is dismissed. The appellant has a right of appeal to the Court of Appeal within 14 days from

the date of this judgment.

Orders accordingly.

Judgment written and signed at Kapenguria

**RUTH. N. SITATI**

**JUDGE**

**Judgment delivered, dated and countersigned in open court at Nyeri on 20<sup>th</sup> day of December, 2018**

**HON. A. MSHILA**

**JUDGE.**

**In the Presence of**

Gicheha for the state

Accused present in person

Kinyua – Court Assistant