



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 17 OF 2017**

**JAMES MWANGI *alias* CHUMA .....APPELLANT**

***Versus***

**REPUBLIC .....PROSECUTOR**

***(Being an appeal from the original conviction and sentence by Hon. B. S Khapoya –Ag. SENIOR RESIDENT MAGISTRATE dated 10<sup>th</sup> March, 2014 in Maralal Senior Resident Magistrate’s Court Criminal Case No. 531 of 2013)***

**JUDGMENT**

1. **JAMES MWANGI *alias* Chuma** the appellant was charged before the Principal Magistrate’s Court at Maralal with the **offence of defilement contrary to section 8(1)(4) of the Sexual Offences Act**. In an alternative charge he was charged with **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act**. The trial court after conducting the trial convicted him on the main count. On being convicted he was sentenced to imprisonment of 15 years. He has filed this appeal against conviction and sentence.

2. This court as the first appellant court is required to subject the trial court’s evidence to fresh scrutiny and to make its own independent conclusion on that evidence. In doing so this court should bear in mind that it neither saw nor heard the witnesses testify.

**BACKGROUND**

3. The complainant N.N.L in her testimony said that she knew the appellant because he used to buy food from her and her sister. The complainant and her sister used to cook food which they then would sell to construction workers at the site. On 12<sup>th</sup> August 2013 at 1 p.m. the complainant was alone at home cooking a dish known as *githeri*. The *githeri* was to be sold at the construction site at Samburu Teachers College in Maralal. The complainant lived with her sister. Complainant delivered the food to the construction site and returned home. While there she heard a knock at the door. It was the appellant. The appellant ordered from her *githeri*. She said that she served him and he ate it while sitting at the veranda. The complainant went back into her house and while there the appellant entered the house and locked all the doors. The appellant then blocked the complainant’s mouth threw her forcibly on the bed and removed her inner clothes. He then proceeded to defile her. Complainant said that she screamed because she felt pain. It was then that the appellant released his grip on her and ran away. In so doing he left behind his cap on the bed. It was thereafter that the complainant noticed that she was bleeding. She washed herself and lay down. On her sister’s arrival later on the complainant informed her that the appellant had defiled her. Her sister took her to hospital where she was admitted for three days. It is important to state that when the sister arrived at the house she noticed that there was blood on the floor of

the kitchen. She also noted that the complainant was in a lot of pain. The sister noticed the appellant's cap which was on their bed. In her evidence the sister stated that she had known the appellant for 2 years and that in those two years the appellant wore the same cap. The sister in evidence stated that when the complainant was examined by the doctor the doctor found that she had lost her virginity and had sustained injuries to her pelvic region.

4. The clinical officer from Maralal hospital stated that on examination of the complainant it was found that she had bruises on the right side of her neck and she appeared incoherent. He said that she had broken her hymen and that she had a tear in the upper part of her vagina which needed to be sutured.

5. In defence the appellant admitted that he used to eat the food that supplied by the complainant and her sister. That on the subject day he was served by a complainant with *githeri*. He said that the complainant informed him that she had dropped out of school while she was in standard 8.

### **GROUND OF APPEAL**

6. The appellant raised two grounds in his appeal. On the first ground he stated that the prosecution had failed to prove the age of the complainant and that the trial court had failed to pay regard that he had consensual sex with the complainant. On the second ground the appellant stated that the prosecution had failed to prove that the appellant had forcible sex with the complainant.

### **ANALYSIS AND DETERMINATION**

7. As it is clear the above grounds of the appellants appeal are all interrelated and I shall proceed to consider them together.

8. On the issue of age of the complainant in evidence said that she was 15 years old. Her sister in evidence said that the complainant was 14 years old. The clinical officer who examined the complainant found her to be 15 years old. There is therefore consistent and clear evidence that the complainant was 15 years old. It is important to state that the doctor who produced the P3 form was not the doctor who examined the complainant. It follows that the statement by that doctor that the complainant was 17 years old does not detract the evidence in the P3 form by the doctor who examined the complainant.

9. The medical evidence in the P3 form showed clearly that the complainant did not consent as alleged by the appellant to the sexual act. The complainant suffered severe injuries which required to be sutured. The complainant was admitted in hospital for treatment for 3 days following the ordeal in the hands of the appellant. In any case the complainant as was well stated by the trial magistrate lacked capacity to consent due to her age. The appellant's defence therefore that the sexual act was consensual is rejected.

10. On the whole the appellant's appeal against conviction fails. Similarly on sentence his appeal fails because the 15 years imprisonment he was sentenced to is the minimum sentence set out in **section 8(4)** of the Sexual Offences Act.

**11. The appeal of James Mwangi alias Chuma against conviction and sentence is hereby dismissed. The trial court conviction is upheld and the sentence is hereby confirmed.**

**DATED AND DELIVERED AT NANYUKI THIS 28<sup>TH</sup> JUNE 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue / Mariastella

Appellant: James Mwangi alias Chuma

For the State: .....

Language: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**