



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.61 OF 2015**

**ARTHUR KIRUGUMI GICHOHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against Conviction and Sentence imposed in Nyeri S.O Criminal Case No.48 of 2014 by Hon. S.Ngungi PM on 30.7.15)***

**JUDGMENT**

**The Trial**

The Appellant herein **Arthur Kirugumi Gichohi** has filed this appeal against conviction and sentence on a charge of sexual assault contrary to section 5(1) (a) (i) as read with Section 5(2) of the Sexual Offences Act. The particulars of the offence are that:-

***On 31.8.14 in Nyeri County unlawfully used his fingers to penetrate the vagina of RWM a girl child aged 9 years***

The prosecution called a total of four (4) witnesses in support of their case. Complainant **RWM** aged 9 years and in class 4 recalled that on 31.8.14, appellant called her to his house, put her on his bed and fingered her private parts. That after leaving appellant's house, she reported the matter to her mother who escorted her to the police station later to hospital.

PW2 Dr. Nelly Wanjiku Ndungu presented complainant's P3 form filled by Dr. Kirima as PEXH. 1 and it showed hymen was broken and there was presence of pus cells. She said complainant was examined 2 days.

PW3 LNG, the complainant's mother said complainant was born on 6.10.06 as shown by her birth certificate PEXH. 2. She told court that on the material date, she called complainant who emerged from a store and when she threatened to beat her she said that appellant had put his fingers in her vagina.

PW4 PC Patricia Mwendwa the investigating officer received complainant's report, arrested and charged appellant.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. He conceded that he was at the scene the offence was allegedly committed but denied the offence.

The learned trial magistrate considered the evidence, dismissed the defence and sentenced appellant to

serve 15 years imprisonment.

### **The appeal**

Aggrieved by this decision, the appellant lodged the instant appeal. In his supplementary grounds of appeal filed on 12.5.17, the appellant set out 4 grounds of appeal to wit:-

- 1. The learned trial magistrate fell into error in basing conviction and sentence on the evidence by PW1 which was inconsistent with the evidence on record***
- 2. The learned trial magistrate erred in basing conviction and sentence on medical evidence that was in corroboration with the evidence on record***
- 3. The learned trial magistrate erred in law and fact in concurring with concurring with PW3 that PW1 answered from the store yet it was controverted by PW1***
- 4. The learned trial magistrate erred in law and fact in convicting appellant for failing to call witnesses to prove that he was at work with them the whole day***

When the appeal came up for hearing; appellant wholly relied on his supplementary grounds of appeal and written submissions filed on 12.5.17.

Mr. Nyamache, learned counsel for the state submitted that only complainant and appellant were present when the offence was committed. He further submitted that appellant did not call witnesses to corroborate his defence.

### **Analysis and Determination**

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of ***Okeno vs. Republic [1972] E.A.32***. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

From the evidence on record; it is apparent that complainant was alone with appellant when the offence was allegedly committed. Appellant stated he could not trace his 2 colleagues with whom he was working on the date the offence was allegedly committed. In his judgment, the trial magistrate rejected appellant's defence on the grounds that the prosecution case was corroborated and that appellant did not call witnesses.

I have considered case in its totality although the P3 form shows that complainant's hymen was broken, the doctor said she could not tell if it was freshly broken when complainant was initially examined since she did not see the first treatment notes. The trial magistrate therefore erred in his finding that the P3 form corroborates complainant's evidence. Appellant's defence that he was on duty with his colleagues raised a reasonable doubt especially because complainant's mother did not testify that she saw appellant in the house where complainant alleged she had been sexually assaulted. The learned trial magistrate had erred in rejecting the defence and shifting the burden of proof to the appellant.

### **Decision**

In the end; I hereby reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. Accordingly, the conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

**DATED THIS 20<sup>th</sup> DAY OF July 2017**

**T. W. CHERERE**

**JUDGE**

**DELIVERED ON THIS 27<sup>th</sup> DAY OF JULY 2017**

**BY: - Ngaah J**

**JUDGE**

**In the presence of-**

Court Assistant -

Appellant -

For the State -