



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

**CRIMINAL APPEAL NO. 71 OF 2010**

**JOSEPH MWAURA WANGONDU.....APELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**FACTS**

1. The Appeal arises from the judgment delivered on 17<sup>th</sup> March, 2010 by the Hon. R.A.A.Otieno RM in CMCR No.8 of 2010. The appellant had been charged on a main charge of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act and an alternate charge of Committing an Indecent Act with a child contrary to Section 11(1) of the same Act.
2. That on the 24/06/2008 at [particulars withheld] Village the appellant intentionally and unlawfully did an act of penetration to MKM a child aged between the age of eight (8) years and fifteen (15) years.
3. The appellant was convicted on the main charge and sentenced to life imprisonment.
4. The appellant being aggrieved with the decision preferred this appeal both on conviction and sentence and listed six (6) Grounds of Appeal inter alia;

- I pleaded not guilty to the charge.

a) That the learned trial magistrate erred in law and facts in basing my conviction upon incomplete and partial allegation of identification of a minor whose evidence needed corroboration from another person.

(b) That the learned trial magistrate erred in law and facts in convicting on the reliance of the weak prosecution evidence without observing that the complainant eyes were blinded during the commission of the alleged defilement with the defiler uttering the name could not be Mwaura which as his intention was to shift burden to a certain Mwaura.

(c) That the learned trial magistrate erred in law and facts in convicting in me to lie imprisonment without observing that there was no medical evidence to support the allegation especially on my side.

d) That the learned trial magistrate erred in law and facts in failing to consider my age at the time and naivety in matters pertaining to law and defence proceeding before conviction.

(e) That the learned trial magistrate erred in law and facts in convicting without first considering the time elapsed from commission to report and later my arrest pointed to doubts

as if the complainant was sure of her allegations they could not have waited for five days before effecting the arrest.

(f) Since I cannot remember all that was said. I pray to be furnished with a copy of the trial proceeding to enable me raise more reasonable grounds.

**REASONS WHEREFORE:** I pray for the total success of this appeal, conviction quashed, sentenced set aside and I be set at liberty.

5. At the hearing of the appeal the appellant was in person while Mr. Njue was present for the State; the appellant had filed written submissions and sought to rely on them whereas Mr. Njue made oral presentations.

#### **APPELLANTS SUBMISSIONS**

6. The appellant submitted that the charge against him had not been proved to the desired standard; that the complainant had not been able to see her assailant as she had been blindfolded; that crucial witnesses were never called by the prosecution to testify; these witnesses being the mother of the complainant and M N ; that there was a time lapse of five days from the day the offence was committed to the date of reporting the offence and the arrest of the appellant; the authenticity of the medical report was brought into question and the manner of its production into court as evidence; that his defence had not been considered by the trial court and therefore he had not been afforded a fair trial.
7. The appellant prayed that his appeal be allowed in totality.

#### **RESPONDENTS SUBMISSIONS**

8. The appeal was opposed; that even though the trial took two (2) years to be heard and completed each and every reason for adjourning is reflected on the court record and is justifiable; that the appellant was out on a pre-trial bond and therefore suffered no prejudice.
9. That the reasons for non-attendance of the maker of the medical report was given; in that was not in Nyeri as he had other duties elsewhere; that the medical report was correctly admitted under the provisions of Section 77 of the Evidence Act; that at the trial the appellant failed to raise any issue on the authenticity of the document and the signature of Doctor Ajevi.
10. The appellant was accorded a fair trial; that he offered no defence therefore the trial court in its judgment only considered the evidence of the prosecution witnesses.
11. When investigations were carried out there was no indication that the complainant's mother was involved; therefore she was not called as a prosecution witness; that M N was not a necessary witness as she did not know what befell the complainant after she had delivered the milk and left her residence.
12. On the issue of delay; it was submitted there was no inordinate delay in revealing the ordeal; that the complainant was defiled on the evening of the 24/06/2008; that on the same evening the grandmother suspected that there was something wrong and on 25/06/2008 she sought intervention of a cousin; on that same day that the complainant revealed the incident to this relative; a report was made to the police on that date and the evidence of Dr Ndindi indicates that the complainant was taken to hospital on the 25/06/2008 and not after eight (8) days as alleged by the appellant.
13. The complainant's evidence was clear and that she knew her assailant was the appellant; that they were also neighbours.
14. That the appellant was rightfully convicted and sentenced and Counsel prayed that the appeal be dismissed.

#### **ISSUES FOR DETERMINATION**

15. Upon hearing the submissions of both sides this court has framed the following issues for determination;

- i. Whether the appellant was positively identified;
- ii. Whether the prosecution failed to call crucial witnesses;
- iii. Whether there was medical evidence was properly admitted;
- iv. Whether there was an inordinate delay in making the first report; and in taking the complainant for medical examination; and in arresting the appellant;
- v. Whether the appellant was accorded a fair trial; and whether the prosecution proved its case to the desired threshold.

### **ANALYSIS**

16. This being the first appellate court, it is trite law and also incumbent upon us to reconsider and re-evaluate the evidence and arrive at our own independent conclusion always keeping in mind that we did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA**.

#### **Whether the appellant was positively identified;**

17. The trial court conducted a voire dire examination and made a finding that the complainant did not know the meaning of an oath; the trial court also made a finding that the complainant was intelligent and truthful; she was then allowed to give an unsworn testimony.
18. On the material day at about 5pm as she was going back home after delivering milk to M N; the appellant approached her from behind and asked her if she knew who it was to which she replied that it was Mwaura; that he then tied a cloth over her eyes and another over her mouth and carried her to the nearby slaughter house and placed her on the nappier grass; he removed her and his clothes and proceeded to defile her; that she pulled down the cloth and saw the appellant as he fled.
19. The appellant in his submissions raises doubts on the visual ability of the complainant; that she was blindfolded therefore was unable to identify him.
20. In its judgment the trial court demonstrates how it arrived at a finding on identification by recognition; it states that;

**“...She identified the accused by name and she did call him by name in court. She even recalled the clothes that the accused was wearing on the material day”**

**‘.....that there was overwhelming evidence against the accused person since he was well known to the complainant and she could not have mistaken his identity.’**

21. In this instance this court notes that there is evidence of the complainants visual ability; the incident occurred at 5.00pm which is still during the day and this court opines that this greatly enhanced the quality of recognition; the complainant elaborated that the appellant was a herdsman and was a person known to the complainant; she identified the appellant as the person who defiled her and even called him by name; she also stated in her testimony that when she lifted the cloth from her eyes she was able to see the appellant as he fled from the scene.
22. This court is satisfied that the conditions were conducive for identification; that the evidence of recognition can be relied upon to form the basis of a conviction as there was positive identification of the appellant.
23. This ground of appeal is found lacking in merit and is hereby disallowed.

#### **The prosecutions failure to call crucial witnesses**

24. The appellant contends that the prosecution failed to call the complainants mother and a M N to testify; the question that arises in the courts mind is whether their evidence would have proved any fact or would it have been adverse to the prosecutions’ case; Counsel made reference to Section 14(3) of the Evidence Act which provides that the prosecution is not bound to call a particular number of witnesses to prove a particular point unless demanded by the law; he submitted that the complainants mother was never involved during investigations and never recorded a statement; as

- for M N apart from the fact that the complainant delivered milk to her she played no role before and after the incident.
25. Having perused the record this court concurs that there was no necessity in calling these two (2) witnesses as they played no role throughout; this court is of the view that any evidence proffered by these two would not have had any probative value and would not have proved any point; therefore no adverse inference can be drawn due to such omission.
26. This ground of appeal is found lacking in merit and is hereby disallowed.

**Whether the medical evidence was properly admitted**

27. The appellant raised the issue of the date on the medical report; that the incident occurred on the 24/06/2008 and that the medical report was dated the 2/07/2008; that there was an inordinate delay of eight (8) days in taking the complainant for a medical examination; that due to the time lapse the evidence may have been doctored; that the document was also not produced by its maker; that he doubted the authenticity of the medical report.
28. The evidence of the grandmother (**PW2**) was that on the evening of 24/06/2008 she suspected that all was not well with the complainant; she sought the intervention of a relative who managed to get the complainant to confide in her and reveal what had transpired; that this revelation was made on the 25/06/2008; on the same day **PW2** took the complainant to Gichira Health Centre for treatment and they were referred to Nyeri PGH.
29. The evidence of **PW4** was that on the 25/06/2008 the complainant was brought to Gichira Police Post by her uncle; that he interviewed the complainant and then instructed one of his officers to make the requisite entry into the Occurrence Book and then referred the complainant to Gichira Health Centre; that on the 2/07/2008 upon receiving information from **PW2** that the appellant had been sighted; accompanied by another police officer they proceeded to the location and found the appellant and they then proceeded to arrest him and later charged him.
30. The evidence of **PW3** was that the complainant was examined by Dr, Ajevi on the 25/06/2008 and that the date 2/07/2008 on the P3Form related to the date the entries were made onto the P3 Form.
31. On the issue of production of the medical report; this court has noted from the record that Dr. Ndindi (**PW3**) explained to the trial court that the doctor who carried out the medical examination and filled the P3Form was unable to attend court as he had other duties and was thus unavailable; upon further perusal of the record this court has not sighted any objections raised by the appellant at the trial as to the genuineness of the document; nor did he raise issues on the signature of the maker; nor did he object to the production of the medical report by **PW3**; nor does the record show that he made a demand that it be produced by none other than by its maker; whilst cross-examining this witness this court notes that the appellant did not ask any questions to demonstrate that **PW3** was not a competent witness.
32. Section 77 of the Evidence Act allows Government medical reports to be produced by persons other than the makers provided the person is competent and is conversant with the handwriting and signature of the maker of the document.
33. Upon perusal of the court record and from the evidence adduced this court is satisfied that there was no inordinate delay in making the first report and in taking the complainant to hospital for a medical examination; and this court is further satisfied that the appellant raised no objections at the trial as to the production and admissibility of the medical report; therefore the medical report was properly admitted.
34. This ground of appeal is found lacking in merit and is disallowed.

**Whether there was delay in arresting the appellant; was he accorded a fair trial and did the prosecution prove its case to the desired threshold;**

35. The appellant submitted to the incident having occurred on the 24/06/2008 and alluded to an inordinate delay in his arrest and also a delay in the time taken to conclude the trial; that the delay and failure watered down the prosecutions' case and that he was not also accorded a fair trial.
36. Counsel conceded that the trial took two (2) years to be determined but that the record bears witness to the reasons for the adjournments; that the appellant was granted bond and has also not demonstrated the prejudice he had suffered.

37. This court opines that the delay in finding, tracing and arresting the appellant is a non-issue; the state is only obligated to give an explanation where there is a delay from the date of arrest and the date of arraignment in court.
38. The appellant in his submissions has not established the prejudice occasioned from the date the case commenced for hearing to the date of its determination; the court record indicates that he was granted bail expeditiously and that the matter was handled as expeditiously as was possible; this court is satisfied that any delay in arresting the appellant and other delays alluded to by the appellant did not occasion any failure of justice.
39. The court record shows that the appellant tendered no defence; that the trial court therefore had only the evidence of the prosecution to consider to arrive at her decision.
40. This ground of appeal is found lacking in merit and is hereby disallowed.
41. Upon re-evaluating the evidence on record this court is satisfied that there was overwhelming evidence; that there was positive and proper identification of the appellant as the person who defiled the complainant; the evidence of the complainant and the medical evidence proved that there was penetration which is a key ingredient of the offence of defilement; there was proof of the age of the victim; this court is satisfied that the prosecution proved its case to the desired threshold.

### **FINDINGS**

42. For the forgoing reasons this court makes the following findings;

- i. That there was positive identification of the appellant.
- ii. That the prosecution did not fail to call crucial witnesses.
- iii. That the medical evidence was properly produced and admitted.
- iv. That there was no inordinate delay in making the first report and in taking the complainant for medical examination and in arresting the appellant.
- v. That the appellant was accorded a fair trial and that the prosecution proved its case to the desired threshold.

### **DETERMINATION**

43. The appeal is found lacking in merit in its entirety and is hereby dismissed.
44. The conviction and sentence are both upheld.

Orders Accordingly.

**Dated, Signed and Delivered at Nyeri this 25<sup>th</sup> day of February, 2016.**

**HON. A MSHILA**

**JUDGE**