



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO 501 OF 2013

TITUS NGAHU MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was convicted on two offences. The first was **defilement** contrary to **section 8(1) & (2) of the Sexual Offences Act, No 3 of 2006**. The particulars of the offence were that on 11th March 2013 at [Particulars Withheld] Sub-location, Ichichi location in Kangema District within Murang'a County, he intentionally caused his penis to penetrate the vagina of **C N K**, a child aged 8 years. For this offence the Appellant was sentenced to life imprisonment.
2. He was also convicted of **assault causing actual bodily harm** contrary to **section 251 of the Penal Code**. It was alleged that on the said day and place he intentionally assaulted the same complainant and thereby occasioned her actual bodily harm. For this offence he was sentenced to 3 years imprisonment, to run concurrently with the life imprisonment.
3. The Appellant has appealed against both convictions and sentences. His petition of appeal dated 9th September 2013 has seven grounds. They may be re-phrased as follows;
 1. **There was no good and positive identification of the Appellant.**
 2. **The trial court ignored the evidence tendered by the Appellant.**
 3. **The trial court erred in permitting cross-examination of the complainant who gave unsworn evidence.**
 4. **The trial court hurried and rushed the trial, sometimes even on unscheduled dates, and thereby occasioned failure of justice.**
 5. **The evidence tendered by the prosecution fell short of establishing the offences to the required standard.**
 6. **The trial court erred in relying upon hearsay evidence not even produced in court.**
 7. **The whole trial as conducted by the trial magistrate was a fraud and caused a miscarriage of justice.**
 8. **The sentences meted out to the Appellant are manifestly harsh and excessive in the**

circumstances.

4. The learned Prosecution Counsel for the Respondent supported both convictions and sentences.
5. This being a first appeal it is my duty to evaluate the evidence placed before the trial court and arrive at my own conclusions regarding the same. I must however remember that I neither saw nor heard the witnesses as they testified, and I must give due allowance for that fact.
6. The prosecution called the Complainant **C N K** and 4 other witnesses. She gave unsworn evidence after a **voire dire** examination by the court. That **voire dire** examination was not recorded. The court found the Complainant **“fit to testify but unsworn”**. There was no definite finding by the trial court that the Complainant understood the importance of speaking the truth, notwithstanding that she was not to testify under oath. She was however cross examined on behalf of the Appellant.
7. The Complainant's testimony was that on 11th March 2013 at 9.30 am she had gone to fetch water at the river. She was alone. On her way home one **Titus Ngahu** asked her whether he could help her carry the water. He then removed the jerrican of water from her back, lifted her up and carried her to a nearby bush. He then poked her eyes with sticks and strangled her with his fingers on both sides of her neck. She felt pain, got bruised and bled from the neck. She said she had marks left by the attempt to strangle her. He then removed her pants and went with it. He also removed her head-scarf and threw it away. She was subsequently taken to hospital. She clarified that she did not see anyone else at the scene.
8. The Complainant further testified that she was taken from the bush by one Wambui (who was not her mother). Wambui took her home and later she was taken to hospital by her father and mother. She did not know what the doctor did. She then identified her assailant as the accused in the dock. She stated that she did not know him prior to the incident though she used to see him in Karura when going to school. Finally in her testimony-in-chief she stated that she did not experience any pain or discomfort in her private parts.
9. In cross-examination the Complainant admitted that Mary Wambui has a son called **Ngahu** who was in secondary school. She further stated that she knew this Ngahu but did not know **Titus Ngahu** at the time she was attacked. She also said that she lost consciousness while at the bush. She reiterated that she did not see anyone else at the scene. She then said that she knew Ngahu the accused when she opened her eyes. He was dark. She also saw him on the road while she was going home.
10. In re-examination she said that she had seen the accused at Karura when going to school but she did not know his home. And then she said, **“It is people who identified the accused person”**. Finally she stated that she did not see Wambui's Ngahu when she went to fetch water; she saw “this Ngahu”, meaning the accused.
11. PW2 was **Mary Wambui Mbatia**. She testified that on 11th March 2013 at about 10.30 am as she was going to the river she heard a child crying in the bush. She investigated and saw a girl. Her eyes were red and her throat had bruises. She knew the child called C N. She called her but she did not respond. She noted that she did not have her head-scarf. She then took her home. Her mother was at home and she left them there and went to her home. Her mother then came and asked her to accompany them to hospital. She did so. But first they went to **Kangema Police Station** where the child was issued a P3 form to take to hospital. After the child had been examined at the hospital her mother told her (PW2) that she had blood in her private parts.
12. PW2 admitted that she had a son called Ngahu. She knew the Appellant prior to the incident as she had seen him cutting grass and burning charcoal. His home was far from the Complainant's home. She knew the Appellant had a charcoal kiln near the Complainant's house.
13. In cross-examination she denied that she had implicated the Appellant. She also denied that she told the Complainant that it was the Appellant who had defiled her. She further denied that she found her son Ngahu with the Complainant and that her son had no intention of escaping. She emphasized that she

found the Complainant alone; the child did not talk to her; and she was screaming and apparently did not know where she was. Her son Ngahu was at the te-selling centre.

14. PW3 (*J W*) was the Complainant's mother. Her testimony was that on 11th March 2013 at about 10.30 am when she got home she found the Complainant sleeping outside. The child had been brought by PW2 who had told her to check the child as she suspected that she had been defiled. The child had bruises and blood on the neck, her eyes were red and she was not talking. She could not even walk. She took the child to *Ichichi Dispensary* but she was advised there to take the child to the police. At Kangema Police Station she was given a P3 form and took the child to *Kangema Hospital*. There she was told that the child's eyes had been poked, that her neck was also injured, and that a vaginal swab had shown some blood.

15. PW3 also testified that the Complainant was born on 27th January 2005 as shown by a birth notification. She also stated that as the Complainant recovered she told her (PW3) that *Titus Ngahu* was the person who attacked her. She further stated that Titus Ngahu used to pass near her home on his way to some lady's home to burn charcoal. Then she stated that the Complainant showed her and others the person who attacked her and then they asked around for his name. She did not know him prior to the incident. She said the complainant had described her attacker as **a tall, dark man wearing gumboots**.

17. Finally in her testimony-in-chief PW3 stated that one day as the Complainant continued to recuperate, she called her (PW3) and told her that she had seen the person who attacked her. He was then arrested by AP officers from Ichichi.

16. In cross-examination PW3 stated that the Complainant had recuperated for about a month. She admitted that in her statement to the police she did not state that the Complainant had told her that she had seen her attacker. She then stated that the child did not know her attacker and that when she subsequently showed her (PW3) her attacker she (PW3) found out his name.

17. PW4 was a Clinical Officer at *Kangema Sub-District Hospital*. She filled out the Complainant's P3 form and produced the same in evidence. Her main findings were that the Complainant had strangle marks on the neck, and both her eyes were red and swollen. She had lacerations on her *labia majora* and vaginal bleeding. Her hymen was broken. There was a whitish discharge on her external genitalia. An HIV test was negative, a urine analysis disclosed glucose, protein and pus cells. No spermatozoa were seen. A high vaginal swab came up with red blood cells and white blood cells. No spermatozoa were seen. The Clinical Officer's conclusion was that there were signs of penetration.

18. The Clinical Officer also produced in evidence the Complainant's treatment cards. She also testified that the Complainant had been brought by relatives who gave a history of her being defiled by a person well known to her. She was in a confused state.

19. Finally PW4 produced in evidence the Complainant's birth notification which showed that she was born on 27th January 2005.

20. In cross-examination PW4 admitted that she was not the one who examined the Complainant when she was first brought to hospital, and that she filled the P3 from the treatment records made by her colleague. She filled the P3 17 days after the child had been seen. She then stated that the broken hymen, bleeding and lacerations were ready signs of penetration.

21. The last witness for the prosecution (PW5) was a police officer. He was the investigating officer in the case. He stated that the Appellant was arrested by AP officers of Ichichi AP camp and brought to him. He charged him with the offences in the charge sheet. He stated that the Complainant was able to identify the Appellant and even gave his name later. He did not interrogate the Appellant.

22. In cross-examination PW5 stated that the Complainant knew the accused person by the name Titus Ngahu. He did not know of another Ngahu, a neighbour of the Complainant, and did not know whether the chief of the area summoned him. He also stated that the Complainant told him when recording her

statement that she was able to identify her attacker; he admitted however that the Complainant's statement that he recorded from her did not state so. In re-examination he reiterated that the Complainant gave him the name of her attacker.

23. In his own defence the Appellant testified under oath and called one witness. His testimony was that on 11th March 2012 he left home at about 8.00 am accompanied by his colleague who was also called **Titus Ngahu**. They proceeded to a place called Kamithi for some charcoal burning. They were both at the site the whole day until 4.20 pm. He stated that the Complainant's home was just a short distance from where they were burning their charcoal. He had not known her before though he knew her mother, but not by name. He knew PW2 as they were residents of the same area and also distant relatives.

24. The Appellant further testified that he had heard about the incident involving the Complainant from people in the area. The assistant chief of the area had also called him and had asked him about the incident, saying that he had heard that his (Appellant's) workmate **Titus Ngahu** was being mentioned in connection with the incident. The Appellant had also heard that Mary Wambui's son also called Ngahu was also being mentioned.

25. In cross-examination the Appellant stated that his friend's full name was **Titus Ngahu Muchuru**. He and his friend were together almost daily. Even when he (Appellant) was arrested they were together. They had been in that particular area burning charcoal for about 10 months. He knew the Complainant's home as it was on the road that he used. But he had not seen the child before. The place where he and his friend were burning charcoal was about 4 homes from the Complainant's home. There was no river where they were burning charcoal; the river was on another road altogether. He was arrested by two police officers and the assistant chief. He did not know why the other two Ngahus were not arrested.

26. The Appellant's witness (DW2) was **Titus Ngahu Muchiru**. His testimony was that he knew the Appellant and had worked with him on charcoal burning for over a year. He recalled that on 11th March 2013 he had gone to the Appellant's home at about 8.00 am and together they had proceeded to their place of work where they had remained until 4.00pm. He and the Appellant were together throughout; the Appellant did not leave their place of work at any time. DW2 did not know the Complainant or her mother. He also did not know PW2. He produced his identification card to show that his name indeed was Titus Ngahu Muchiru.

27. In cross-examination he stated that their charcoal site was very near the Complainant's home. He also stated that the assistant chief had called him but had asked him about charcoal, not about the Complainant's incident. He repeatedly stated that he was with the Appellant the whole day. He also stated that he was with him when he was arrested.

28. In response to some questions asked by the trial court DW2 stated that when the Appellant was arrested he was with him and that that he (DW2) was not taken in for questioning. The assistant chief had called him 2 weeks prior to the arrest.

29. That then is the totality of the evidence placed before the trial court. I have anxiously considered the same. There cannot be any doubt at all that the Complainant, a young girl then aged just under 8 years, was not only defiled but her attacker also assaulted her and seriously injured her. He not only tried to strangle her but also tried to put out her eyes with a stick or something similar. The attempted strangling left her with bleeding bruises around the neck. The attempt at putting out her eyes left them swollen and blood-shot. They did not clear for over a month. The assault apparently rendered her unconscious at some point. She was also left confused to such extent that she seemed unaware that she had been defiled, no doubt because of the injuries to her neck and eyes which apparently were much more painful. But the medical evidence placed before the trial court clearly established that she was penetrated. The medical evidence also clearly established the other injuries she suffered and which constituted the second charge of assault.

30. The main issue in this appeal, however, is the identity of the person who assaulted the Complainant.

When she was picked up by PW2 and taken to her home she was not able to speak. Even as she was taken to the police and hospital by her mother and others she was still not able to speak. It is not clear at what point in time she gave a description of her assaulter to her mother as **a tall, dark man wearing gumboots**. Although the Complainant herself testified that she used to see the Appellant when going to school, there is no indication in the testimony of her mother that she had told her so.

31. The Complainant's further testimony was that *it was people who identified the accused person*. She herself did not know the name of the Appellant, yet her mother stated that *as the child recovered she told her that Titus Ngahu was the person who attacked her*.

32. PW3 testified that subsequently the child told her that she had seen her attacker. She admitted that she did not state so in her statement to the police.

33. The circumstances in which the Complainant subsequently saw and identified her attacker, and the subsequent arrest of the Appellant, are also not clear. Apparently she was at home and saw him walking along the road. At what distance did she see him? Was he followed immediately and accosted? PW3 said that when the Complainant showed her (PW3) her attacker she found out his name. How much later was this? When was the Appellant arrested? Was it immediately after the supposed identification by the Complainant, or was it after a number of days? In what circumstances was he arrested? The arresting officers themselves never testified.

34. To add to all these uncertainties, there is the issue of three men sharing the name Ngahu. There was the Appellant; then his friend DW2 who also shared with him the first name of **Titus**; and finally there was PW2's son who from the tenor of the testimony of his mother (PW2) appears to have been a suspect also.

35. All these uncertainties would probably have been cleared by a full and proper investigation, which would have included a properly conducted identification parade. There was none. The supposed investigation by the investigating officer (PW5) was at best luck-luster. There is no evidence that he interviewed the other two Ngahus in order to eliminate them as suspects. He did not get to talk to the Complainant until much later and apparently after the name of the Appellant had been supplied to the Complainant by other persons. There was no evidence of how the person who was supposedly identified by the Complainant as her attacker was linked to the Appellant and his arrest.

36. It would be meet and just for the Complainant's attacker to face the full wrath of the law. But I am not satisfied beyond reasonable doubt that the Appellant was properly and positively identified as the Complainant's attacker. There are many doubts raised by the evidence placed before trial court as already seen. His conviction is not safe.

37. In the event I will allow this appeal in its entirety. The two convictions are hereby quashed and the sentences imposed upon the Appellant set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF MARCH 2015

H.P.G.WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 13TH DAY OF MARCH 2015