



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 713 OF 2010**

SIMON WANYOIKE NJOROGE .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 3459 of 2007 in the Chief Magistrate's Court at Thika – B. A. Owino (SRM) on 17<sup>th</sup> July 2010)*

**JUDGMENT**

**Introduction**

1. The appellant **Simon Wanyoike Njoroge**, was charged with two counts of defilement of a child contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative to each count, he was charged with compelling indecent act with a child contrary to **Section 6(a)** of the same Act. At the close of the trial the appellant was convicted on the two alternative counts and sentenced to serve seven (7) years imprisonment on each count. The sentences were ordered to run consecutively.

**Particulars of the charge**

2. The brief particulars in the two counts were that on the 11<sup>th</sup> day of July 2007 at *[particulars withheld]* village in Thika District within Central Province, wilfully and unlawfully, he committed acts which caused penetration with his male genital organ into the female genital organs of N. W. W, and A. M. N. who were children aged under 11 years. (identity concealed on account of their being a minors)
3. In the alternative it was alleged that on the same date and at the same place, he compelled N. W. W, an 8 year old minor and A. M. N. an 11 year old minor to engage in indecent acts with himself and touched their genital organs.

**Grounds of Appeal**

4. The appellant filed an appeal relying on seven grounds of appeal in which he urged that the complainants were not subjected to medical tests; that the investigations were shoddy; that he was arrested after seven days; that there was no spermatozoa found in the children and that the sentence was excessive.

## Respondent's Reply

5. Miss Ndombi, learned State Counsel, opposed the appeal on behalf of the respondent. She submitted that the appellant was rightly convicted for the offence of indecent assault and sentenced to 7 years in each count to run consecutively. Further that Section 6 of the Sexual Offences Act provides for a sentence not below 5 years imprisonment. That the evidence of **PW2** and **PW6** who knew the appellant prior to the incident confirmed as did the medical evidence that the two minors were sexually assaulted. Miss Ndombi therefore urged the court to dismiss the appeal.

## Case summary

6. In a nutshell, the prosecution's case was that on 11<sup>th</sup> July 2007 **PW2**, **PW3** and **PW6** who were all minors were walking home from school when they met the appellant whom they knew as "Kanyoi". The appellant offered them some sweets which they declined to take. He took a cane and hit them on the legs eventually chasing away the boy, **PW3**. He dragged the girls, **PW2** and **PW6**, who are the complainants herein, in to the bushes by the road side and ordered them to lie down, where upon he defiled them in turns. The two minors reported the matter to their teacher the following day who informed their parents. The appellant was eventually arrested with the help of the area Assistant Chief, and handed to the police who charged him as read.
7. The appellant, in his defence given without oath and without calling any witnesses admitted that his nickname was "Kanyoi", but denied any involvement in the incident. He testified that the families of the complainants bore him a grudge and that the villagers ganged up against him because he had a job at Delmonte (K) Ltd. He maintained that he only learnt of the incident upon his arrest.

## Analysis

8. Being the first appellate court I have analysed and re-evaluated all the evidence on record, to make my own findings and draw my own conclusions, bearing in mind that I did not have the advantage of seeing or hearing the witnesses as they testified. (see **Njoroge v Republic [1989] KLR pg 313**).
9. At the hearing of the appeal the appellant stated that he wished to abandon the appeal on conviction and only pursue the appeal on sentence. He however went on to state that he did not commit the offence. The court interpreted this to mean that he should not have been found guilty and that therefore his conviction was in error. For those reasons the court considered the entire appeal. The issues for determination are whether the two minors were indecently assaulted and if so, whether there was sufficient evidence to link the appellant to the offences.

## On Sexual Assault

10. **PW2**, who was an 8 year old minor, testified without oath after being subjected to voire dire examination. Concerning what happened to her she stated as follows:

**"He dragged me on the ground into the bushes. He removed me my pants (*sic*). He also removed his, then he did me bad manners. He removed my pants and did me bad manners in my private parts in my place for urinating. He removed his thing for urinating and put it in mine. He put it in mine, I felt pain, I cried."**

11. **PW6**, who was an 11 year old minor, was also subjected to voire dire examination and allowed to testify on oath, after it was established that she was able to understand the importance of telling the truth. The relevant part of her testimony was that:

**"Accused hit me on the legs and threatened us. He then led us into some bushes.**

**Accused then told us to lie down. He lifted my uniform dress and removed my pants. He then slept on me and did me “tabia mbaya” (bad manners). I felt pain but could not scream. He then undressed Nancy and did “tabia mbaya” (bad manners) to her also.”**

12. The medical evidence tendered by **PW1** Dr. Dorcas Supa, was that she examined both **PW2** and **PW6** on 18<sup>th</sup> July 2007 for purposes of filling P3 forms in their regard. Her findings were *inter alia*, that:

- N. W. W was aged 8 years at the time of examination.
- Both minors had broken hymens and emitted foul smelling discharges.
- No tears or spermatozoa were seen on either of them.

She testified that both minors had presented with a history of rape (defilement), and the initial examination was done by a clinical officer whose notes **PW1** used to fill their P3 forms.

13. The P3 forms filled in their regard indicated that **PW2** was aged 8 years old while **PW6** was aged 11 years old at the time of their examination, which was a day after the assault. The minors' testimonies that they were dragged into the bushes by the side of the road by a man, were corroborated by the evidence of **PW3** also a minor aged 9 years, who was with them on the fateful day. He witnessed the assailant hold both girls by their hands and lead them into the bushes. **PW3** went home and only learnt the next day, what had befallen the girls in the bushes.

14. In her findings on this issue the learned trial magistrate rendered herself thus:

**“No doubt valuable evidence was lost in this way. Although the girls' hymens were found to be broken PW1, Dr. Dorcas Supa admitted that she could not ascertain when the hymens were broken. The laboratory results also showed no presence of spermatozoa or material evidence that could link accused to an offence of defilement.”**

For this reason she found the appellant guilty in the alternative counts in both charges, and I humbly agree with her findings.

## **Identification**

15. I analysed the evidence of identification with great caution bearing in mind what was stated in the case of **Republic Vs. Turnbull & others (1976) 3 All ER 549**, that mistakes can be made even in cases of recognition and that an honest witness may none the less be mistaken.

16. The circumstances of identification in this case are first, that the attack occurred in broad daylight at about 3 p.m. as the minors were walking home from school. Second, that the minors knew their assailant and both identified the appellant as that assailant. **PW2** stated that the appellant was a goatherd who had been “sacked”, while **PW6** testified that the attacker was known to her as she went to the same school with his children.

17. To lend credence to the evidence of **PW2** and **PW6**, was the testimony of **PW3** also a minor aged 9 years who stated as follows:

**“I saw the man holding the 2 girls by the hands. He then went with them to some bushes beside the road. The 2 girls did not resist the man. The man I saw holding the 2 girls is accused before the court. Accused was known to me. I knew his home. He lives near the road and has many cows”**

18. The record shows that the trial magistrate considered the defence and discarded it as untenable. I note however that the trial magistrate stated that the appellant raised a defence of alibi, but that is not so. When the appellant said that he was at home at 8 p.m. having supper with his family, this was in reference to the 19<sup>th</sup> July 2007 when he was arrested by the Assistant Chief.
19. The offence occurred on 11<sup>th</sup> July 2007 and the appellant did not state anything with regard to that day. The court is however alive to the fact that this being a criminal case, the appellant was under no obligation to explain his whereabouts on 11<sup>th</sup> July 2007, or to say anything in his defence.
20. All in all however, the minors' evidence places the appellant at the scene and debunks his defence that the case arose out of a grudge, which would mean that he had been framed. I find no reason to believe that the minors implicated him because their families had a pre-existing grudge with him, or that the neighbours were jealous that he had a job as stated in his defence. The record shows that the minors withstood cross-examination beautifully, a feat they would not have achieved if they were giving fabricated evidence. I agree with the learned trial magistrate that there was no room for mistaken identity in the circumstances of this case.
21. After a careful analysis of the evidence on record, I find that the evidence adduced by the prosecution was sufficient to prove the guilt of the appellant beyond reasonable doubt. The conviction was founded on sound evidence.
22. On sentence the court imposed a sentence of 7 years on each count. This was unlawful since the two complainants were aged 7 years and 11 years respectively. **Section 8(2)** of the **Sexual Offences Act** provides for a sentence of life imprisonment in such circumstances. However the court notes that the state did not serve notice to enhance sentence upon the appellant. Had this been done this court would have been obliged to substitute the proper sentence since the appeal has failed. Since the notice was not served upon him the court finds that it would be prejudicial to the appellant to substitute the lawful sentence since he was not accorded a chance to consider the options available to him.

The appeal is therefore found to be lacking in merit and is dismissed in its entirety.

**SIGNED DATED and DELIVERED** in open court this **3<sup>rd</sup> day of April 2014.**

**L. A. ACHODE**

**JUDGE**