REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.68 OF 2011

BETWEEN

CHARLES GITONGA WARUINGI ….....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from original conviction and sentence in the CM's Court at Nyeri in Criminal Case No 31 OF 2009 dated and delivered on 19th April 2011– Hon. D.O. Ogembo, PM)

JUDGMENT

The appellant CHARLES GITONGA WARUINGI was charged with the offence of defilement of a girl contrary to **Section 8 (1) (4)** of the **Sexual Offences Act No.3 of 2006**. The particulars of which were that on the 4th day of October 2009 in Nyeri District within Central Province intentionally and unlawfully did an act which caused penetration to T.W.N. a child aged 16 years.

He faced an alternative charge of Indecent Act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No.3 of 2006** the particulars of which were that on 4th day of October 2009 at Tetu village in Nyeri District within Central Province, intentioanlly and unlawfully committed an indecent act with T.W.N. by causing his genital organ to touch her sexual organ.

He pleaded not guilty, was tried, convicted and sentenced to serve ten (10) years imprisonment. Being aggrieved by the said sentence, he filed this appeal and in his home grown grounds of appeal stated that no medical test was done on him and was convicted without investigation report and that his defence.

When the appeal came up for hearing before me Mr. Njue appeared for the State and conceeded to the appeal on the ground that the complainant was noted during the trial to be mentally challenged and that the court found that she was not a competent witness. It was further submitted that once the complainant was taken to be examined, she was never brought back to be cross examined by the appellant and therefore his right for fair trial was violated.

It must be noted that the court is not under a duty to allow the appeal on the basis that the same is conceeded to by the prosecution but must re-evaluate the evidence tendered and to come to its own conclusion.

The appellant who was not represented at the hearing submitted a memorandum of appeal together with written submissions which he relied upon. It was submitted that the evidence of PW2 was not conclusive and contradicted the evidence of PW1 on the date when she reported and that the benefit of that doubt should have been given to the appellant.

It was further submitted that the mode of his arrest was also doubtful and that if he was arrested on 9th October and held till 24th October 2009 which was 13 days then he was unlawfully detained. It was further submitted that the charge against him were not proved beyond reasonable doubt. It was further submitted that there was no first report for Tetu police station. It was further submitted that there was no evidence to prove that PW1 was of unsound mind.

It was submitted that the medical evidence was not conclusive and on the authority of **Charles Kibara Muraya -vs- R. Criminal Appeal No.330 of [1989] CA Nyeri** where it was held that the more serious the charge the more the burden of proof on the prosecution. It was submitted that the case was not proved. It was further submitted that his defence was rejected without giving reasons for the same by the trial court.

This being a first appeal the court is under duty to re-evaluate the evidence tendered as I hereby do. PW1 T.W. aged sixteen testified that on 4th November 2009 she met the appellant on the way who told her to go to his place. She went to his house. He removed his clothes then removed her clothes and told her that they have sex. She stated that they went to bed for two hours and that he had been disturbing her at home and that he had been abusing her family. At that stage the prosecution requested that she be taken ot P.G. Hospital for mental check up.

PW2 Lucy Nyawira Ndingui's evidence was that on 5th October 2009 she went to church and left PW1 at her grandmother's place. She later found her on bed and that for four days she did not tell her anything until on 9th October 2009 when she told her that she had been waylaid by the appellant and took her to his place. She stated that that was the 3rd time the appellant was harrassing PW1.

PW3 Dr. Musyoki Dindi testified that on genital examination of the complainant there was no hymen with foul smelling at vaginal discharge and that P3 form was filled on 28th October 2009. Under cross examination he testified that the date of the alleged offence was 5th October 2009 while the date of report to hospital was 10th October 2009.

PW4 PC Mohammed Chiwayo testified before Hon. D.O. Ogembo having complied with **Section 200 CPC** testified that on 24th October 2009 at 4.00 p.m he booked the OB and found a note requiring his colleague at Nyeri police station where there was a complaint of defilement of a girl with unsound mind. He went and got the suspect from Tetu trading centre.

When put on his defence the appellant testified that the complainant had a mental problem and was moving from house to house. He stated that the complianant's mother always accused and reports people to the police. He stated that when his wife was away he befriended PW2 and upon the return of his wife PW2 insisted that he pays her for the time they had together and therefore the case was out of their disagreement. He further testified that the complainant should have reported to her grandmother.

Having looked at the evidence tendered I would agree that Mr. Njue was right in conceeding to this appeal. The only evidence on record is the hearsay evidence of PW4. In finding that the appellant had subjected the complainant to sexual intercourse in view of the evidence of the prosecution that the complainant knew the appelant the trial court fell into error.

There was no evidence tendered by the prosecution to prove that the appellant had a sexual contact with the complainant whose evidence as noted by the trial court that the prosecution did not have the benefit of the evidence of the complainant. Having therefore found that the complainant was of unsound mind in the absence of any independent evidence the conviction of the appellant was not safe.

I would therefore allow the appeal herein, quash the conviction and set aside the sentence. The appellant should be set free forthwith unless otherwise lawfully held.

Signed and dated this day of 2014

J. WAKIAGA

JUDGE.

Delivered by Justice J. Ngaah on behalf of Justice J. Wakiaga this 18th day of December 2014

J. NGAAH

JUDGE.

In the presence of:

---------- for Appellant

---------- for Respondent