REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 230 OF 2012

JOHN GAITI WANGARI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in Criminal Case Number 304 of 2011 in the Senior Resident Magistrate's Court at Gatundu – Kinyanjui (RM)

JUDGMENT

1. This appeal arises out of the conviction of the appellant for the offence of defilement contrary to **Section 8(1)** as read with **sub-section 3** of the **Sexual Offences Act No. 3 of 2006**, by the learned trial magistrate M/s. Kinyanjui in **CM Cr. Case No. 304 of 2011 Gatundu.** Upon conviction the appellant was sentenced to serve 20 (twenty) years imprisonment.

2. In the alternative, the appellant faced a charge of indecent act with a female contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006**. It had been alleged that on 3rd July 2011 at Kahuguini village in Gatundu within Kiambu County, he intentionally and unlawfully committed an act which caused penetration to S.W.K. (identity concealed on account of her being a minor).
3. The appellant's subsequent appeal was based on the amended grounds that his conviction was founded on a defective charge, the charge sheet having failed to state what part of the appellant penetrated what part of the complainant's body. Further that the prosecution failed to avail three material witnesses, and lastly that the prosecution had failed to prove their case to the required standard.

4. The appeal was opposed through the state counsel M/s. Njuguna. She contended that since the complainant testified that the appellant inserted his penis into her vagina, the omission in the charge sheet to mention what part of the assailant's body penetrated what part of the complainant's body could be rectified by invoking **Section 382** of the **Criminal Procedure Code**. In her view this omission did not cause the appellant any prejudice because the evidence disclosed what was done and the P3 form confirmed the act. Further that, the complainant identified the appellant because he had been her neighbour since childhood.

5. On the second and third grounds Miss Njuguna contended that it is the prosecution's discretion to decide who to call as a witness, and that the prosecution did prove their case beyond reasonable doubt.

6. I have scrutinized and reassessed the evidence to make my own findings and draw my own

conclusions. In doing so I gave allowance for the fact that I neither saw nor heard the witnesses as they testified.

7. The prosecution's case, in a nutshell, was that on 3rd July 2011 at about 8.00 p.m, **PW1** the complainant went to the appellant's house to fetch some water, leaving the appellant at her home where he was visiting. On her way back she met the appellant at the church and he demanded that she gives him what was between her legs.

8. The appellant grabbed her hand and pulled her behind the church where he removed her, long trousers, bikers and inner wear. He unzipped his trousers, dropped them to knee level and felled the minor by pulling one of her legs. The appellant lay on the minor who was lying in a supine position and inserted his penis into her vagina, and defiled her.

9. An hour later the appellant fled on seeing that his wife and one Michael had seen him and were approaching the scene. The minor went home and reported the incident to her parents. The minor's parents together with an irate mob that gathered to hear what had befallen her, set upon the appellant and beat and scalded him before handing him over to the police at Kahuguini police post. He was handed over to Gatundu police who escorted him and the minor to hospital for treatment. He was subsequently charged.

10. In his defence the appellant gave unsworn testimony in which he told the court that he was sitting outside his house at about 7 p.m. on 3rd July 2011 when two men approached him and set upon him without much ado. They beat him and scalded him with hot water. He cried out and the two men fled. He was rescued by Administration Police and handed over to Gatundu police who took him to hospital. He was surprised to be later locked up and charged as read. He averred that he did not even know who had complained.

11. The two issues for determination are whether the complainant had been defiled and if so, who the perpetrator was.

12. There was no dispute that the complainant was a minor as at 3rd July 2011. She testified that she was aged 15 years and in class 8 by the time she took the stand to testify in this case on 23rd February 2012. She testified that she was born in 1996 and produced an immunization card to support her assertion. **PW2** the medical witness confirmed that she was aged 14 years at the time of the initial examination, immediately after the assault some 8 months before the date of testimony.

13. The relevant part of what transpired that day, according to the minor's recollection is as follows:

> **"He pulled my hand and took me behind the church. He was using force. When we got there he removed my trouser and biker and underpants. He removed all of them at once. They remained at the ankle. He opened his zip and dropped the clothes to the knees. I stood there, he was not holding me. I was afraid. I did not run away. I thought he would beat me. I did not scream because he lied he would give me Kshs.50/-. When I said I would scream he covered my mouth and pulled me. He pulled my leg and I fell and lay down facing upwards. He then lay on top of me. He did bad things to me. He raped me. He removed his penis and put it in my vagina. I told him I would report him and he told me not to report."**

14. The minor's testimony found support in the evidence of **PW2** Dr. Mwangi of Gatundu Hospital who produced a P3 on behalf of Dr. Ng'ang'a. Dr. Mwangi had worked with Dr. Ng'ang'a for two years and was conversant with her handwriting and signature. The prosecutor laid a basis to have the P3 form produced by a Dr. other than the one authored the P3 form by applying under **Section 77 Criminal Procedure Code** to be allowed to do so. He submitted that Dr. Ng'ang'a the author of the P3 form was away at the University pursuing her Masters degree and could not be availed to testify without occasioning undue delay.

15. The application which was not objected to by the appellant was allowed by the court. **PW2** testified that the minor presented with a history of having been defiled by a person known to her. Upon examination the Dr. observed the following:

- Clothes stained in mud
- She was in pain
- Approximate age of injury – hours
- Type of weapon used – blunt
- Hymen broken but no presence of blood or infection
- High vaginal swab revealed presence of spermatozoa

The conclusion was that there was recent sexual activity. He clarified that the P3 dated 12th July 2011 had been filled on a different date from the date of the examination and had been filled in reliance of a post rape care form filled during initial the examination.

16. From the foregoing I am satisfied that the minor being aged 14 years at the material time, and there being medical evidence that she had been involved in sexual activity, there can be no other finding other than that she was defiled, since she had no capacity to enter into consensual sex at that age.
17. I considered the evidence on the identity of the perpetrator with circumspection calling to mind the caution issued by the Court of Appeal in **Ogeto v Republic [2004] 2KLR**, in which the Hon. Judges of Appeal Omolo, Githinji and Onyango Otieno, JJA held, *inter alia*, that:

> ***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".***

18. The evidence shows that these were two persons who were well known to each other. The minor testified that her sister and the appellant were neighbours and the sister and appellant's wife were friends. She also stated that she left the appellant in her sister's home when she went to his home for his wife to give her some water in a pan. The time was 8.00 p.m.

19. Her testimony is that the appellant followed her upto some neighbourhood church where he appears to have waited to accost her on her way back. The appellant conversed with the minor before and during the sexual assault beseeching her not to report the encounter. He offered her a bun which she turned down and advised him to give it to his child. The minor also testified that she had known the appellant since she was young and that he lived just some 20 metres away from the church where he attacked her.

20. In the minor's estimation the appellant defiled her for about an hour. The minor was not of tender years who may have been easily confused as to the identity of her assailant. She knew him by name and where he lived. In his cross-examination of the minor it would appear that the appellant suggested that there existed a dispute between his family and that of the minor's sister. This was perhaps to lay a basis for asserting that there was reason for the charges to have been fabricated to frame him. The minor denied the existence of any such dispute and the appellant did not pursue this line of defence.

21. This being a criminal case I reiterate that there was no burden whatsoever on the appellant to prove his innocence. I have given the defence raised by the appellant adequate consideration and find that it flies in the face of the prosecution's evidence. The evidence in totality proved the offence of defilement, as illustrated by testimony of the minor of what transpired on the fateful day, and supported by the findings in the P3 form.

22. It has been contended by the appellant that material witnesses were not called to testify for the

prosecution. On this issue, I refer to **Section 143** of the **Evidence Act** which provides that:

> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"**

In ***Michael Kinuthia Muturi versus Republic, Criminal Appeal No. 51 of 2008, Court of Appeal Nairobi (2011) eKLR***, the Court of Appeal noted that:

> **"There will be instances, of course, when the failure to call some witnesses will attract adverse inference and that is when the evidence on record is barely sufficient to prove the case."**

23. It shall be remembered that it is not necessary that the evidence of a child be corroborated for the court to found a conviction upon it, provided that the court is satisfied that the child is telling the truth and record the reasons therefor. The trial court expressed satisfaction in the fact that the child was telling the truth, and that there was no reason for her to fabricate evidence against the appellant.

The proviso to **Section 124** of the **Evidence Act** provides that:

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

24. After a careful re-assessment, of the evidence on record, I am in agreement with submissions of the learned state counsel that the omission in the charge sheet occasioned no prejudice to the appellant and was curable under **Section 382** of the **Criminal Procedure Code**. I am satisfied that the conviction entered against the appellant was based on sound evidence. I therefore find that the appeal is unmerited. I uphold both the conviction and sentence imposed by the learned trial magistrate.

The appeal is hereby dismissed.

SIGNED DATED and **DELIVERED** in open court this **19th day** of **September 2013.**

L. A. ACHODE

JUDGE