IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.176 OF 2010

MICHAEL MWANGI WARUTUMO ….……. APPELLANT

VERSUS

REPUBLIC …….…..…….. RESPONDENT

(An Appeal from original conviction and sentence in Naivasha P.M.CR.C. No.40 of 2009 by Hon. N.N. Njagi, Principal Magistrate dated 14th May, 2010)

JUDGMENT

MICHAEL MWANGI WARUTUMO (the appellant) was convicted on a charge of defilement of a girl contrary to **Section 8(3) of the Sexual Offences Act No.3 of 2006** and sentenced to serve 20 years imprisonment.

The charge against him stated that on 2nd day of January 2009 at around 6.30 p.m. at a Village in NYANDARUA SOUTH DISCTRICT, within Central Province, he committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of P.N.K, a girl aged 15 years, which caused penetration. The appellant denied the charge and after a trial in which four witnesses testified in support of the prosecution case, and appellant was the only defence witness, he was convicted.

He had faced an alternative charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No.3 of 2006**, that on the said date and place, he committed an indecent act by placing the male organ (penis) on the surface of the female organ (vagina) of P.N.K, a child aged 15 years by touching her private parts, namely vagina. He was discharged on the alternative charge. P (PW1) told the trial court that on 02/01/09 at 6.30 p.m., she was at home when her mother sent her with food to take to the appellant who was visiting her brother (E.G) and was staying in a separate house. Her brother was not present, having gone to visit an uncle. After she had served the appellant food, she went to collect the used plates, and that is when the appellant covered her mouth, held her and took her to the bed, removed both their clothes and had sexual intercourse with her for about one hour. Accused ejaculated inside her, and he did not use a condom. Meanwhile her mother came and called her three times, but she did not answer. Eventually her father came, by which time appellant had hidden under the bed. Appellant was removed from the house and taken to the police station. A torn pant which PW1 had been wearing was taken to the police station. It was PW1's evidence that she got to know the appellant very well when her brother was circumcised. Although she was in pain during the incident, she did not scream.

PW2 A.N.K (the girl's mother) informed the court that on the material date, she sent her daughter with food to serve her son G1 and the appellant. The girl took the food but did not come back, so PW2 got impatient and after 20 minutes she got out and learnt from her nephew G2, that PW1 had been locked in the house where appellant was. She called out her name but got no answer; she then went around the

house and knocked on the window. Appellant realized she would break the door, so he opened and PW2 pulled PW1 out. PW1 told her she could not answer when being called because appellant had covered her mouth. PW1 then described to her mother how appellant had sexual intercourse with her. When PW2 checked her private parts, she realized the girl was bleeding and her panty was blood stained. She took PW1 to hospital where she was examined. Appellant was also apprehended and taken to hospital. Her evidence was that PW2 was born in 1992 and was 15 years at the date of the trial.

On cross-examination PW2 stated:

"G1 was not there when you were in the house taking food I gave the girl . . . . . you did not eat the food as you were very drunk. . . ."

Dr. LAURA WATITI (PW3) who examined PW1 told the trial court that she was 15 years old and a physical examination disclosed a bruised hymen with a foul smelling discharge but no sexually transmitted disease was found. The examination was done four days after the incident. Her findings were that there was evidence of penetration as there were bruises on the vagina. The P3 form was produced as Exhibit 1.

The investigating officer **PC NICHOLAS MWANGANGI (PW4)** was on patrol duties within the trading centre when he got a call from a nurse saying that members of the public had brought a boy and a girl on allegations of defilement by the boy. He issued them both with P3 forms then visited the scene and says the girl's underwear was blood stained (Exhibit 3). He also produced a blood stained pant belonging to the boy as Exhibit 2.

In his defence which was unsworn, appellant told the court that he had been invited by PW1's father for a drink (beer) and he denies defiling the girl saying he was drunk.

The trial magistrate in his judgment noted the sequence of events from the moment the girl took food to the appellant in the house, the girl missing her brother, the locked door, calls by her mother not getting any response, the eventual resurfacing of the girl from the locked house and appellant's presence there, the information the girl gave her mother which was confirmed by the medical findings, which clearly showed that the girl had been defiled. The trial magistrate observed as follows:

"The spermatozoa may not have been seen, but the evidence of penetration was found by the doctor. The hymen of the girl was found to have been bruised at the time of the examination. The P3 form Exhibit 1 confirms the defilement."

The appellant now challenges the findings on grounds that:

1. The charge was defective.

2. The trial magistrate erred in not properly directing his mind to the degree, standard of proof and the law relating to the burden of proof.

3. There were obvious discrepancies and inconsistencies which the trial magistrate did not properly address.

4. The trial magistrate was selective in analyzing the evidence and failed to form a balanced view.

5. The trial magistrate admitted evidence which was not by an expert witness.

6. The crucial witnesses were not called.

7. The conviction was against the weight of the evidence on record.

8. Appellant's defence was not considered.

Mr. Ongeri submitted that under **Section 8(3)** of the Sexual Offences Act:

1. The age of the victim is a paramount importance, yet in this instance there was no age assessment report or birth certificate tendered by prosecution.

He pointed out that according to the evidence of the mother, the girl was born in 1992, which would make her 16 years and not 15, and if that was the case then appellant ought to have been charged under **Section 8(1)** as read with **Section 8(4)** and not under **Section 8(3).** He cited the decision in **JOHN G. WAGNER & 2 OTHERS V R** HCC Appeal No.405 and 406 of 2009 pg 21-24.

In conceding the appeal, Mr. Omutelema acknowledge that the complainant's age was not ascertained because both the girl and her mother claimed she was 15 years and her mother claimed she was 15 years at the time of the offence, yet her very own mother said she was born in 1992, meaning that at the date of the offence she was 17 years old.

Indeed an accurate assessment of the age of a child is a material factor in charging, and sentencing. It has been acknowledged in several judicial pronouncements that the best placed person to state the age of a child is the person who was present at the birth of the child. Naturally the most appropriate person would be the mother – but what happens in an instance where the mother cannot recall or does not know the year of birth – or as in this case where the age given and the year of birth are in contradiction? This would then require other supporting evidence such as a birth certificate or an age assessment report (which were not presented to the trial court). Indeed it is not clear how Dr. Watiti came to the conclusion that PW1 was 15 years, since she does not allude to an age assessment process, then the only logical inference to draw is that she simply relied on information given to her by PW1 and PW2. Certainly age is an important factor for offences under the Sexual Offences Act because offences are categorized in such a manner that the age becomes a major determinant in the sentence provided – to this extent then if the age had been properly determined then the appellant could well have been charged under **Section 8(1)** as read with **Section 8(4)** and certainly the minimum sentence is less by five years – so indeed the appellant was prejudiced.

The 2nd issue Mr. Ongeri has addressed is with regard to the exhibits which he says although produced by the investigating officer, were never identified by the complainant, and were never presented to the Government Analyst for examination to confirm that the blood and spermatozoa alleged to have been seen by the investigating officer were from the appellant. This omission is conceded by Mr. Omutelema – I confirm that such presumption was improper and indeed prejudicial to the appellant.

Another limb raised which it seems the trial magistrate did not consider, is that appellant had pleaded being drunk as his defence, and that this was corroborated by the evidence of PW2 who said appellant did not eat his food because he was drunk.

Both Mr. Ongeri and Mr. Omutelema are in agreement that intoxication is a defence available under the law and the trial magistrate ought to have considered **Section 13(2), 13(2) (a) and 13(4)** of the **Penal Code** when making his findings.

Section 13 (2) provides:

"(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing . . . ."

(4) Intoxication shall be taken into account for the purposes of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

The trial magistrate did not address his mind to this defence offered nor did he give any reason as to why he did not deem it proper defence.

Certainly from the evidence of PW2 regarding the state of the appellant and what he said in his defence there was room for doubt to be created as to whether he really knew what he was doing, especially taking into consideration the circumstances – this was at the complainant's home, her mother was present . . . . Surely that alone warranted the trial magistrate examining the defence offered and he erred by failing to do so. My finding then is that the appeal is properly conceded; indeed the conviction was unsafe and is quashed. The sentence meted is set aside and appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 3rd day of February, 2012.

H.A. OMONDI
JUDGE