



**WACHIRA MUGENI NGATI..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the conviction and sentence by B.A. OJOO Ag. Senior Resident Magistrate at Baricho in Criminal Case No. 1372 of 2007 on 13<sup>th</sup> December 2007)***

### **J U D G M E N T**

The Appellant herein faced three counts of defilement of a girl contrary to Section 8 (1) (4) of the Sexual Offences Act No.3/2006. He also faced three alternative counts of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3/2006. He was acquitted of the main counts of defilement but convicted on the 3 alternative counts and sentenced to 20 years imprisonment on each count.

And being aggrieved by the Judgment he has filed this appeal citing 6 grounds:-

- 1. That the trial Magistrate erred in law and fact by failing to consider that the Appellant's arrest was surrounded by doubts.***
- 2. The prosecution side completely failed to prove the case beyond any reasonable doubt as the law provide.***
- 3. That the Appellant was done medical examination which does not relate to the alleged sex (STD) which was found with the complainants.***
- 4. That the trial Magistrate failed to consider the grudge which existed between them.***
- 5. That the investigations carried were very poor in that there was a gap left in proving the offence and implicate against the Appellant.***
- 6. That the trial Magistrate disputed the Appellant's defence which was very true without sufficient grounds.***

When the appeal came for hearing the Appellant presented written submissions to the Court. In them he states that the evidence of the minor girls is contradictory and it was a frame up. And that if he had done that to them they could not have come up. He also wondered where the charge of indecent assault came from.

The learned State Counsel Ms. Matiru opposed the Appeal saying the minors aged 10, 12, and 13 had been defiled. PW1 narrated the incident. The appellant was a neighbor and they knew him well. The witnesses narrated what the appellant would do to them. The medial evidence confirmed that the girls and the appellant had contacted STDs.

I am alive to the need to reconsider and reevaluate the evidence and come to my own independent conclusion. I am also bearing in mind that I never had the advantage of hearing or seeing the witnesses. I am guided by the case of *SIMIYU VS REPUBLIC [2005] 1 KLR 192*.

The complainant in this case testified as PW1, PW2, PW3 and PW4 after satisfying the Court that they could give their evidence on oath. All these girls stated that the Appellant is their neighbour and they know him well. They used to visit his mother and do some house chores for her. Then on 19/4/2007 the Appellant called them and asked them to go and help him wash his dishes at his house as well. They agreed and went to his house and found him there. He gave them tea and Milo and buttered bread. As they took the tea the Appellant started calling them into the inner room one by one and caused them to remove their clothes and he defiled them. He gave them 5/= each to buy sweets. Thereafter they worked for him and went home. The Appellant had warned them not to tell anyone what he had done to them.

The same thing happened to PW4 whom the Appellant sent to the shops on 23/4/2007 to buy sugar and bread. He told her to take those things to his house. When she did he pulled her inside the house, put her on the bed and defiled her. She is the one who reported to Mama W. what had been happening to the small girls. PW8 confirmed the report she got from PW4. She sent for the girls and they came. They narrated what the Appellant had been doing to them. Their mothers were informed. The villagers heard of it and they arrested the Appellant and took him to the AP Post and then to Baricho Police Station. The girls were taken to hospital.

PW9 the Clinical officer examined the girls and found the following:-

- PW1 had a urinary tract infection; labia minora had slight swelling with slight discharge. There was non-penetrative sex for her. Hymen was intact (EXB1).
- PW2 had a urinary tract infection. Labia minora were slightly inflamed. Presence of pus cells. There was non-penetrative sex for her (EXB2)
- PW3 had a swelling on the labia minora; presence of discharge and pus cells. There was non-penetrative sex. (EXB3)
- PW4 – had a urinary tract infection to 2 degree PENETRATIVE SEXUAL ASSULT. She even had gonorrhoea (EXB4)

The Appellant was sent for urinalysis. The urine showed that the urine had some proteins, pus cells and epithelial cells. The HIV/AIDS test done was negative. The results co-related to the results of the assaulted girls. The Appellant had a bacterial infection. PW9 produced the clinical notes and P3 that PW10, PW11, PW12 are parents of the sexually assaulted girls.

The Appellant elected to give an unsworn defence. He was a guard in Karatina. On 23/4/2007 8 a.m. he returned home from work arriving at 9.30 a.m. He prepared breakfast. He went to assist his mother. Later he went to prepare lunch which he ate and slept. He was woken up and found a group of villagers at his door. PW1's father was there. They frog marched him to Kibirigwi trading centre. He was beaten by the mob. He was taken to Baricho Police Station. He was taken to the Hospital. He denied the charges. DW1 could not confirm whether the accused committed those offences or not.

In ground 1 the Appellant says his arrest was surrounded by doubts. It is on record that the Appellant was arrested by an angry group of villagers. They took him to the AP Post and then Baricho Police Station. He did not deny having been arrested.

Ground 3: That he was done medical examination which did not relate to the alleged sex (STD) which was found with the complainants. The urinalysis done on him was correctly done to determine if he had any Sexually Transmitted Disease. This was very relevant to the complaint of the girls.

I will tackle grounds 2, 4, 5 & 6 together. Nowhere in his defence did he allude to any grudge between

him and the witnesses. Even his own witness (DW1) did not allude to any such grudge. Coming to the evidence on record there was medical evidence that PW4 had been defiled though the Appellant was not charged for that. PW9's evidence dealt with the case of each of the 3 complainants. They had all had non penetrative sex and had been infected with a bacterial infection. The infection in them was what was found in the Appellant. PW1, PW2, PW3, PW4 and PW7 all mentioned the Appellant as the person who had tried to penetrate them with his male organ. In fact he did penetrate PW4. The evidence of these witnesses was so consistent, graphic and detailed. The Appellant never cross examined PW2, PW3, PW4. The evidence of these children was neither shaken nor rebutted. They all knew the Appellant very well.

In his evidence the appellant appeared to suggest that he did not know anything about the charges. His mere denial did not however shake the evidence of the prosecution. The learned trial magistrate trial Magistrate analyzed the evidence well and came to the correct conclusion. I am satisfied that the conviction is safe. However, the order that the sentences run consecutively was erroneous. These acts were committed in a series on the same date.

I hereby set aside that order and substitute it with an order that the sentences to run concurrently. Save for that order, the appeal has no merit. It is dismissed. Rights of appeal explained.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 29<sup>TH</sup> DAY OF MAY 2012.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Ms. Matiru for Prosecution**

**Appellant present**

**Njue CC**