REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 618 of 2010

JOHN WAMBUGU KUNGU... APPELLANT

VERSUS

REPUBLIC …………………………………………………..... RESPONDENT

(From the original conviction and sentence in Criminal Case No.1464 of 2009 of the Principal Magistrate's Court at Githunguri by B.M.Nzakayo – Resident Magistrate)

J U D G M E N T

The appellant, **JOHN WAMBUGU KUNG'U**, was charged with the offence of Defilement contrary to **Section 8 (1)** as read with **Section 8 (2) of the Sexual Offences Act.** In the alternative, the appellant was said to have committed the offence of Indecent act with a female child **contrary to section 11 (1) of the Sexual offences Act.**

After a full trial, the appellant was convicted on the alternative count, of Indecent Act with a female child. He was then sentenced to 10 years imprisonment.

In his appeal to this court, the appellant raised the following issues;

- *Section 214 of the Criminal Procedure Code* ***was not complied with.***
- *Sections 107 and 163 of the Evidence Act* ***were not complied with.***
- ***The evidence was contradictory and inconsistent.***
- ***The evidence was insufficient and vital or crucial witnesses did not testify.***
- ***The defence was formidable and plausible***.

When canvassing the appeal the appellant submitted that because the learned trial magistrate held that the penetration had not been proved, the prosecution witnesses must be said to have been liars.

The appellant also submitted that the trial court was wrong to have held that the appellant's penis came into contact with the complainant's vagina, when the charge sheet had only asserted that the appellant had viewed the minor's private parts.

Thirdly, the trial court was faulted for failing to recall the complainant after the charge sheet was amended. That failure is said to have deprived the appellant an opportunity to cross-examine the

complainant on the aspects that were introduced through the amendment.

In any event, it is the appellant's contention that the case against him was simply framed against him by the complainant's mother. His story was that **PW 2,** (the mother of the complainant), framed him after the appellant rejected her request for an affair with her.

The appellant also asserted that the complainant gave contradicting or inconsistent evidence. She said that the appellant had offered her a sweet. But later, she said that she had been offered a soda.

Meanwhile, the grandmother of the complainant, who had been left with the minor, did not testify. Another person who did not testify was the complainant's aunt, L. The said L was apparently the first person that the complainant reported to about the incident in issue. The failure by the prosecution to call those 2 witnesses is said to have deprived the court of crucial evidence, which could have assisted the court to arrive at a just decision.

The appellant also complained that whereas **PW 2** had told the trial court that Ms W K would not be a witness at the trial, the said person went ahead to give evidence as **PW 3**. In the circumstances, the appellant argued that **PW 3** must have been hired to simply try and provide corroboration for the evidence of **PW 2**.

As far as the appellant was concerned, he should have been subjected to medical examination to establish whether or not the infection found on the complainant could be linked to him.

PW 4 was a clinical officer at the Githunguri Health Centre. The appellant submitted that that witness was not qualified to produce the P3 form in which the information about the complainant's condition was recorded. As a result, the P3 form was said to be of no evidential value.

According to the appellant, he is a mature man. Therefore, if he were to insert his genital organ into the genital organ of the complainant (who was only 3 years old), there would result clear evidence of tears and blood. I understand the appellant to be inviting this court to find that the evidence tendered was not credible.

Furthermore, because the complainant had only been in that area for about 2 days before the incident allegedly took place, the appellant argued that it was improbable for the complainant to leave the company of her aunt, L, and to go to a stranger like the appellant.

Finally, because the defence was plausible, and also because the evidence of the minor was not corroborated, the appellant submitted that the conviction should not be allowed to stand. Unless there was corroboration of the evidence of a minor, the appellant construes that to constitute a violation of **Sections 124 and 125 of the Evidence Act**, if the accused was convicted.

In answer to the appeal, Ms Mwanza, learned state counsel, submitted that the prosecution did prove that the appellant removed the complainant's clothing and his own clothing. He then inserted his "nakedness" into that of the complainant. However, as the complainant felt pain, the appellant left her. But the contact made still left tale tale signs on the complainant's private parts. Those signs included the redness of the vaginal orifice, which was also inflamed.

Even though there was no eye-witness to the incident, the respondent submitted that the evidence of the minor was sufficient to sustain conviction of the appellant.

As a first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. I will proceed to do. I will also give due consideration to the legal arguments advanced before me.

When the appellant took plea on 9th November 2009, the particulars of the Alternative Charge were as follows;

***"JOHN WAMBUGU KUNG'U*: On the 6th day of November 2009 at Giathaini Village in Githunguri District within Central Province, committed an indecent act with a female child namely, ANG by touching her vagina."**

Clearly therefore, even at that stage, there was no assertion by the prosecution that the appellant had simply "viewed" the complainant's vagina. He was alleged to have touched it.

On 16th July, 2010, the learned trial magistrate granted leave to the prosecution to amend the charge sheet.

The record shows that when the prosecutor sought leave to amend the charge sheet, he said that the original charge sheet had stated that the appellant had allegedly viewed the minor's private parts. Of course, that statement was factually incorrect.

Nonetheless, Mr. Otieno, the learned advocate who was then representing he appellant, told the court that he had no objection to the proposed amendment.

The particulars of the Alternative Charge in the amended charge sheet were as follows;

***"JOHN WAMBUGU KUNG'U*: On the 6th day of November 2009 at Giathaini Village in Githunguri District within Central Province committed an indecent act with a female child namely ANG aged 3 years by intentionally causing contact between his genital organ (penis) and the genital organ (vagina) of the said female child."**

Following the amendment of the charge sheet, I find that there is no merit in the appellant's contention that the learned trial magistrate was wrong to have concluded that the appellant's penis came into contact with the complainant's vagina.

Secondly, the fact that the evidence adduced only conclusively proved that the appellant's penis made contact with the complainant's vagina, did not, of itself, imply that the prosecution witnesses who had asserted that there had been penetration were liars.

The complainant (**PW 1**) did say that the appellant had "poked" her private parts. He did so when the 2 of them were naked. The appellant poked the complainant using "his stick" which was from "his nakedness."

The young child did demonstrate to the trial court how the appellant removed his penis. He then put it in the complainant's nakedness.

Elsewhere, the complainant said that the appellant used his stick to prick the nakedness of the complainant.

Bearing in mind the fact that the complainant was only 3 years old, I am not sure about the actual word that she used when testifying about the action of the appellant.

In Kiswahili, she used the words;

> ***"Wambugu alinidunga kwa nui"***

Possibly, that is what prompted the trial court to use the words "poking" and "pricking".

But the complainant also testified that the appellant "put in" his nakedness into her nakedness.

When the complainant's mother (**PW 2**) noticed that the child was crying, as she walked with her feet astride, **PW 2** examined **PW 1**. The mother found that the complainant's vagina was red and swollen.

PW 3 also checked **PW 1**. She corroborated the evidence of **PW 2**, regarding the complainant's red and swollen vagina.

The child was then taken to the Githunguri Health Clinic, where she was examined by a qualified clinician, Regina Kimani. The said clinician did not testify at the trial. Instead, it was Scolastica Wambui, a clinical officer, who produced the treatment notes recorded by Regina.

PW 4, said that the vagina of the complainant could be penetrated to a distance of 1.5cm, if the person examining her inserted a finger into her vaginal orifice. That was not normal, for a child who was 3 years old.

PW 4 also testified that the complainant had a urinary tract infection. The said infection as consistent with contact being made between the sexual organs of 2 persons.

As the complainant had not had any such infection prior to the material day, the clinical officer's evidence corroborated the child's testimony. Her words were that the appellant;

> ***"had touched her private parts with his."***

If corroboration was needed, in law, the same was amply provided by the prosecution witnesses. The complainant was walking with her feet astride, soon after the appellant poked or pricked her vagina using his penis.

When **PW 2** and **PW 3** checked the sexual organ of the child, they found her vagina was red and swollen.

The clinician who examined **PW 1** found the vagina to be "highly swollen", reddish and inflamed. The child also had a sexually transmitted bacterial infection in her urinary tract. The infection was consistent with what is passed on from one person to another.

The identity of the person who committed the act was not in doubt. The complainant said that it was the appellant.

Although the appellant alleges that the child's mother simply framed him, after he had rejected her advances, the fact is that the complainant's body bore real evidence of what had been done to her.

Furthermore, when the appellant was cross-examining the mother of the complainant, he failed to raise any issues about the alleged attempt by **PW 2** to have an affair with him. He first raised that issue when he was putting forward his defence. In the circumstances, the alleged defence cannot be anything other than an afterthought.

To the extent that the complainant gave evidence which was then corroborated by medical evidence, the prosecution discharged the burden of proof, by proving that the complainant's vagina was violated by the appellant's penis. In effect, **Section 107 of the Evidence Act** was complied with.

As regards **Section 163 of the Evidence Act,** I have found nothing on record to show that the credibility of any of the prosecution witnesses was impeached by the appellant. Therefore, there was no merit in the appellant's contention that the case against him was unproved because the credibility of witnesses was impeached.

After the original charge was amended, the learned trial magistrate caused the plea to be taken again. By so doing, the court complied with **section 214 of the Criminal Procedure Code.**

In the result, there is no merit in the appellant's contention that that statutory provision was not complied with.

Finally, I find that the trial court did give due consideration to the appellant’s defence. The said court came to the conclusion, just like I have done herein, that the contention that the complainant’s mother simply framed the appellant after he had rebuffed her advances was nothing more than an afterthought. It did not cast any doubt on the consistent, corroborative and proven case which had been put forward by the prosecution. Therefore, there is no merit in the appeal. It is dismissed.

I uphold both conviction and sentence.

Dated, Signed and Delivered at Nairobi this 15th day of November, 2012.

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FRED A. OCHIENG
JUDGE