



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.173 OF 2008

PAUL WACHIRA MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Nakuru C.M.A/CR.C.NO.121/2007 by Hon E. TANUI, Resident Magistrate, dated 25th July, 2008]

JUDGMENT

The appellant, Paul Wichira Muriithi, was charged in the court below with the offence of **sexual assault** contrary to **section 5(1)(b)** as read with **section 5(2)** of the **Sexual Offences Act**.

According to the charge sheet, the appellant is alleged to have committed the offence on KKC, a boy aged 10 years on 13th May, 2007 at K.N Farm. It was the prosecution case that KKC (the complainant) had gone, in the company of his cousin TCF, also 10 years of age, to visit their grandfather. On their way back, they met the appellant who got hold of the hand of KKC. The appellant was a stranger to the boys. The appellant forced KKC to lie on his stomach on the ground, removed his trousers, applied saliva on his private parts before inserting it in the anus of KKC. TCF upon seeing this ran away as he screamed for help.

Among those who responded included **P.W.3, James Korir (Korir)** who saw the appellant fleeing from the scene of the offence. He gave chase and caught up with him. Members of the public attacked the appellant and was rescued by an army officer, P.W.2, Isaiah Kipchumba. The complainant was taken to the hospital. The police arrested the appellant and he too was taken to the hospital for treatment of the injuries sustained during the mob attack.

P.W.6, Jacob Chelimo examined the complainant at Njoro Health Centre. He noted that the complainant's anus was hyperaenic with minimal bruising of the perianul. There was, however, no discharge seen in the anal region. The witness gave the approximate age of the injuries as 4 days.

In his brief defence, the appellant confirmed meeting the complainant on the day in question but maintained that he only sought to know from him the direction to a certain place. He denied committing the offence with which he was charged.

The learned trial magistrate (E. Tanui, Resident Magistrate) considered the evidence presented before her as outlined in the foregoing paragraphs and found that the prosecution proved the charges

against the appellant beyond reasonable doubt and upon conviction she sentenced the appellant to 25 years imprisonment.

Being aggrieved, the appellant has brought this appeal challenging the decision on the following condensed grounds:

- i) that the trial magistrate failed to evaluate the evidence;
- ii) that the prosecution evidence was contradictory
- iii) that the trial magistrate did not consider the appellant's defence.

Learned counsel for the respondent opposed the appeal on the ground that the prosecution evidence against the appellant was credible and consistent; that there was sufficient incriminating evidence against the appellant confirmed by medical evidence.

For my part, I have considered the evidence on record presented before the learned trial magistrate, the grounds of appeal, the written arguments of the appellant and oral submissions by learned counsel for the respondent. There is no dispute that the complainant was sexually assaulted; that this happened in the afternoon in broad day light. The appellant has himself conceded that on the material day he met the complainant but denied committing the offence charged. That being the case, the only question left is whether the appellant committed sexual assault in terms of **section 5(1)(b)** of the **Sexual Offence Act**.

That section provides that:

“5(1) Any person who unlawfully

(a)

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body is guilty of an offence termed sexual assault.”

The term manipulation is defined in the **Concise Oxford English Dictionary** 11th Ed Revised, to mean, *inter alia*, to “*examine or treat (a part of the body, by feeling or moving it in the hand*” While penetration is defined in **section 2** of the **Sexual Offences Act** to mean:

“..... the partial or complete insertion of the genital organ of a person into the genital organ of another person.”

For the purposes of the Act, **Section 2** further declares that the term genital organs include the anus.

I reiterate that the offence was committed in early part of the afternoon. The complainant and TCF who were the only eye witnesses satisfied to the court that they understood the nature of an oath and proceeded to give evidence under oath. I have myself read their testimony and find the same to be cogent. For some strange reason, the appellant did not test that testimony and the evidence of other witnesses, except that of the investigating officer by cross-examination. The evidence of the complainant and that of TCF was strengthened by that of James Korir, who arrived at the scene shortly and arrested the appellant. There is also medical evidence which lend credence to the allegations against the appellant.

Specifically, the clinical officer found that the anus was hyperaenic due to bruising of perianul region. The only comment I make with regard to the medical examination report (P3) is the observation by the clinical officer that the injuries may have been inflicted 4 days before the examination. It is trite learning that such evidence being an expert opinion must be treated only as opinion evidence and the court is duty-bound to make an independent examination of the entire evidence and satisfy itself whether the expert opinion can be accepted. See **Asira Vs. Republic** (1986) KLR 227 and **Daniel Muhia Gicheru Vs. Republic**, Criminal Appeal No.NAI. 74 of 1991. There is sufficient evidence on record that the complainant was taken to Njoro Health Centre the same day the offence was committed.

From the totality of the evidence in this matter, I am, as the learned trial magistrate satisfied that the appellant committed the offence of sexual assault as charged. The appellant's defence was displaced by the overwhelming evidence of the prosecution witnesses. I find no contradictions in the prosecution case.

For the reasons stated, the appeal fails and is dismissed.

Dated, Delivered and Signed at Nakuru this 19th day of May, 2011.

**W. OUKO
JUDGE**