REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 91 OF 2010

PETER MUNYWA WANJIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 310 of 2008 of the Resident Magistrate's Court at Gatundu by D.G. Karani – Resident Magistrate)

JUDGMENT

The appellant, **PETER MUNYWA WANJIRA**, was convicted for the offence of Defilement of a girl contrary to **section 8(1)** as read with **section 8 (3) of the Sexual Offences Act, 2006.** He was then sentenced to 20 years imprisonment.

In his appeal to this court, he has raised 6 issues, which can be summarized as follows;

(1) The case was not proved beyond any reasonable doubt, as required by law;

(2) The complainant's evidence was not corroborated in any material particulars;

(3) The doctor who examined the complainant found no evidence of forceful penetration;

(4) Vital witnesses were not called by the prosecution;

(5) The appellant was framed;

(6) The defence was not given adequate consideration.

When the appeal came up for hearing, the learned state counsel, Mr. Omari conceded the appeal.

He did so because the doctor who examined the complainant had found no evidence of forced penetration. The doctor had also been unable to specify the age of the injury.

In determining this appeal, I will re-evaluate the evidence on record and draw my own conclusions therefrom. However, I will bear in mind the fact that I did not observe any of the witnesses as they testified.

The first point to be noted is that the trial from which the appeal arises was the second one, to a certain degree. I say so because four (4) prosecution witnesses had testified before the court file was destroyed, (alongside many other files and property, which were lost) in a fire that consumed the court house.

Following the destruction of the court file, the trial started afresh.

PW 1, RWW, was the complainant. Her father was deceased, whilst her mother was so sickly that the complainant was being looked after by a guardian, Rev. MG **(PW 3).**

On the material day, when **PW 1** was at school, she was sent by the Matron to take a knife to the school kitchen. When **PW 1** got there, she was defiled by the appellant, who was a cook within the said school, **[particulars withheld] Academy.**

PW 1 testified that the appellant threatened to stab her with a knife, if she screamed. But because she was in pain, **PW 1** could not help

crying.

Immediately after the appellant released her, **PW 1** reported the incident to **Mrs Kari**, who then informed **Mrs. Nguku**. However, **Mrs Nguku** said that the appellant was not capable of defiling the girl.

On the next day **Madam Catherine** sent **PW 1** to the appellant, to take a mobile phone to him. When **PW 1** got there, the appellant touched her breasts. **PW 1** resisted.

Later, **PW 1** informed **Mr. Mugo** that she wanted to go home. **Mr. Mugo** declined to give her permission.

About a week after the first incident (of defilement) **PW 1** ran away from the school, and went to the home of her guardian **(PW 3).** When **PW 3** heard from **PW 1** what had happened, he escorted her to the Assistant Chief of Kimunyu Area. He later escorted her to report the incident at the police station, after which **PW 1** was treated at the Gatundu District Hospital.

PW 2, GWW, was a member of the ACK St. John's church, Kimunyu. Although she was not related to **PW 1**, she knew her well.

On 15th June 2008, she received a call from the Director of Green View Academy, informing her that **PW 1** had left school. As **PW 2** knew that their church had taken on the responsibility over **PW 1**, she called **PW 3** and **PW 4.**

Later that evening, **PW 3** phoned **PW 2**, and informed her that **PW 1** had reached home.

PW 1 informed them that she had been defiled by a cook at [particulars withheld] Academy, named Munywa.

PW 2 did not know the said Munywa.

PW 3, REV. MG, confirmed that **PW 2** phoned him on 15th June 2008, morning, and told him that **PW 1** had left [particulars withheld] Academy without permission.

When **PW 3** talked to **PW 1**, the complainant told him that she had been raped by the school cook, Peter Munywa.

PW 3 arranged for a report to be made at the police station. He also arranged for **PW 1** to be treated at the hospital.

Prior to the incident, **PW 3** did not know the appellant.

PW 4, LWK, was also a member of the ACK Church, Kimunyu.

PW 4 learnt from DW that **PW 1** had informed her, that she, **(PW 1),** had been defiled whilst she was at school.

On the next day (16th June 2008) **PW 4** met with **PW 1**, who reiterated that she had been defiled.

PW 4 did not know the person whom **PW 1** had named as her assailant. **PW 4** only saw the appellant in court.

PW 5, DR. ROSE CHEMWEI, worked at the Gatundu District Hosptial, together with Dr. Sarah Kagia. As they had worked together for over 4 months, **PW 5** knew the handwriting and signature of Dr. Sarah Kagia.

As Dr. Kagia had left Government service by the time the appellant was on trial, **PW 5** produced the P3 form which Dr. Kagia had filled when she examined **PW 1** on 16th June 2008.

According to **PW 5**, the following were the findings of Dr. Kagia;

> ***(1) PW 1's upper and lower limbs were okay;***
>
> ***(2) Approximate age of the injuries could not be estimated;***
>
> ***(3) External genitalia was normal, but hymen was broken;***
>
> ***(4) There was no discharge, but blood was noted;***
>
> ***(5) There was evidence of penetration.***
>
> ***(6) There were no features of forceful penetration.***

Dr. Chemwei expressed the view that if there had been forceful penetration, there would have been tears and/or healing wounds or scars to her external genitalia.

During cross-examination **PW 5** said that some women broke their hymen through physical activity such as by riding a bicycle. And, as regards the blood which was seen on the complainant the doctor said that it was not clear whether or not it was menstrual blood.

PW 6, PC EUNICE LOKAPEL, was on duty at the Gatundu Police Station on 16th June 2008, when **PW 1** reported that she had been defiled by a cook at her school.

The respondent conceded the appeal because the doctor who examined the complainant said that there was no evidence of forceful penetration.

Section 8 (1) of the Sexual Offences Act stipulates as follows;

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

Clearly therefore, there is no requirement that before an accused person can be convicted for the offence of defilement, it must be proved that the victim was penetrated forcefully.

It is enough that there is proof of penetration.

I therefore find and hold that the basis upon which the appeal was conceded was not sound in law.

The offence was committed on 4th June 2008. The complainant immediately reported to Mrs Kari and Mrs Nguku. Very sadly indeed, Mrs Nguku dismissed the complainant because she believed that the appellant could not have defiled the complainant.

Thereafter, when Mr. Mugo was asked for permission, to allow **PW 1** to go home, he refused.

As a consequence of the actions of those employees of [particulars withheld] Academy, the complainant did not get an immediate opportunity to report to the police or to be examined by a medial practitioner. To my mind, the persons who were on trial are the staff of [particulars withheld] Academy. I will not condemn them yet, because I have not given them a hearing.

Notwithstanding the delay in having the complainant examined, the doctor who examined her found evidence that she had been penetrated.

Yes, her hymen may, conceivably been lost to physical activity; and it is also possible that the blood which was viewed may or may not have been from her menstrual flow; but if the evidence of her being penetrated is put within the perspective prevailing in the rest of the evidence presented to court, there can be no doubt that the complainant was indeed defiled.

The learned trial magistrate, who had the advantage to observe the complainant as she testified, found that she did not cook up the story about her defilement. The trial court also held that the complainant did not waver when she was cross-examined.

Having carefully perused the record, I find absolutely no reason to disagree with the assessment of the learned trial magistrate.

The issue of identification did not arise at all, as the offence was committed in broad daylight, by a cook who was well known to the complainant. In the event, I find that the conviction was sound. It is therefore upheld.

As regards the sentence, **Section 8(3) of the Sexual Offices Act**, prescribes life imprisonment. In the event, the sentence of 20 years imprisonment is lawful. I therefore find no reason to interfere with it.

In the result, the appeal is dismissed.

Dated, Signed and Delivered at Nairobi, this 20th day of June, 2011

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FRED A. OCHIENG

JUDGE