REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 267 OF 2005

J.N.W……..……..……..……..APPELLANT

VERSUS

REPUBLIC……...……..……..……RESPONDENT

(Appeal from the original conviction and sentence by M. R. Gitonga, Principal Magistrate, in Nyeri Chief Magistrate's Criminal Case No.3302 of 2004 delivered on 24th November 2004)

JUDGMENT

J.N.W, the appellant herein, was tried on a charge of attempted defilement of a girl contrary to *Section 145 (2)* of the Penal Code. The particulars of the offence were that on the 26th day of August 2004 in Nyeri District within Central Province, attempted to have unlawful carnal knowledge of R.W.K, a girl under the age of 16 years. The Appellant was convicted and sentenced to serve 14 years imprisonment after undergoing a full trial. The Appellant was aggrieved hence this appeal.

On appeal, the Appellant put forward the following grounds in his Petition of appeal:

1. That the trial court erred in law and fact in failing to consider that no exhibit was recovered from the complainant's reproductive organs to connect me with the offence.

2. That the trial court erred in law and fact in failing to consider the evidence of the doctor that the reproductive track was intact, no traces of mucous of the sperm was recovered.

3. That the trial court erred in law and fact in failing to find that no specimen was recovered from the complainant.

4. That the trial court erred in law and fact in failing to find that the evidence given before the court was highly contradicted in that P.W. 3 said that the actual time of the incidence was day time and she came to know about it during the night.

5. That the trial court erred in law and fact in considering the evidence of P.W. 2 who is a child and unreliable one unless corroborated by other material evidence.

6. That the trial court erred in law and fact in failing to consider the first report of this case and the evidence given by the doctor.

Before delving deeper into the merits or otherwise of the appeal, let me set out in brief the case that was before the trial Court. The prosecution's case was supported by the evidence of four witnesses. **R.W**

(P.W.2), the complainant herein, told the trial court that on 26th August 2004 at about 1.00 p.m. she went to relieve herself in a toilet inside a coffee plantation. On her way out of the toilet, P.W. 2 said the appellant who lives with P.W.2's family called her aside. The appellant is said to have taken the Complainant into the Coffee Plantation where she defiled her. P.W. 2 said she went home and at night she informed her mother, A.W.K, about the incident. **A.W.K** (P.W.3) told the trial Magistrate that the Appellant is the Complainant's cousin who stayed with them. P.W. 3 said that on 26th August 2004 at about 10.00 p.m. the Complainant urinated on the bed while she was asleep. She heard her cry and her cries prompted her to wake up. She inquired from P.W. 2 what had happened to her and that is when P.W. 2 told her that the Appellant had defiled her during the day. P.W. 3 reported the incident to the Police in the morning after which she took the child (P.W. 2) to hospital for examination and treatment. The Police swung into action and arrested the appellant. Peter Karanja (P.W. 1), the clinical officer who examined the Complainant on 27th August 2004, noted that when the Complainant (P.W. 2) was taken to him, she had changed her clothing and that she had no physical injuries even on her private parts. P.W. 1 stated that there was no discharge or traces of pus cells upon undertaking a vaginal swab. P.W. 1 concluded that there was no conclusive evidence of rape. Let me make a few comments on the evidence of P.W. 1. It is obvious from the recorded evidence (both handwritten and typed) that the witness (P.W. 1) was not cross-examined by the Appellant. It is also apparent that the said witness did not produce the medical report which was in form of the P3 form as an exhibit in evidence. **P.C. Zachary Njuguna** (P.W. 4) the arresting officer, confirmed having arrested the Appellant upon receiving a complaint from P.W.3, the Complainant's mother.

When the Appellant was placed on his defence, he chose not to testify but summoned one witness to testify in support of his case. **E.W.W** (D.W.1) told the trial Magistrate that on 26th August 2004, she left for a workshop leaving the Appellant at home. She said when she came back she was informed by the area Assistant Chief that the Appellant had defiled a child. She said the Appellant has been a disobedient and lay-about person.

Having set out in brief the case that was before the trial court, let me now examine the merits or otherwise of the Appeal. The Appellant merely stated that he was held in Police custody beyond the period fixed by the Constitution hence his trial should be declared to have been a nullity. The appellant further urged this Court to find that his conviction was based on contradictory evidence. Miss Ngalyuka, learned Senior State Counsel urged this Court to dismiss the appeal since there was sufficient evidence to sustain a conviction. Let me begin with the first issue as to whether or not the Police held the appellant beyond the period fixed by the Constitution. Miss Ngalyuka did not brief this Court on the issue but she left it to the Court to decide. I have examined the record and it is clear that the Appellant was arrested on 27th August 2004 and kept in Police custody until 8th September 2004 when he was arraigned in Court. Under *Section 72* of the old Constitution, the Police were only allowed to hold the suspect for a maximum of 24 hours before taking him to Court. In this case, the prosecution has failed to explain reasons why the suspect was kept in Police custody for 11 days before being taken to Court. It is therefore clear that the Police breached the appellant's constitutional rights. In such a case the Appellant is entitled to pursue damages as stated in the Constitution. However, the State has not found it fit to explain the reasons behind the delay. For this reason, I will declare the Appellant's trial to be null. The second ground argued is to the effect that there was no sufficient evidence to sustain a conviction. Miss Ngalyuka is of the view that there was strong evidence to sustain the conviction. On my part, I have carefully examined the evidence presented by the prosecution. The evidence of the Complainant is to the effect that the appellant defiled her in a coffee plantation. The complainant was a child aged six years. Her evidence required corroboration under *Section 124* of the Evidence Act or in the alternative the Court shall receive the evidence of such a witness (complainant) and proceed to convict, if for reasons to be recorded, that the Court is satisfied that the alleged victim is telling the truth. In this case, the trial Magistrate formed the opinion that the Complainant told the truth. The learned Principal Magistrate critically examined the evidence of the clinical officer and appreciated the fact that the same was not conclusive. I think this is where the trial Magistrate fell into error. It is obvious from that the evidence of the clinical officer (P.W. 1) that no medical report (i.e. P3) was produced. Secondly, the Appellant was not given a chance to cross-examine such a witness. The learned Principal Magistrate's holding is based on the evidence of P.W. 2 and P.W.3. The evidence of P.W.2 alleges that the Appellant inserted his penis into the Complainant's genitalia. In fact the Complainant states that the Appellant did it in and out many times. Her evidence was

discounted by that of P.W. 1. It cannot therefore be true that the Complainant had told the truth. The Complainant was emphatic that the Appellant inserted his penis into her genitalia in and out. This is a child aged six (6) years. If such a thing occurred one would expect her hymen to be broken. After a careful re-examination of the evidence, I have come to the conclusion that the Complainant (P.W. 2) did not tell the truth. The evidence as a whole indicates that the appellant's woes were compounded by his disobedient behaviour. It is as if the family had conspired to have him taken out of the home for a while. I say so because the evidence of the appellant's only witness is telling. The Appellant's was blant. She said the Appellant was disobedient and a lay-about. In the end I have come to the conclusion that the evidence tendered by the Prosecution did not prove the offence the appellant was convicted for.

The appeal is allowed. The conviction and sentence are quashed and set aside respectively. The appellant be set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 23rd day of September 2011.

J. K. SERGON
JUDGE

In open Court in the presence of Miss Maundu for the State and in the presence of the Appellant.