REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 267 OF 2007

JOHN WAMBUGU NGARE ……..…….....……..APPELLANT

VERSUS

REPUBLIC…….……..……RESPONDENT

(Appeal from the original conviction and sentence by E. J. OSORO, Senior Resident Magistrate, in Nyeri Chief Magistrate's

Criminal Case No.5129 of 2006 delivered on 11th September 2007)

JUDGMENT

John Wambugu Ngare, the appellant herein, was tried on a charge of defilement of a girl contrary to *Section 8 (1) (2)* of the Sexual Offences Act No. 3 of 2006. He also faced an alternative count of indecent act with a child contrary to *Section 11 (1)* of the Sexual Offences Act No. 3 of 2006. In the end he was convicted and sentenced to life imprisonment. Being aggrieved, the Appellant filed this Appeal.

On appeal the Appellant put forward the following grounds in his petition:

1. That the learned trial magistrate erred in both law and facts by failing to consider that the complainant told the court that she had met with the accused person but nothing that had happened.

2. That the learned trial magistrate erred in both points of law and facts in failing to consider that P.W. 4 had stated of how she was told by P.W. 1 that she was late because of another girl she was with who smelled bad because of urinating at night but she was not told about what had befallen on her.

3. That the learned trial magistrate erred in both law and facts in failing to find that P.W. 4 testified that after going into her office with the complainant she pressed her to say what had befallen on her but she (P.W.1) said she had not been done anything.

4. That the learned trial magistrate erred in law and facts in failing to consider that P.W. 2 was only passed the information about the alleged matter by P.W. 5.

5. That the trial magistrate erred in law and facts in failing to consider that there were no bloodstained clothes or underwear produced in court as n evidence.

6. That the trial magistrate erred in law and facts in failing to consider that this was a serious case which needed a thoroughly investigation of which it had none.

7. That the learned trial magistrate erred in law and facts in failing to consider that I was not examined to clear the doubt in this case.

Before considering the appeal, let me set out in brief the case that was before the trial Court. The complainant who was a child aged eight (8) years told the trial court that she was on her way to school on 15th September 2004 when she met the Appellant whom she referred to as 'guka' meaning grandfather. She said the said guka led her to a nearby thicket where he undressed her before defiling her. The appellant is said to have instructed the complainant to go to school thereafter. The complainant reported to her teacher what had happened to her. T.W. N (P.W.5), the complainant's teacher, told the trial magistrate that on 15th September 2004, she noted the Complainant was missing from class. At about 9.30 a.m. P.W. 1 is said to have arrived in P.W.5's class. P.W. 5 said she examined P.W.1's private underwear and found the same to contain a whitish discharge and that is when P.W. 1 revealed to P.W. 5 that she had been defiled by the Appellant. P.W. 5 reported the incident to Alice Wangare Mwangi (P.W. 2) the school Deputy head. At tea break P.W. 2 and P.W. 5 took P.W. 1 to the Police. The Police referred them to Nyeri Provincial General Hospital for examination and treatment. The P3 form was filled by Dr. Karanja but was produced on his behalf by Dr. Muraya Joram (P.W. 3). In the P3 form it is indicated that the Complainant's vaginal wall was torn and the hymen broken. The doctor formed the opinion that there was defilement by forceful penetration. The appellant denied committing the offence in his unsworn statement of defence. He stated the offence was committed when he was in Police cells hence it was not possible for him to commit the same. The trial magistrate considered the evidence tendered by both sides and came to the conclusion that the Complainant was a truthful witness. The trial magistrate dismissed the Appellant's defence as evasive.

Having set out in brief the case that was before the trial court, let me turn my attention to the appeal. When the appeal came up for hearing, the Appellant was permitted to rely on written submissions. Miss Ngalyuka, learned Senior State counsel conceded the appeal on one main ground that the victim testified in the absence of the Appellant hence he had no chance to cross-examine the Complainant to test the veracity of her evidence. I have carefully considered this ground of concession. The record shows that on 26th February 2007 the Complainant gave sworn testimony in the presence of the appellant. Midstream, the Court prosecutor applied to the Court to allow the witness to testify in the absence of the appellant. The learned Senior Resident Magistrate promptly granted the order even without hearing the accused (appellant) on the application. The rest of the Complainant's evidence was therefore taken in the absence of the accused. The trial magistrate purported to recall the Appellant back to court to cross-examine P.W. 1. There is no proceedings to show he even had a chance to cross-examine. Even if he had a chance, how was the Appellant to cross-examine a witness on evidence given in his absence. With respect, I think the appellant was seriously prejudiced. He did not undergo a fair and transparent trial. A miscarriage of justice occurred which must be corrected on appeal. I have carefully looked at the judgment of the learned trial Senior Resident Magistrate and it is apparent that the learned magistrate stated that the Complainant's evidence was truthful and credible. That piece of evidence was never tested by cross-examination so that one can claim that the same was credible. The Complainant's evidence was never challenged hence it is her word against that of the accused who was not given a chance to cross-examine her. I must commend Miss Ngalyuka for conceding the appeal. I was tempted to order for a retrial but after considering the circumstances of this case, I do not think it will be fair to the

Appellant. The offence allegedly took place on 15th September 2004 about seven years ago. The witnesses may not even recollect the evidence.

I allow the appeal by quashing the conviction and by setting aside the sentence. The Appellant should 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 the Appellant in person.