



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 68 OF 2010

(From original conviction and sentence in Criminal Case No. 429 of 2010 of the Senior Principal Magistrate's court at Naivasha – T.W.C. WAMAE (MRS, SPM))

JOHN NGANGA NGENDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

John Nganga Ngendo, the appellant herein, was charged before the Senior Principal Magistrate Naivasha, T.W.C. Wamae on 12/2/2011 for the offence of defilement contrary to **Section 8(3)** of the **Sexual Offences Act (SOA No.2 of 2006)**. The particulars of the charge were that on diverse dates between 10/8/2008 and 22/8/08 in Nyandarua District, the appellant caused his penis to penetrate the vagina of C.W.C. a child aged 12 years. In the alternative, he was charged with the offence of indecent assault of a girl contrary to **Section 11(1)** of the **Sexual Offences Act of 2006**. It was alleged that on diverse dates between 10th August 2008 and 22nd day of August 2008 in Nyandarua District, within the Central Province, indecently assaulted C.W.C., a girl aged 12 years by touching her private parts, namely, buttocks and vagina. After a full hearing, he was convicted on the main charge and sentenced to 20 years imprisonment. He was aggrieved by both conviction and sentence against which he filed this appeal.

The grounds of appeal are contained in the petition of appeal and the written submissions which the appellant handed to the court. The grounds can be summarized as follows:-

- 1. That his Constitutional rights were violated when he was detained in police cells for 3 days.**
- 2. That the conviction is founded on contradictory evidence.**
- 3. That the medical report is of no evidential value.**
- 4. That there was no proof of the complainant's age.**
- 5. That his defence was not considered.**

As the first appellate court, I have a duty to evaluate the evidence afresh and make my own findings and conclusions and do hereby start by reviewing the evidence on record. The brief facts of this case are that on 22/8/08, PW1, C. W., a girl aged 12 years, was left at home with her brother, A. W. aged 10 years while her mother went on duty. The appellant was employed to milk PW's parent's cows. When C. was in the kitchen, the appellant went there, told A. to go out, closed the door, forced C.'s under pant and biker

out, unzipped his trousers, removed his penis and put it in her vagina and urinated on her. He wore his clothes and told her to go out, but he got hold of her again took her where fodder for cows is kept, laid her on her back and defiled her again.

A. recalled that it was on 22/8/08 at 9.00 a.m., he was in the kitchen with C. when the appellant ordered him out. When A. refused to leave, the appellant beat him up. Later, the appellant pulled C. out; forced her to lie down, put her on fodder, pulled down his pants and defiled her. According to A, the appellant was armed with a panga and stick. C. did not report the incident to his mother because the appellant threatened to kill her. He also threatened to kill A. but on 24/8/08, A. informed the mother, PW4, C. K. about what he had seen the appellant do to his sister (PW1). C reported to N[...] Police Station and C. was taken to N[...] Health Centre, and then to Nairobi Women's hospital for examination. A P3 form was issued. PW3, Dr. Jackline Gichana who worked at Naivasha District Hospital produced the P3 form on behalf of her colleague, Dr. Kanyeki, who had examined C. on 4/9/2009. The same doctor also examined the appellant and produced the P3 form in respect of both C. and the appellant. There was no evidence of penetration or injuries to C.'s private parts save that her hymen had long been broken.

In his unsworn defence, the appellant said that on 18/5/2008, his employer, C. M. promised to pay his arrears. That C.W. (PW4) was one of C.M.s' tenants and that the appellant lent her Kshs.4,000/- on 19/5/08 and they entered into an agreement in the presence of the employer, wherein she promised to pay in August 2008. The appellant asked for his money on 18/8/08. She promised to pay on 19/8/08, he went to her house but she did not pay him. He threatened to report to police within 3 days. He went away on 20/8/08 and when he returned on 2/9/08, he was arrested before he could make his report. He denied having committed the offence.

Mr. Nyakundi, learned Counsel for the State opposed the appeal for reasons that the appellant was known to the complainant, the offence was committed during the day time; that though the complainant was reluctant to report the incident, A. did. Counsel submitted that the court believed the two witnesses to be truthful and that as regards the age of the complainant, the mother testified that she was 12 years and so did the doctor who examined her.

On the claim that the appellant's right to be produced in court within 24 hours, I find that this is not the correct forum for the appellant to raise that issue. He should have raised it once he appeared before the court for plea so that the police would have been called upon to respond. At this stage, the police cannot reply to that allegation and it would be unfair if the court were to consider that defence. The appellant was arrested during theof the old constitution. In essence he is alleging that **Section 72 3(3)** was violated. That Section requires that a person arrested on reasonable suspicion of having committed an offence or about to commit an offence and who is not brought before a court as soon as is reasonably practicable and if not brought to court within 24 hours of his arrest, from the commencement of his detention, then the burden of proving that the person arrested has been brought before the court within a reasonable time shall rest on the person alleging that the provisions relating to the above subsection were complied with. The above allegations should have been raised at the earliest opportunity possible, when the appellant was arraigned before the court so that the police could have had an opportunity to respond. I find the said ground to be baseless and to have been raised too late in the day. Besides even if it was found that the appellant's rights were violated, he would have recourse to a civil claim for damages under **Section 72(6)** of the **Constitution**.

Under **Section 11** of the **Sexual Offences Act**, the age of the complainant must be disclosed. In this case, the C. claimed to be 12 years old and was in Class 6. Her mother, C.K also testified that C. is 12 years. The report from Nairobi Women's Hospital (PEX3) also shows that the complainant was 12 years old. Even though there was no certificate to confirm the date of birth, I am satisfied that C., the mother to the complainant is the best person to confirm the complainant's age. I have no reason to doubt her evidence.

As to the allegation that the evidence of C. and A. was contradictory, both of them said that they were in the kitchen when the appellant went there and chased PW2; that he later pulled the complainant outside the house to the place where fodder is kept and further defiled her there. The only difference in their

evidence is Amos' allegation that the appellant had a panga and stick at the time. I find that it is not expected that all evidence will be similar in all minor details. Each witness gives an account of what he or she saw and there is no guarantee that they see every minor detail of the scene of incident. Besides the panga and stick were not used in this case. In this respect I find no contradiction in the prosecution evidence.

There is no doubt that the appellant was known to the witnesses. The appellant admits to have known C.K., C. and A. both identified him as the person who used to milk their cows. C.K. did confirm that the appellant was employed in the same plot where she lived but he used to milk her cows. I am satisfied that there is no contradiction as regards the identity of the appellant.

The complainant was examined by the doctor several days after the alleged incident. It would therefore not be easy to find any evidence of recent sexual activity. PW1 however, told the court that this was not the first time that the appellant defiled her. That was corroborated by the doctor's finding C's hymen had long been broken. The trial court did believe the evidence of C. and A. It is that court that assessed the witnesses' demeanor and this court has no reason to doubt or interfere with that the lower court's findings.

In his defence the appellant claims to have lent Kshs.4,000/- to C.K. and that is why she framed him when she failed to pay back. The appellant made the allegation when he cross examined C. but she denied that allegation. In his defence, the appellant claimed that an agreement was written in the presence of his employer, but he had not mentioned the employer earlier during the prosecution case so that the prosecution could have called the said employer as a witness. The mention of his employer in his defence is an afterthought and this court will reject it.

For the foregoing reasons, I do find that the conviction on the main charge is safe and is hereby confirmed. The appellant was given the minimum sentence i.e. 20 years for the charge he faces and this court will not therefore interfere with the sentence. The appeal is hereby dismissed.

DATED and DELIVERED this 14th day of October, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Appellant – in person.

Mr. Nyakundi for the State.

Kennedy - Court Clerk.