



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 86 of 2008**

**BENARD GATU MUCHIRI .....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Benard Gatu Muchiri, the appellant herein was tried on a charge of defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that on the 2<sup>nd</sup> day of October 2007 in Nyeri District within Central Province unlawfully committed an act which causes penetration with a child aged 4 years namely E.W.N. The appellant also faced an alternative charge of indecent assault of a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. After undergoing a full trial, the appellant was convicted on the main count and sentenced to life imprisonment. Being dissatisfied, he preferred this appeal. He put forward then following grounds on appeal:

1. *The learned trial magistrate failed to consider that I was detained in police cells from 6 a.m. up to the next day 9 a.m. when I was taken to court without any reason. The prosecutor didn't explain whereabouts for all those hours.*
2. *The learned trial magistrate undermined the fact that P.W.1 had o walking difficult revealed on pg 3 line 21 and 22 it is logical that if the child i.e. P.W.1 was defiled she would have had difficult in walking.*
3. *The learned trial magistrate did not consider the false evidence that was given by P.W.5 coprol Limo Andukomo from Mathuthuini chief camp. He stated that he searched me for 5 days and we find this in page 6 line 5, the report was on 2/10/07 and I was arrested on 4/10/07. My Lordship if he searched me for 5 days he would have arrested me on 7<sup>th</sup>.10.07 therefore I find that his statement did not hold any water.*
4. *The learned trial magistrate failed to consider my age. I am over 70 years and even my part up to that and before it was not working. Also at my age I cannot recognize all peoples in my village.*

The appeal was vehemently opposed by Miss Ngalyuka, learned State counsel. She was of the view that the appellant was placed at the scene of crime and that the incident took place during broad daylight. Miss Ngalyuka further pointed out that the appellant was somebody well known to the complainant.

Let me set out in brief the case that was before the trial court. The prosecution's case was buttressed by the evidence of seven witnesses. W.N (P.W.1), the complainant told the trial court that the appellant, their neighbour took her to a nearby footpath where he removed her pants before defiling her. P.W.1 said P M(P.W.2) came and ordered her to dress up. P.W.2 had been sent by her mother to the Posho mill. On the way she said, she saw the appellant, a fellow villager lying on top of P.W.1 besides the foot path next

to a maize plantation. When the appellant saw her, he rose, pulled up his trouser and went to herd his goats. P.W.2 said she saw P.W.1's pants at the knee level. P.W.2 informed TW (P.W.4) what she had seen before proceeding to the Posho mill. P.W.4 said she went to tell M W (P.W.3) what she had been told by P.W.2. The duo i.e. P.W.3 and P.W.4 took P.W.1 to hospital. The matter was reported to the police. CPL. Limo Andukumo (P.W.5) said he received a report from P.W.1, P.W.2 and P.W.3 on 2/10/2007. P.W.5 said the two named the appellant as the assailant. He said the appellant was a person known to him as he lives next to Muthuthiini chief's camp. It took P.W.5 five days to arrest the appellant. The P3 form filled by Dr. Macharia was produced by Dr. Murage Mbugua (P.W.6) under S. 77(1) of the Evidence Act. According to the P3 form, the complainant suffered an enlarged vulva opening and inflamed vaginal walls. It is said that there was no tears nor bruises.

The appellant gave an unsworn statement in which he denied committing the offence. He said on the material day he was herding his goats and nothing sinister took place.

On appeal the appellant raised the grounds earlier reproduced. In short the appellant is of the view that the prosecution did not prove its case beyond reasonable doubt. It is also argued that the sentence meted out is harsh and excessive.

This being the first appellate court the appellant is entitled to a re-evaluation of the case that was before the trial court. It has been stated that the evidence did not establish the case against the appellant beyond reasonable doubt. I have reconsidered the evidence tendered. It is plain from the record that the evidence of the complainant (P.W.1) was improperly received. The learned Senior Resident Magistrate did not indicate in the proceedings that P.W.1 being a child of tender age was possessed of sufficient intelligence to testify. Even if her evidence was properly received there was need for corroboration of the evidence of P.W.1. In that regard the medical evidence contained in the P3 form was critical. I have carefully perused the P3 form and I am of the view that the same was inconclusive. There was nothing to show that P.W.1 was defiled. Even if the P3 Form had shown evidence of defilement, still it will be difficult for it to be accepted because the same was not produced by the maker. The trial court allowed P.W.6 to produce the P3 form on behalf of Dr. Macharia without laying the basis under S. 77(1) of the evidence Act. There was no evidence to show that it was extremely difficult to secure the attendance of Dr. Macharia. In that event, the defence was denied the chance to cross-examine Dr. Macharia. On this score, the P3 form was of no evidential value.

In the end I am convinced that the appeal must be allowed. Consequently the appeal is allowed. The conviction and the sentences are quashed and set aside respectively. The appellant is set free forthwith unless lawfully held.

Dated and delivered this 13<sup>th</sup> day of January 2010.

**J.K. SERGON**  
**JUDGE**

In open court in the presence of Mr. Makura for the state and the appellant in person.

**J.K. SERGON**  
**JUDGE**