REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 38 of 2009

BENARD KAMURWA GICHOHI ……….......APPELLANT

Versus

REPUBLIC…………………………..…….RESPONDENT

JUDGMENT

The appellant herein, Benard Kamurwa Gichohi, was convicted for the office of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. He was then sentenced to serve twenty five years imprisonment. Being dissatisfied, the appellant preferred this appeal. On appeal, the appellant put forward the following five grounds in his petition:

i that the trial magistrate erred in law and in facts in failing to find that there was no first report

ii given out by the complainant family to the neighbors.

iii That the trial magistrate erred in how the facts by doctors evidence which was not proved beyond any reasonable doubts that I had committed the offence not that I was examined to show that I was responsible for this said offence.

iv That the trial magistrate erred in law and facts in failing to consider that this was not an eye witness during the said offence.

v That the trial magistrate erred on law/facts in failing to put in consideration that this was not sufficient evidence adduced to connect me with this offence and that the evidence induced was from one family only.

vi That the trial magistrate erred in law and facts

vii in failing to consider that it was not understood onwhich evidence complainant relied on because the complainant sometimes denied having been done the said act, and sometimes committed being done the same after being forced by the prosecutor.

viii That I wish to be available at the hearing of this appeal.

When the appeal came up for hearing, the appellant, with leave of this court, relied on written submissions. Mr. Orinda, learned Principal State Counsel conceded the appeal on two main grounds namely: First, that the trial magistrate did not give the appellant a chance to cross-examine P.W.1. Secondly, that the medical evidence was not tendered by the doctor who examined the complainant. The learned Senior Principal State Counsel urged this court to allow the appeal and make an

order for the case to be heard afresh.

This being the first appellate court, the appellant is entitled to a re-evaluation of the case that was before the trial court. I wish to re-evaluate the evidence presented before the trial court before considering the merits or otherwise of the appeal. The prosecution's case is buttressed by the evidence of five witnesses. The complainant, B.T.W (P.W.1), a child aged 4½ years told the trial magistrate that on 20th April 2008, the appellant inserted his penis into his anus. He said he felt pain and cried. This happened outside the home of P.W.1. while P.W.1's mother was inside the house. S.W.W (P.W.2) said she rushed out of the house when she heard screams. She found the complainant (P.W.1) crying. His trouser was loose with the front part facing the opposite direction. P.W.2 found the appellant seated on his bed while the complainant stood next to the bed. P.W.2 took her son, complainant to the main house where she examined him. She said the complainant was bleeding. James Njenga Wang'ang'a (P.W.3) said he was called by P.W.1's father, A.W. P.W.3 said he informed CPL. Michael Kuria (P.W.5) a police officer stationed at Gakindu police post. P.W.5 visited the complaint's home where he interrogated P.W.1 and the appellant after which P.W.5 arrested the appellant. P.W.1 was issued with a P.3 form which he took to M sub-district Hospital and later to Nyeri Provincial General Hospital. The P.3 was filled by Dr. Murage but was produced in court by Dr. Paul Kimathi (P.W.4) under S. 77 of the Evidence Act. According to the P3 form, there was lacerations on the complainant's anal orifice and blood discharge.

In his unsworn statement the appellant said that he had gone to sleep while P.W.2 was cooking in the kitchen. He alleged that within 20 minutes P.W.2 came and alleged that he had sodomised her son (P.W.1). The appellant said that by then the child was standing next to the store where he used to sleep.

Having set out in brief the case that was before the trial court, let me now consider the grounds put forward on appeal. It is the submission of the appellant that the medical evidence were inconclusive in that the same did not connect him with the offence. Mr. Orinda, learned Principal State Counsel, was of the view that the medical evidence were not properly produced. According to Mr. Orinda it was necessary for the basis to be laid before the evidence can be produced by any witness other than the maker. It is his submission that this defect rendered the trial a mistrial. The learned Senior Principal State Counsel further urged this court to find that the trial magistrate erred when he denied the appellant a chance to cross-examine the complainant (P.W.1). There is no dispute that the complainant (P.W.1) was examined by Dr. Murage who filled and signed the P3 form. The P.3 form was produced by Dr. Paul Kimathi (P.W.4) under S. 77 of the Evidence Act. P.W.4 said that Dr. Murage had resigned from Government Service and his whereabouts was unknown to him at the time. I have carefully perused the recorded proceedings. It is merely alleged that Dr. Murage had left Government Service and his whereabouts unknown. There is no evidence that Dr. Paul Kimathi (P.W.4) ever worked with Dr. Murage. P.W.4 did not state that he was familiar with the handwriting and signature of Dr. Murage. I agree with the submissions of Mr. Orinda that the basis for the production of the medical evidence under S. 77(1) of the Evidence Act was not laid before allowing P.W.4 to produce the P3 form. In any case there was no evidence that the prosecution undertook due diligence to secure the attendance of Dr. Murage. The appellant was entitled to cross-examine the maker of the P3 form. For this reason I formed the view that the appellant had no fair trial. The Court of Appeal dealt with a near similar case in the case of Hillary Bwire Wafula = vs= R. Cr. Appeal No. 8 of 1996 (unreported) in which the Court of Appeal expressed itself in part as follows:

> *"The contention was that the doctor was neither called to testify nor made available for the defence to cross-examine him if they so wished. In a criminal case as a rule the prosecution must take all reasonable steps to secure the attendance of any of their witnesses whom the defence might reasonably expect to be present. In a murder trial the defence expects the doctor who performed the autopsy on the body of the deceased to be present. The prosecution might not have intended to call the doctor. However, where the prosecution does not intend to call a witness whose evidence is material at a trial they (prosecution) nonetheless have a duty to ensure that the witness is present in court during the trial so that should the defence wish, they may call the witness. the only exception is that to this rule as to attendance of witnesses is if the witness is absent for reasons beyond the prosecution's control. Having said what we have said above and counsel for the state having admitted that the failure to call the doctor left the cause of death unclear, it could not be said that there was no reasonable doubt as to whether it was the appellant's assault on the deceased that caused her death. The benefit of that doubt should go to the appellant."*

It is conceded by Mr. Orinda, and rightly so that the prosecution did not lay the basis before producing the P3 form under S. 77(1) of the Evidence Act. That rendered the evidence of the P3 form useless hence of

no evidential value. The record shows that the appellant was not given a chance to cross-examine the complainant (P.W.1). It is therefore correct to hold that the appellant did not undergo a fair trial. In his defence the appellant stated that the complainant was standing outside next to the store. Such an issue could have come out clearly if the appellant had been given a chance to cross-examine P.W.1. I am satisfied that the appeal should be allowed. The remaining issue is whether I should order for a retrial. Mr. Orinda, has urged this court to order for a fresh trial. The principles to be considered before making an order for re-trial were restated by the Court of Appeal in the case of Mwangi = vs= R [1983] K.L.R. 522 as follows:

> *"A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result."*

In this appeal, it is quite obvious that if a retrial is ordered, the prosecution are likely to correct the mistakes it made before the trial court. The benefit of doubt had already accrued to the appellant. The prosecution did not apply due diligence to secure the attendance of the doctor who examined the complainant before filling the P3 form. It will be unjust to the appellant to be subjected to a fresh trial. The trial is likely to take a long period in view of the fact that the prosecution may take long to trace Dr. Murage. The prosecution miserably failed to comply with the provisions of section 77(1) of the Evidence Act. The prosecution if given a chance by a fresh trial will obviously correct the error.

In the end the appeal is allowed. The conviction is quashed and the sentence is set aside. The appellant is hereby set free forthwith unless lawfully held.

Dated and delivered this 13th day of January 2010.

J.K. SERGON
JUDGE

In open court in the presence of Mr. Makura learned State Counsel.

J.K. SERGON
JUDGE