



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 111 of 2008**

**M W M**.....**APPELLANT**

**VERSUS**

**REPUBLIC**.....**RESPONDENT**

*(Appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Nanyuki in Criminal Case No.493 of 2007 dated 8<sup>th</sup> May 2008 by H. N. Ndungu (Miss), Ag. Senior Principal Magistrate)*

**JUDGMENT**

**M W M**, the appellant herein was tried on a charge of incest by male contrary to *Section 20 (1)* of the Sexual Offences Act No. 3 of 2006. In the end he was convicted and sentenced to ten (10) years imprisonment. He is now before this Court seeking to challenge both the conviction and the sentence.

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

1. *That the trial magistrate erred in both points of law and fact in finding credibility upon the prosecution case as sufficiently established whilst the basic ingredients were hardly established.*
2. *That the learned trial magistrate failed in both points of law and fact in finding credibility upon the prosecution case whereas upon the medical evidence adduced I was not examined to clear out the prevailing doubts.*
3. *That the learned trial magistrate erred in both points of law and fact in accepting the entire evidence adduced upon the prosecution case whilst it lacked corroboration in totality.*
4. *That the learned trial magistrate erred in law and fact in finding the 10 years imprisonment as satisfactorily whilst the case flowed with doubts contradictions and discrepancies.*

5. *That the learned trial magistrate failed in both points of law and fact in finding the prosecution case as well established whilst there were no adequate facts adduced or existed to incriminate me with this alleged offence since I had already served a one year sentence of assault from the same complainant.*
6. *That the learned trial magistrate erred in both points of law and fact in upholding the evidence adduced by PW3 whereas we had grudge with her that made her to implicate me with this alleged offence.*
7. *That the learned trial magistrate erred in both points of law and fact in rejecting my defence without proper determination and reasons thereof in respect to section 169 (1) cpc.*

In his amended supplementary grounds of appeal, the Appellant also put forward the following grounds:

1. *That the learned trial magistrate erred in analyzing the difficult story given by the complainant on who had defiled her, but could have observed that the charge of defilement of the two boys was initiary freely investigated and the two arranged in court of law the subsequent change of mind incriminating the fact remain an after thought and the benefit of doubt could have been resolved to the appellant.*
2. *That the learned trial magistrate erred in both point of law and fact in accepting to commence with the Police charge where I was incarcerated within a prolegal space violating section 72 and B and 77 of the Constitution thus are detained for space of more than two months in Police cell for no justified reasons.*
3. *That the learned magistrate erred in both points of law and fact in finding a conviction upon the charge but forced to observe that the charge that course by apprehension was of assault which had also attracted the school teacher and not defilement which I was the complainant against the two boys.*
4. *That the learned magistrate erred in both point of law and fact in ignoring the fact that failies of the clinical officer to disclose the sexual transmitted disease and the drugs offered expressly implied the appellant was free from qualy.*

A careful consideration of the above stated grounds will reveal that the Appellant is basically relying on two main grounds:

- (i) *That his constitutional rights under Section 72 (3) (b) of the Constitution were breached.*
- (ii) *That there was no credible evidence to sustain a conviction.*

I will start by dealing with both the aforesaid grounds together with the re-evaluation of the evidence. The prosecution's case before the trial court was supported by six witnesses. The particulars of the charge are that on **diverse dates between October 2006 and 5<sup>th</sup> January 2007 at [particulars withheld] village in Nyeri District within Central Province being a male person intentionally and unlawfully committed an act which caused penetration, with a genital organ to M M W a female person who to his knowledge is his daughter. M M (P. W. 1), told the trial court that in the month of October 2006, the Appellant defiled her.** She said by then, her mother had separated with her father (Appellant) leaving her to stay with the Appellant. She said the Appellant defiled her many times thereafter on his bed during the night. P. W. 1 said she reported the incident to the teacher **G W M (P. W. 2).** P.W.1's teacher at **[particulars withheld] Primary School** told the trial

court that on 9<sup>th</sup> January 2007 she found the complainant (P. W. 1) surrounded by many children on her way to school. Upon making inquiries she (P. W. 2) discovered that P. W. 1 was feeling unwell. She took P. W. 1 to her school staff room where she informed the head teacher of P. W. 1's predicament. P. W. 1 was taken to Nanyuki District hospital for examination and treatment P. W. 2 in company with another female teacher. Upon examination, P. W. 2 said, the doctors informed her that P. W. 1 had been defiled. The matter was reported to the children's officer. A N (P. W. 3), P. W.1 's mother, told the trial court that she had left the matrimonial home for her parents leaving behind P. W. 1 and other children under the care of the Appellant. P. W. 3 said she learnt from her brother on 11<sup>th</sup> January 2007 that the Appellant had been arrested as a suspect for defiling P. W. 1. she said she reported the complaint to the children's officer Pius Mbithi Mbeke (P. W. 4) who confirmed having received a report of defilement on 10<sup>th</sup> January 2007. P. W. 4 said P. W. 1 told him that her father (Appellant) had defiled her. Charles Kurgat (P. W. 5) produced the medical report which had been filled by Dr. Kayawa, now deceased, on behalf of the aforesaid doctor. The P3 form indicates that the complainant (P. W. 1) had contracted a sexually transmitted disease and that there was evidence that P.W. 1 had been defiled. The investigating officer in this matter, P. C. Ruth Hinga (P. W. 6), told the trial court that she arrested the Appellant on 10<sup>th</sup> January 2007 when he was brought to the Police Station in company of P. W. 1 and a teacher. She said the child (P. W. 1) was too nervous to talk hence she released her back and requested her grandmother to visit the Police Station the next day. It is the evidence of P. W. 6 that when P. W. 1 came to record her statement on 11<sup>th</sup> January 2007 she alleged that she had been beaten by her father (Appellant) and that she had been defiled by two other men. Consequently, P. W. 6 charged the Appellant for assault which charge the Appellant promptly pleaded guilty. He was then sentenced to serve ten (10) months in prison. P. W. 6 said she arrested two other men whom P. W. 1 had alleged to have defiled her. It is said that P. W. 1 changed her story and this time round accused the father (Appellant) of having defiled her. P. W. 6 said she consequently set free the two young men and then charged the Appellant with the offence he was convicted for. P. W. 6 told the trial court that the child (P. W. 1) had told her that she had been prompted by her aunt to frame up the two men.

When placed on his defence, the Appellant denied having committed the offence. He claimed that he had been framed up by his estranged wife (P. W. 3). He said P.W. 3 wants him jailed to settle a score due to their domestic dispute.

Having re-evaluated the evidence, let me now turn to the two main grounds I had earlier identified. It is argued that the Appellant's constitutional rights were breached. The Appellant has alleged that he was held in Police custody for more than two (2) months before being taken to court. The learned Provincial State Counsel filed the replying affidavit of Cpl Ruth Hinga (P. W. 6) to explain the delay. It is claimed that the Appellant was serving a sentence meted out in Nanyuki S.R.M. Cr. No. 117 of 2007 hence the Police did not breach the Appellant's constitutional rights. I am convinced the State has explained the cause of the delay. It is not denied by the Appellant that he was serving a sentence of ten (10) months pronounced in Nanyuki S.R.M. Cr. Case No. 117 of 2007 at the time of his arrest. Consequently I see no merit on this ground.

The second issue raised is that there was no credible evidence which could sustain a conviction. I have carefully re-evaluated the evidence. In this regard the evidence of P. W. 6 and those of the Appellant are very crucial. It is said that P. W. 1 had initially told P. W. 6 that she had been told by her aunt to implicate two young boys as the persons who defiled her. Those boys were subsequently arrested and charged for defilement. The complaint was later terminated under *Section 87 (a)* of the Criminal Procedure Code. I have formed the opinion that P. W. 1 is a witness of doubtful integrity hence her evidence cannot be relied on to sustain a conviction. According to the evidence of P. W. 6 she was influenced by her aunt to implicate two boys with the offence of defilement. It is possible that she was also influenced by her mother (P. W. 3) to implicate her father (Appellant). This implication is strengthened by the undisputed fact that the Appellant and P. W. 3 are involved in a domestic dispute which made P. W. 3 desert her matrimonial home for her parents. Had the learned acting Principal

Magistrate analysed the evidence of P. W. 6 and the defence put forward by the appellant she would not have convicted the Appellant.

In the final analysis I am convinced the appeal must succeed. It is allowed. The conviction and sentence are quashed and set aside respectively. The Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 12<sup>th</sup> day of February 2010.

**J. K. SERGON**

**JUDGE**

In open court in the presence of the Appellant and Mr. Orinda for the State.