REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 285 of 2008
(From original conviction and sentence and Criminal Case No.2100 of 2007 of Principal Magistrate' Court at Nyahururu – T. MATHEKA, AG.PM)

JOHN NDUNGU WAITHA……..…APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

The Appellant, JOHN NDUNGU WAITHA, was charged with rape contrary to Section 3(1) (a) of the Sexual Offences Act 2006. he was charged that on the 10th day of July, 2007 at around 1.00 pm in Laikipia West District within Rift Valley Province, he intentionally and unlawfully had carnal knowledge of M.N knowing her to be a person with mental disabilities. He pleaded not guilty but after trial before the Principal Magistrate at Nyahururu, he was convicted and sentenced to 20 years imprisonment. This appeal is against that conviction and sentence.

On account of her mental retardation, the complainant did not testify. Her plight was, however, ably put forward to court by PW1 and PW2 who caught the Appellant red handed on the act of raping the complainant. PW1, a

neighbour of the complainant's grandmother and who knew the complainant since birth, testified that on 10th July, 2007, he heard the complainant making noise. On going into her grandmother's compound to find out what was disturbing her, he saw the Appellant pulling her into her grand mother's house. He went to the house and found the door bolted from inside. Before he could decide on what to do, he saw PW2 who was passing by with his cattle and beckoned him. Together they forced the door open and found the Appellant half naked on the complainant. He tried to plead with them to settle the matter but they refused. Soon thereafter a crowd gathered and appellant was arrested and later handed over to police.

In his written submissions, the Appellant raised three grounds of appeal that his constitutional rights were violated, that the learned trial magistrate erred in basing his conviction on contradicted and inconclusive evidence and that the trial court ignore his defence. He submitted as he was arrested on 10th July 2007 but was not taken to court until 20th July 2007 that violated his constitutional

rights under Section 72(3) of the Constitution and thus rendered his trial null and void.

The Appellant submitted that the evidence against him should have been dismissed as it was riddled with contradictions. Enumerating the contradictions he said whereas PW1 said he was his neighbour, he subsequently turned round and said he only know him by appearance and whereas the trial court found that the complainant could not speak, PW4 claimed she told him she had been defiled. Because he was not himself examined, he said the medical evidence was inconclusive and the doctor's

opinion was slanted as it was based only the examination of the complainant. Quoting from the case of Mwaula Muthoka Vs Republic, [1980] KLR 127 that "The explanation of the defendant need only be reasonable and possibly true", he saw his defence as reasonable and faulted the trial magistrate for rejecting it.

Opposing the appeal, Mr. Gumo for the state submitted that the Appellant committed the offence in broad day light and was caught red handed by PW1 and PW2 who know him well. He urged me to dismiss the appeal.

I have considered these rival submissions and carefully read the lower court record.

In Dominic Mutie Mwalimu Vs Republic, Criminal Appeal No. 217 (CA Nairobi), the Court of Appeal held that breach of Section 72(3) of the Constitution has to be raised at the earliest opportunity for the prosecution to respond. I agree with the learned state counsel that it was too late in the day to raise the complaint at the appeal stage. At any rate my view has always been that in criminal cases, the complainants' rights are also violated. In a case like this one where a mentally retarded girl has been sexually molested, justice demands that whoever has molested her should be punished if only to serve as a deterrence to other similar offences. If in the course of prosecuting the offender the police detain a suspect longer than required, the suspect can always seek a remedy against the state. It is in my view a travesty of justice to dismiss the case against him just because there has been delay in bringing him to court. Consequently I dismiss this ground of appeal.

On examining her, Dr Peter Wanderi, PW 5, found a foul smelling discharge from in the complainant's vagina and that the complainant had been defiled. The next question is who did that? Neither PW1 nor PW2 had any reason to tramp up the charge against the Appellant. There was no evidence that either of them or any of their relatives wanted to kill the Appellant as he claimed.Even if that were the case I cannot see how they would have used the mentally retarded complainant to tramp up a charge against him. I agree with the learned trial magistrate that the Appellant's defence was hollow and the learned trial magistrate was entitled to reject it.

Having, as I am duty bound to do (Okeno Vs Republic [1972] EA 32 and Mwangi Vs Republic [2000] 2 KLR 28), exhaustively re-evaluated the evidence on record, I am satisfied that the Appellant was convicted on the eye witness evidence of PW1 and PW2. Consequently I dismiss his appeal against conviction.

The act of defiling a mentally retarded girl is something that any right thinking member of society should highly deprecate. The Appellant deserved the sentence imposed on him. I therefore dismiss the appeal against sentence also.

In the upshot I dismiss this appeal in its entirety.

DATED and delivered this 3rd day of February, 2010.

D.K. MARAGA

JUDGE.