REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 286 of 2008

(From original conviction and sentence in Criminal Case No. 2435 of 2009 of the Principal Magistrate's court at Nyahururu – T. MATHEKA, AG. PM)

JOHN WANDETO THIGA……....APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

JUDGMENT

The Appellant, **JOHN WANDETO THIGA**, was charged with defilement of a girl contrary to **Section 8(3)** of the **Sexual Offences Act**. He was charged that on the 28th July 2007, in Laikipia West District within Rift Valley Province, he had carnal knowledge of S.W.K, a girl aged 13 years old. He denied the charge but after trial before the Principal Magistrate at Nyahururu, he was convicted and sentenced to 20 years imprisonment. This appeal is against both that conviction and sentence.

In the five grounds of appeal, the Appellant's counsel have raised three main complaints that the learned trial magistrate erred in allowing the Appellant's trial when his constitutional rights to a fair trial had blatantly been violated; that the trial court erred in ignoring the defence case and basing the Appellant's conviction on scanty and inconsistent evidence and that the trial court failed to analyse the evidence on record as required by law.

Expounding on these grounds of appeal, Mr. Kahiga for the Appellant submitted that the Appellant was detained for more than 24 hours before he was taken to court thus violating his rights to a fair trial under **Section 72** of the **Constitution**. He said the trial court erred in proceeding with the trial in the face of that violation.

Arguing the other grounds of appeal together, he submitted that it was impossible for the Appellant to

have defiled the complainant as she claimed with his clothes on and while he was standing and she was lying down. In his view the absence of hymen is no proof of defilement as there is no evidence of penetration. Even if I overrule him on that he said there is no nexus of the absence of hymen with the Appellant. The Appellant having not been examined, he contended that the complainant could have been

defiled by someone else. He dismissed the medical evidence as, according to him, the complainant was examined on 7th August 2007, that is after 10 days and the doctor, PW5, did not produce any treatment cards to support the findings he noted on the P3 form. He faulted the trial court for failure to find that the defence evidence of a grudge between the Appellant and the complainant's family stood uncontroverted.

On his part Mr. Gumo for the state dismissed the constitutional issue as having been raised too late in the day. On the conviction he submitted that the trial court's failure to analyse the evidence as to whether the Appellant had removed his clothes before defiling the complainant was not fatal. He said with the medical evidence that the complainant's hymen had been broken, penetration was obvious.

I have considered these rival submissions. 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 the criminal cases we should be mindful of the fact that the complainants' rights are also violated. In a case like this one where a young girl has been traumatized, justice demands that whoever has molested her should be appropriately 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 traversity 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 the merits of the appeal itself, as this is a first appeal, I have, as I am obliged to (**Okeno Vs Republic [1972] EA 32** and **Mwangi Vs Republic [2000] 2 KLR 28),** exhaustively re-evaluated the evidence on record to find out if this Appellant's conviction is proper. Mr. Kahiga's contention that complainant's evidence should not be relied upon because there was no eye witness has no legal basis. **Section 124** of the **Evidence Act** makes it clear that in sexual offences, the evidence of a child victim, if believed, does not require corroboration.

In this case, I agree with the trial court that the complainant vividly stated what happened to her. She narrated how the Appellant held her, removed her pants and, to use her own words, "did bad things to

her." It is not true, as Mr. Kahiga argued that she claimed the Appellant defiled her while he was standing with his clothes on. What should be inferred from her statement that he did not remove his clothes is that he did not remove his shirt. She stated that having thrown her to the ground, he knelt down and laid on her. In that position she could not have seen whether or nor the appellant removed his trousers.

The accusation against the trial magistrate that she ignored the defence case of a grudge is not fair. Her statement: "Accused's testimony that it is all grounded on malice has no basis" is clear proof that she considered the Appellant's defence.

I have myself considered the alleged grudge. The Appellant claimed that because he stopped working for the complainant's mother after marrying and complained when she grazed her cattle on his land, the complainant's mother was not happy and she hatched a plot to fix him. The Appellant did not put that to the complainant's mother when she testified. If there was any such grudge, the Appellant could not have taken his young children to her home, left them with her and gone to fetch firewood with the complainant.

Even if I were to accept DW 1's evidence that there was some bad blood between the Appellant and the complainant's family, I cannot appreciate how a 13 year old girl could have been used to settle that score. I have no doubt in my mind that the allegation of a grudge was an afterthought and the learned trial magistrate was therefore right in rejecting it.

For this reasons, I dismiss the appeal against conviction.

On sentence, I note that the Appellant was not only a neigbour who society would expect to protect young children like the complainant in this case but also a married man with four children and therefore in a position of parentis to the complainant. To make matters worse, he left his own children in the care of the complainant's mother when he went with the complainant into the forest to fetch firewood. He abused the trust the complainant's mother had in him. How could he have felt if she let someone sexually molest one or all of his own children? In my view the Appellant deserved a stiffer sentence than the 20 years imprisonment term he was given. The appeal against sentence is also dismissed.

In the upshot I dismiss this appeal in its entirety.

DATED and delivered this 2nd day of February, 2010.

D.K. MARAGA
JUDGE.