REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 106 OF 2007

*(From Original Conviction and Sentence in Criminal Case No.2476 of 2004 of the Chief Magistrate's Court at Mombasa: **J.B. Mdivo – R.M.**)*

JOEL MWANGI KINYUA ..... APPELLANT
VERSUS
REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant herein **JOEL MWANGI KINYUA**, has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Mombasa Law Courts for a charge of **DEFILEMENT OF A GIRL UNDER 16 YEARS CONTRARY TO SECTION 145(1) OF THE PENAL CODE**. The particulars of the charge were

"On the 13th day of August 2004 at about 9.00 p.m. at K village in Mombasa District within CoastProvince, had carnal knowledge of T W, a girl under the age of sixteen years."

In addition the Appellant faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 145(2) OF THE PENAL CODE**. The appellant entered a plea of ***'not guilty'*** to both charges. His trial commenced before the lower court on 20th June 2007. At this trial the prosecution led by **INSPECTOR MARY** called a total of four (4) witnesses in support of their case.

The brief facts of the prosecution case as narrated by the complainant **T W**, a child aged 12 years was that on 17th November 1996 she was sent by her mother to deliver kale (sukuma wiki) vegetables to the Appellant, a neighbour who lived in the flat below theirs. She went to the Appellant's house and knocked on the door. He invited her in. She delivered the vegetables but as she made to leave the Appellant told her to lie on his bed. The complainant refused. He then carried the child and laid her on his

bed. He removed his clothes and proceeded to defile her. After the act the complainant went home. Her mother questioned her severally and she finally admitted what had happened. The complainant's parents confronted the Appellant who denied that he had raped the girl. They all then went to the police station to report the matter. The complainant was taken to the hospital for medical examination. After police concluded their investigations the Appellant was arrested and charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied the charges. On 22nd June 2007 the learned trial magistrate delivered her judgement in which she convicted the Appellant on the main charge. After listening to his mitigation the court sentenced to serve ten (10) years imprisonment. Being dissatisfied with both his conviction and sentence the Appellant filed this appeal.

The Appellant acted in person at the hearing of his appeal and relied upon his written submissions which had been filed in court. **MR. MUTETI**, learned State Counsel appeared for the Respondent State and opposed the appeal. Being a court of first appeal I am guided by the decision of the Court of Appeal in **OKENO –VS- REPUBLIC [1972] E.A.L.R. 31** where it was held

"It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld."

I have carefully perused the written submissions filed by the Appellant. He has raised the following grounds of Appeal.

§ Violation of constitutional rights guaranteed under S. 72(3) of the (old) Constitution
§ Insufficiency of Evidence
§ Failure by trial court to consider his defence

With respect to the first ground it is indeed correct as has been submitted by the Appellant that S. 72(3) of the (old) Constitution of Kenya under which his trial was conducted, did provide that any suspect arrested for a non-capital offence must be arraigned before a court within 24 hours of such arrest. The offence for which the Appellant had been arrested and detained was defilement which is a non-capital offence thus strictly speaking he ought to have been brought before the court within 24 hours of his arrest. As the Appellant has submitted this did not happen. The record clearly indicates that the Appellant was arrested on 13th August 2004 but was not arraigned in

court until 23rd August 2004, a period of ten (10) days later. The question is – does this breach of S. 72(3) entitle the Appellant to an automatic acquittal as he submits? The short answer is no it does not. The courts in this country have made several pronouncements on this very issue. The settled position now is that contained in the decision of the Court of Appeal in the case of **ELIUD NJERU NYAGA –VS- REPUBLIC [2006] KLR** where their lordships held as follows:-

"While we would reiterate the position that under fair trial provisions of the Constitution, an accused person must be brought to court within twenty-four hours for non-capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal."

The accepted test now is whether the delay complained of was so inordinate as to amount to a total violation of the right to a fair trial. In my view this ten day delay cannot be termed inordinate at all. We cannot close our eyes to the very real limitations under which the police in Kenya have to carry out their duties – where at times even fuel for a vehicle to transport a suspect to court may be unavailable. In these circumstances the delay in bringing the Appellant to court may not have been calculated. In my view this delay was not inordinate and does not nullify the subsequent trial. I do therefore dismiss this ground of the appeal. If it is any consolation the Appellant still retains his right to sue for damages in a civil cause.

The Appellant raises a second ground of appeal that the evidence adduced at the trial was insufficient to support his conviction. The charge which the Appellant faced was that of Defilement. For this charge to be proved it must be established that the victim was a minor i.e. was below 18 years of age. The complainant in her evidence told the court that she was 12 years old. This would put her at 8 years in 2004 when the incident occurred. The fact that the trial magistrate felt it necessary to conduct a ***'voire dire'*** examination on **PW1** is further evidence of her tender age. I must here commend the trial magistrate for the exhaustive manner in which she conducted this ***'voire dire'*** examination by recording both the questions put to the child as well as the answers thereto. The complainant in her evidence told the court that on the material night she was sent by her mother a vegetable vendor to deliver kales to the Appellant who was their neighbour. When she entered into his house the Appellant threw her onto his bed and proceeded to rape her. The complainant may be out of embarrassment, fear or shame declined to state verbally what the Appellant

had done to her. She did however accept to write down as recorded at page 25 line 18

"Alinifanya tabia mbaya vile alinilalia"
Interpretation
"He did bad manners on me whilst he lay on top of me"

The child was unable to verbalize the act. Once again I do commend the initiative of the trial magistrate who resorted to diagrams to elicit the evidence from the child. Page 26 line 10

"Q – where did he touch you?
CHILD – puts a black mark on her vaginal area.
Q – writes down on papers
"Kile kitu chake cha kukojoa"
Interpretation
"That thing he uses to urinate"

The child no doubt meant that the Appellant put his penis into her vagina. I am satisfied that this evidence was properly given and recorded as it came from the child herself. It is quite conceivable that a child may be unable to verbalize an act and it is accepted practice by child psychologists to elicit explanations by diagrams. There can be no doubt about what the complainant meant. Her evidence was clear concise and she gave a graphic illustration of her ordeal.

The complainant's evidence is corroborated by her mother **PW2 JNM**, who confirms that she did send her child to deliver kales to the Appellant who was their neighbour. She became concerned when the child stayed longer than expected and when complainant returned **PW2** questioned her about the delay. The complainant revealed that she had been defiled. **PW2** then examined her private parts and noted seminal fluid. She then alerted the child's father. **PW2** examined the child immediately upon her return from the Appellant's house and the finding of semen on her private parts provides corroboration of her allegation of defilement.

Most important in the area of corroboration is the evidence of the doctor **PW4 DR. LAWRENCE NGONE** who produced the P3 form relating to the examination of the complainant. He found that the child had indeed been defiled. Under cross-examination by Mr. Okuthe learned counsel for the Appellant **PW4** states at page 33 line 2

"It is shown the hymen broke because the red blood cells indicated this. It is possible for the hymen to be broken without bruising the vaginal

lips. The pus cells in the girls sample indicate the child had an infection the source of which is indeterminate"

It must be noted that the complainant was examined a full seven (7) days after the incident. This in my view explains the fact that no lacerations were seen on her vagina – they may have healed within that period. The raptured hymen is conclusive proof of penetration. I therefore am satisfied and find as a fact that the complainant was defiled as she alleged.

The next crucial question is the identity of her assailant. The complainant herself named the Appellant as the man who raped her. The incident though occurring at night took place inside the Appellant's room. The lights were on. Indeed at page 25 line 7 the complainant states

"The house has electricity. It was well lit."

Therefore the complainant had adequate light to see the Appellant. The incident took about half an hour giving her adequate opportunity to see and identify him well. More importantly the Appellant was not a stranger to the complainant. He was a neighbour whom she knew very well. Apart from mere visual identification the complainant was able to identify the Appellant. In the case of **ANJONONI & OTHERS –VS- REPUBLIC [1980] KLR 59** it was held by the Court of Appeal

"recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another"

Since the complainant knew the Appellant very well, I find there to be no possibility of a mistaken identity. The complainant's evidence with respect to identification has been corroborated by the evidence of **PW2**. She confirms that the person to whom she sent her child to deliver vegetable was the Appellant. **PW2** further confirms that the Appellant is their neighbour and lives in the flat below theirs. This again is evidence based on recognition which has been held to be more reliable than mere visual identification alone. Both witnesses positively identified the Appellant in court. I am satisfied that the identification was clear identification of the Appellant.

In his evidence the Appellant claimed that the charges were fabricated by the complainant's mother in her attempt to evade paying him the money he owed her. The Appellant's advocate did not raise this issue at all in his cross-examination of **PW2**. This appears to be a mere afterthought. The learned trial magistrate did in her judgement give due consideration to this defence but dismissed the same and in my view properly so. If the debt was owed to

PW2 what possible motive would the complainant a mere child have to tender false evidence against him? This defence does not in any way dislodge the weighty prosecution evidence. On the whole I am satisfied that the prosecution case against the Appellant was overwhelming. The witnesses gave clear, credible and cogent testimony. They all remained unshaken under cross-examination by defence counsel. The prosecution did prove their case beyond a reasonable doubt and I have no hesitation in confirming the conviction of the trial court against this Appellant on a charge of Defilement. The Appellant was accorded an opportunity to mitigate thereafter he was sentenced to serve ten (10) years imprisonment. The sentence was both lawful and appropriate taking into account the nature of the offence and the fact that the victim was a minor. I do uphold this sentence. Finally this appeal fails in its entirety. The conviction and sentence of the lower court are hereby confirmed and upheld.

Dated and Delivered in Mombasa this 13th day of October 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Appellant in person
Mr. Onserio for State

M. ODERO
JUDGE
13/10/2010