REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 88 OF 2010
(From Original Conviction and Sentence in Criminal Case No. 1870 of 2008 of the Chief Magistrate's Court at Mombasa: ***R.N. Makungu – S.R.M.)***

JAMES NGATIA WACHIRA ..... APPELLANT
VERSUS
REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant **JAMES NGATIA WACHIRA**, had been arraigned before the subordinate court on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1)(3) OF THE SEXUAL OFFENCES ACT, 2006.** The particulars of the offence were that

"On the 13th day of May 2008 at a Primary School , within Mombasa District of Coast Province, unlawfully committed an act which caused penetration with A.N.B a girl aged 14 years"

The Appellant pleaded ***'not guilty'*** to the charge. His trial commenced before the learned Senior Resident Magistrate sitting at Mombasa Law Courts on 25th July 2008. At this trial the prosecution led by **INSPECTOR MWANGI**, called a total of seven (7) witnesses in support of their case. The brief facts of the prosecution case as narrated by the complainant **A.W**, a girl aged 14 years, were that on 13th May 2005 she was in her class with other pupils. A fellow school-boy from class 7 came and called the complainant telling her that she was needed by **MR. WACHIRA** (the Appellant herein) who was the social studies teacher. The complainant went to the teacher's office where he held her by the hand and pulled her in and began to remove her under-clothes i.e. pant and biker. The Appellant then proceeded to defile her when both were seated. After the act the Appellant returned to her class-room. She revealed what had happened to her sister **M.N PW2** and her friend **L.J PW3**. The children reported the matter to a Child Rights activist in the area **AMINA JUMA PW5** whom they all referred to as ***'Mama Sauti'*** probably because she worked with an organization known as '***Sauti ya Mama'***. **PW5** took up the matter and escorted the complainant to Coast General Hospital for treatment. She also reported the matter to police whereupon the Appellant was arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied defiling the complainant. On 28th January 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant for Defilement and thereafter sentenced him to serve twenty (20) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

Being a court of first appeal I am under an obligation to re-examine and re-evaluate the prosecution evidence and to draw my own conclusions based on the same [see **OKENO –VS- REPUBLIC [1975] E.A.L.R. 32**]. The Appellant who was unrepresented during the hearing of this appeal opted to rely entirely upon his written submissions which, with the leave of the court, had been duly filed. **MR. ONSERIO** learned State Counsel opposed the appeal and urged the court to uphold both the conviction

and sentence of the lower court. On my part I have carefully perused and considered the record from the lower court, as well as the submissions made in this matter.

The fact that there had been defilement of the complainant is not in any doubt. The child herself testified to this. **PW7 DR. LAWRENCE NGONE** of Coast Provincial General Hospital also gave evidence that upon examining the complainant he found that her hymen had been ruptured – which is conclusive proof of the fact of penetration. He produces in court her P3 form duly filled and signed **Pexb2**.

The complainant and her two school-mates identify the Appellant who was their teacher as the man who committed this act of defilement on the complainant. I have anxiously examined the evidence of these witnesses and I find it to be riddled with contradictions and inconsistencies. The complainant in her evidence states that the Appellant removed her underwear and defiled her whilst both were seated. At page 6 line 1 she states

"He then did bad things to me. He unleashed his belt, removed his penis and then he inserted his penis. He removed his penis. He did this when I was seated, he was also seated"

However under cross-examination by **MR. OKUTHE**, counsel for the Appellant states at page 7 line 15

"I told police in my statement that he pushed me to the ground and slept on me. He did not sleep on me. He did it while standing"

She now states that the Appellant defiled her while standing as opposed to seated which is what she had told the court in her evidence in chief. Why would the complainant record one thing in her statement only to contradict herself in her evidence to the court?

PW2 and **PW3** the sister and friend to the complainant respectively, both told the court that they witnessed the alleged act of defilement. Their evidence is unfortunately not any clearer than that of the complainant. **PW2** tells the court in her evidence at page 13 line …..

"I saw them. The door was not locked. The two of them were on the floor. Wachira (accused) was on top of PW1"

She too contradicts herself in cross-examination at page 13 line 24 when she states

"I told him in my statement [to police] that they were having sex while standing. N was standing. It is not true she was on the floor"

Again I am left to wonder which was which? Was the complainant defiled whilst standing up or whilst lying on the ground? For good measure and to further confuse matter **PW3** states that both complainant and Appellant were standing. At page 16 line 1 she asserts

"He was doing sex while standing. PW1 was on the wall also standing"

Standing, sitting and lying down are all very different and distinct postures. The witnesses who were all aged between14 an 15 years would not in my view have been confused about what they saw. They were old enough to tell the difference. The inconsistencies and contradictions in the evidence of these eye-witnesses cannot be glossed over as they serve to place doubt on the veracity of these witnesses. The learned trial magistrate erred in not taking these inconsistencies into account. If they were all truly eye witnesses they ought to have all seen the same thing. The contradictions in their evidence leads one to suspect that they were coached.

Aside from these eye-witnesses there is also the puzzle about the young class 7 boy who allegedly told the complainant that the teacher (Appellant) wanted to see her. The complainant, **PW2** and **PW3**, all insist that this boy is the one who called the complainant out of the class-room. (on this they are unanimous). This boy is a crucial witness because it is only he who can confirm whether or not the Appellant did actually send for the complainant. Curiously he was not called to testify – it is as if he vanished into thin air. The failure of the prosecution to call such a key and crucial witness can only lead to the presumption that his evidence if adduced may have been adverse to their case. It is inconceivable

that the police have been unable to trace a class 7 school-boy. This boy could not have just vanished into thin air. I do opine that such a boy did not actually exist at all.

Finally the Appellant did raise the issue of a serious anomaly in the P3 form produced in court. This led me to carefully scrutinize the original copy of this P3 form **Pexb2**. It indicates that the complainant was sent to the hospital for examination on 23rd May 2008. Yet strangely enough the same P3 form is signed and dated 22nd May 2008 one day earlier. How could the P3 be signed and dated a full day **before** the complainant was actually examined? This is a serious anomaly which has not been explained leading me to doubt the authenticity of this P3 form. In any event a document bearing such a serious anomaly cannot be taken as reliable proof of any fact in issue.

The Appellant in his defence claimed that the charge against him was fabricated as the result of a dispute he had with his wife at the Tononoka Children's Court. The learned trial magistrate dismissed this defence. In my view she erred in so doing, especially in view of the above anomalies in the prosecution case. This defence was in the circumstances quite plausible and at the very least placed a reasonable doubt on the prosecution case. It ought to have been given greater weight by the trial court.

Finally I note that no investigating officer testified in this case. **PW6 PC. DAVID KOSORO** told the court that he only visited the scene and handed over the case to a **CORPORAL PROTUS WALUCHO** to investigate. The said Corporal Walucho was not called to testify. Whilst failure of an investigating officer to testify is not necessarily fatal to the prosecution in these circumstances where such major inconsistencies and anomalies are found to exist, his evidence would have been crucial to plug the loop-holes in the prosecution case. As such in the circumstances failure of the investigating officer to testify is fatal to the prosecution case. For all the above reasons I do find that the Appellant's conviction was not based on sound evidence. Doubts abound regarding the prosecution case which doubts must be settled in favour of the Appellant. I therefore quash his conviction by the lower court. The subsequent 20 year sentence is also set aside. This appeal succeeds. The accused to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 10th day of November 2010.

M. ODERO
JUDGE

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

M. ODERO
JUDGE
10/11/2010