REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

DANIEL KAMAU WARUI…….……..APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

JUDGMENT

Daniel Kamau Warui the appellant herein was charged with the offence of **defilement of a girl** contrary to **section 145(1) of the Penal code.** The particulars of the offence state that on the 26th September 2004, at K [PARTICULARS WITHHELD]Village in Nyandarua District, within Central Province had unlawful carnal knowledge of BWM, a girl under the age of 16 years. The appellant was alternatively charged with the offence of **indecent assault on a female** contrary to **section 144(1) of the Penal Code.** The particulars of the alternative offence state that on the 26th day of September 2004 at K[PARTICULARS WITHHELD]Village in Nyandarua District within Central Province unlawfully and indecently assaulted BWM by touching her private parts a girl of the age of 15 *(fifteen)* years

The appellant pleaded not guilty and after trial by the Resident Magistrate Naivasha. He was found guilty of the main charge and on conviction he was sentenced to seven (7) years imprisonment. Being dissatisfied with the conviction and sentence he has appealed to this court. In the memorandum of appeal 13 grounds of appeal are raised although during the hearing of the appeal Counsel consolidated the grounds into basically three grounds.

Counsel took issue with the judgment by the trial court which did not comply with the provisions of Section 169 (1) and (2) of the Criminal Procedure Code. The trial magistrate did not identify the points for determination and did not give the reasons for the judgment. Moreover the judgment did not specify the offence with which the appellant was charged with and the section of the Penal Code. For these reasons counsel submitted that the judgment is a nullity and the appeal should be allowed. The judgment by the trial court was also faulted for failing to take into account the inconsistencies found in the evidence of the prosecution namely the evidence of the complainant, her mother and the investigating officer regarding the day when the offence was committed, when it was reported to the Police and when the complainant was taken for treatment.

Counsel also submitted that the appellant was arrested on 2nd November 2004 and he was taken to court on 8th November 2004 which was in contravention of his fundamental rights to a fair trial as provided for under section 72(3)(b) of the constitution. Although this issue was not raised before the trial magistrate the court had a duty to peruse the record and safeguard the fundamental rights of the appellant.

On the part of the State the learned State Counsel **Mr. Njogu** conceded to this appeal on the grounds that the, one paragraph judgment by the learned trial magistrate did not comply with the provisions of section 169 of the Criminal Procedure Code.

This being a first appeal this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **Njoroge vs. Republic [1987] KLR 19.**

I now wish to set out albeit briefly the evidence that was before the trial court which led to the conviction and sentence of the appellant. **B W(PW1)** (it was later indicated by the mother that she was aged 16 years) testified that on 26th September 2004 she was sent by her mother **LW [PW2]** to buy charcoal from the accused person who was also a neighbour. On her way, PW1 met with the accused persons children. Upon reaching the accused person's house it was raining so the appellant offered PW1 a stool to sit on. The accused person asked the two children to go to the shop and buy rice. The appellant then pulled PW1and dragged her to the bedroom, placed her on the bed and

defiled her. She tried to scream but the appellant covered her mouth with his wife's skirt. PW1 said that she felt pain after the appellant finished defiling her he told her to leave and he threw the charcoal for her outside.

On the way to her mother's house, PW1 met a friend known as Mama M and she informed her what had happened. The lady accompanied her and they reported the matter to PW2. They all confronted the appellant, when PW2 asked the appellant what he had done to his daughter. He admitted but sought for forgiveness and said he would pay the expenses for taking the complainant to the hospital. PW2 took the complainant to Munyaka Police Station and they were referred to Naivasha General Hospital.

On 26th October 2004, **George Kariuki PW4** testified that he examined the complainant who complained of having been defiled. On examination he found her hymen was broken and there were lacerations. No spermatozoa were found but a few pus cells were seen. He referred the complainant to the Nairobi Women's Hospital. The complainant later came and he signed the P3 form which was produced in evidence.

Further evidence was adduced by PW2 the mother of the complainant. She confirmed that on 26th September 2004 she sent the complainant to buy charcoal from the appellant's place. PW1 later returned while accompanied by JK PW3 and Mama M. The complainant said that she had been defiled by the appellant. Her dress was soiled with spermatozoa. She told the complainant to remove the dress. They immediately went to the appellant's house and demanded to be told what he had done to the complainant. The appellant requested for reconciliation and apologised that what he did is what men normally do. They went to the police station and they were referred to Naivasha District Hospital. Since it was at night, they went to the hospital the following day. The complainant was treated and referred to Nairobi Hurlingham Hospital where she was given further treatment. PW2 testified that at the same time she lost her father and it took time for her to pursue the matter.

This matter was investigated by **PC Stanley Sikutua (PW4**) of Munyaka Police Patrol Base. He confirmed that the report was defilement of a girl was made on 29th October 2004 as indicated in the occurrence book at Munyaka police patrol base. The complainant was referred to the Naivasha District Hospital, however PW2 went to the Police Station on 28th September 2004 but was not accompanied by the complainant, and thus northing was done. It was not until 28th October, that she came with the complainant and upon being asked why it took so long to complete the report, she said that her father had died and she had attended the funeral. It is on 28th September 2004 when PW4 took a full report and issued a P3. The Chief of the area summoned the accused person to his office on 2nd November 2004 that is where he was arrested by PW4 after he was identified by the Chief, PW1 and PW2.

The appellant was found to have a case to answer. He opted to give unsworn statement of defence. He alleged that he was framed up by PW2 the mother of the complainant who had unsuccessfully tried to borrow a sum of Kshs 5,000/= from him. Thereafter the appellant alleged that PW2 spread rumours in the village that he had defiled her daughter. The appellant decided to report the matter to the Chief on 2nd November 2004 where he was arrested.

The appellant also relied on the evidence of **Hezekiah Kamau Waithaka DW2**. He testified that he knew the appellant, the complainant and PW2. After PW2 alleged that the appellant had raped her daughter she approached DW2 the following day and said she had incurred expenses of Kshs 800/= which the appellant should reimburse because she did not want to proceed with the case. DW2 advised her to go to the Police but after one month PW2 approached him again this time claiming to be paid Kshs 7,000/= so as to settle the matter. This time DW2 advised her to call the village elder. It is the appellant who summoned PW2 to the assistant Chief but instead she went to the Police to report the matter and the appellant was arrested.

After considering the above evidence the trial court wrote a one paragraph judgment as follows:

"***The offence is defilement of a girl contrary to section 145(1) of the Penal code. The particulars are as per charge sheet. There is the alternative indecent assault on female c/s 144(1) of the Penal Code. The particulars are as per charge sheet. I have considered the evidence on record. Its true that on the material day and time PW1 was at the accused having been sent to buy charcoal from the accused how is a charcoal dealer. That if the PW1's family and the accused were relating well then they could not be buying charcoal from him. The relationship was good why accused should be complicated. No reason given. Other than the other evidence adduced collaborating there is P3 form. I do disregard the defence as were defence. I do find that accused guilty of the offence and convict him accordingly under section 215 C.P.C."***

This judgment has been seriously challenged by counsel for the appellant and rightly so because the provisions of section 169 of the Criminal Procedure code clearly stipulates how a judgment shall be written as follows:

"***169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."

It goes without saying that this judgment does not meet the basic requirement provided for by the law. I have gone through the evidence before the trial court with tremendous respect the proceedings were haphazardly recorded. This was a case of defilement of a child below the age of sixteen years. No voire dire examination was conducted even though perhaps it was not necessary in view of the physical appearance of the complainant. The trial court did not even establish the age of the complainant. The trial was conducted in a very convoluted manner. There is total mix up of the dates especially when the matter was reported to the Police and when the complainant was treated.

This court has agonised on whether to refer this matter for retrial. The principles governing matters which can be referred for retrial were set out in the case of **Ekimat vs. Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported)** where the Court of Appeal reiterated the principles that:

"***In the case of*** *Ahmed Sumar v Republic [1964] E.A. 481*, ***at page 483, the predecessor to this court stated as follows:***

'***It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.'***

The basic principle to consider is the facts of the case and the circumstances of the case as well as the ends of justice. In this particular case the offence took place almost five years ago the complainant was then 16 years old. At the moment she must be 21 years old. The appellant was convicted and sentenced on 16th August 2005. He has served over four years of the seven years sentence. Even if there is overwhelming evidence a retrial may not serve the ends of justice. The period served by the appellant is reasonable punishment. I will therefore not order a retrial but allow the appeal. The sentence imposed by the trial court is set aside and unless the appellant is otherwise lawfully held he is to be set at liberty.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE