PETER NJERU WANJIRU…….....…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From the conviction and sentence in criminal case No. 6000 of 2005 of the Principle Magistrate's Court at Makadara)

JUDGEMENT

Peter Njeru Wanjiru (appellant) was charged with defilement of a girl under the age of 14 years penal code contrary to section 145 (1) penal code that on 17th day of September 2005 at [*particulars withheld pursuant to section 76 (5) of the Children Act*] had carnal knowledge of **P. W.** a girl under the age of 16 years.

He faced an alternative charge of indecent assault on a female contrary to section 144 (1) penal code that on the same day and place, unlawfully indecently assaulted **P. W.** a girl under the age of 14 years by touching her private parts namely vagina.

He denied the offence and upon hearing and determining the case the learned trial magistrate convicted him on the main charge of defilement and sentenced him to 17 years in jail with hard labour.

The complainant **P. W.** (PW1) was aged 8 years at the time of testifying on 24/7/2006. She narrated how she was in the company of her two cousins, J and T, when they went to the appellant. Appellant gave each of them Kshs. 5/- and sent the other two girls to buy him cigarettes. He was left with PW1 and she said.

"***He did bad behavior to me on a bed……. He removed his …. long trousers. I removed my underpants. He did the bad thing with his "Mdudu". He put his "Mdudu" into my "Mdudu" (he pointed his private part into mine". It was painful.***

PW 1 later informed her aunt about the incident.

J. W. (PW2), a aunt who was informed about the incident examined the child's private parts and noted that her dress and underparts were blood stained. She also noticed a whitish substance on the clothes.

PW3 PC Francisca Mutiso received the report and the child. She took the child to the Doctor for examination and charged the appellant.

Doctor Zephania Kamau (PW4) who examined PW1 on 22/9/2005 some injuries on the private parts and

her hymen had been damaged. She had not healed and had unusual redness on the vagina.

Incidentally the child had initially been taken to Nairobi Women's Hospital, and from the notes, Dr. Kamau noted that PW1 was observed to be bleeding from the pierced hymen on the first day of examination.

Upon being put on his defence, the appellant gave unsworn testimony saying he had left his place of work at 3.00 pm when he found some women on the road. He went to his house and five minutes later, his neighbour came accompanied by five young men and she said he had defiled her niece. He was then arrested.

In his judgment, the learned trial magistrate posed two questions: -

(a) Did appellant have carnal knowledge of Peris as was alleged?

(b) Alternatively, did appellant indecently and unlawfully assault PW1 by touching her vagina?

The learned trial Magistrate noted that when the incident occurred, the appellant and PW1 were alone and that also there were two children who had left appellant with PW1, they were not called as witnesses yet the two children were crucial witnesses.

The learned trial Magistrate then warned himself of the danger of convicting on the evidence of single witness but noted that the young girl reported the incident immediately to relatives and her neighbours and appellant was arrested on the same day. The learned trial magistrate also considered the results of the medical examination especially the damage to the vulva, hymen and that she was bleeding form the hymen and she found that the evidence moved the charge.

Appellant challenged both conviction and sentence contently in this amended grounds of appeal that: -

(1) The learned trial magistrate erred in failing to observe that no medical test was carried out in respect of himself.

(2) That the trial magistrate failed to observe that some essential witnesses were not summoned to clear the doubts.

(3) That the trial magistrate failed to note that the case was a frame up.

(4) The trial magistrate failed to observe that investigations were carried out before the offence was committed.

(5) The trial magistrate failed to observe that most of the important exhibits were tampered with.

(6) The trial magistrate failed to note that section 211 criminal procedure code was not adequately complied together.

It is his submission that appellant argued that for case of defilement to be prove, it is was important to have the specimen of both victim and aggressor produced also took issue with the allegation of defilement saying according to PW 2, the information she got was that PW1 had been pinched by Njiru and that PW1 never said she was raped.

He wonders why PW1's mother washed the stained clothes or why PW2 never told police about those clothes.

He also wonders whether the report from the Nairobi Women's Hospital disclosed the cause of the injuries and whether PW1 ever disclosed to the Dr. (PW4) what had happened to her.

Appellant's contention is that since PW3 refers to 16/9/2005 as the date she was told to investigate the offence, then it means investigations were done before the offence occurred, since the charge sheet refers to 17/9/2005 as the date of the offence.

The appeal was opposed, and the learned state counsel Mrs. Gakobo submitted that the offence was committed at noon and PW1 knew the appellant ever before the incident and therefore the question of mistaken identity would not arise.

She further pointed out that PW2 examined PW1immediately after the offence and that her evidence materially supported that of PW1 and that the features she noted were consistent with defilement. The learned State Counsel's view was that PW1's evidence corroborated by that of the Dr. (PW4) and that appellant had not objected to PW4 referring to the initial treatment notes and so no prejudice was occasioned.

Mrs. Gakobo argued that the trial Court did consider evidence of prosecution witness and found that appellant had an opportunity to be alone with the complainant and commit the offence and as for this being a frame up, the learned State Counsel submitted that the complainant reported the incident immediately which confirms that she couldn't have been framing up the appellant.

I have re-evaluated the evidence presented before the lower Court as well as the judgment. The learned trial magistrate observed that essential witnesses were the two little girls who were in company of the complainant and were not called. He had this to say:-

"The two children were crucial witnesses. It appears there was quite some ignorance on the part of the relatives and parents of the victim. Apart from not availing the children to the police the record evidence, he cheated the victim, who were allegedly wanted killing very important evidence".

So the learned trial magistrate was quite alive to the fact that the crucial witnesses were not called BUT, he also noted the reason for such omission – I don't think it was because the prosecution feared that if called, the two girls would give evidence which would be adverse to the prosecutions case.

The learned trial magistrate then warned himself of the danger of relying on the witness of single witness evidence and the need for corroboration and duly gave his reasons for relying on evidence presented and found it safe and reliable.

In so doing he met the requirement of section 124 of the Court regarding evidence of children in sexual offences.

Indeed the learned trial magistrate even lamented about the stained clothes which had been seen by PW2 but which complainant's mother washed out of ignorance.

Was this a frame up? From the evidence and even the appellant's own defence, there was nothing whatsoever to suggest that PW1 had framed up the appellant – what would be the reason for such frame up? Nothing is suggested on the part of PW1 perhaps the only thing would evidence of the investigating officer referring to 16/9/2005 while the offence was stated to have occurred on 17/9/2005.

I confirm that is also the date recorded in the handwritten proceedings.

It this fatal? I think the not, because if one considers the evidence of the other witnesses, they all refer to 17/9/2005. What is more is that PW3 role was minimal, the merely received the child and took her to the Doctor for examination (ie PW4) and charged the appellant. I wouldn't consider those actions prejudicial, infact PW4 merely completed formalities.

According to the lower Court's records appellant elected to give unsworn testimony. There is the provision in section 211 that at the close of prosecution case, the Court shall again explain the circumstance of the charge to the accused. The trial Court's record simply shows that the learned trial

magistrate recorded.

"Accused has a case to answer"

Would this be prejudicial to appellant? I think not - on two limbs.

(a) Appellant was already informed of the charge at plea.

(b) During the proceedings the evidence led was clear and related to the charge and that is what he was being called upon to answer to.

I honestly found no prejudice in that

The major issue of concern however, is the fact that appellant was not taken for medical treatment at all. By the time PW4 was examined PW1, a number of days had passed and this may explain why no discharge was seen. However, the appellant was never taken for medical examination. Indeed if body found samples had been taken from both victim and appellant for analysis that would have been the best test. So was that a fatal omission?

There is the child's evidence as to how appellant removed his trouser, he removed his panty, and then

"***He did the bad thing with his "mdudu". He put his mdudu into my mdudu (he pointed his private part into mine it was painful".***

This was not some fairy tale or imaginary scene by the child. This evidence was not only graphic, it was detailed and very clear. Could this case is on all fours with the Court of Appeal is decision in ***Kassim Ali vs. Republic*** **Criminal Appeal 84 of 2005**, where the appellant was convicted despite there being no medical evidence?

The surrounding circumstances, the opportunity to be alone with the child, the need for corroboration, were well addressed by the learned Trial Magistrate who concluded.

"the evidence on record proves that the accused indeed defiled the girl as alleged".

In both cases, the report was made immediately the only distraction between this case and the **Kassim Ali's** case is that in the latter case the clothes victim had worn during the offence were produced in court. The other issue is that whereas PW1 gave such a graphic description of what appellant did, PW2 referred to the report – she received as one of pinching – yet would pinching result in gross interference with the hymen? I think it is common knowledge and a biological fact, that the hymen is not some body artefact which hangs out of a female body and can be easily accessed by one action such as a pinch.

The commission of the offence was corroborated by the circumstances, see **Ongweya vs. Republic 1964 EA 129**. So the absence of medical evidence to support the fact of defilement was not decisive as the same can be proved by oral evidence of a victim or by the circumstances. The conviction was safe and I uphold it.

The appellant was sentenced to 17 years for an offence, which carries life imprisonment. Taking into account the age of the victim and the trauma, I find no reason whatsoever to interfere with the sentence – t was justified and I confirm it.

Consequently, the appeal is dismissed.

Delivered and dated this 18th day of June 2008 at Nairobi.

H.A. OMONDI

JUDGE