REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 262 of 2007

ROBERT MUNGAI NJUGUNA…….. APPELLANT

V E R S U S

REPUBLIC ……..……RESPONDENT

(From the original decision in Criminal Case No. 1715 of 2006 in the Senior Resident Magistrate's Court at Githunguri – L.M. Mutai (SRM)

J U D G M E N T

ROBERT NJUGUNA MUNGAI, the appellant, was charged before the subordinate court with defilement of a girl contrary to section 8 (1) (2) of the Sexual Offences Act 2006. The particulars of the offence were that on 6th October, 2006 at*[particulars wthheld]* village in Kiambu District within Central province, committed an act of defilement with a child aged 7 years namely ***MWG*** by penetrating her genital organs. In the alternative he was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act 2006. The particulars of offence were that on 6th October, 2006 at *[particulars wthheld]* village in Kiambu district within Central Province committed an indecent act with a child namely ***MWG*** a girl aged 7 years by touching and viewing her genital organs.

After a full trial, he was convicted of the main count of defilement. He was sentenced to life imprisonment. Being dissatisfied with the decision of the subordinate court, he has appealed to this court. In addition to his grounds of appeal, the appellant filed written submissions which he relied upon at the hearing of the appeal.

The learned State Counsel, Mrs Obuo, opposed the appeal and supported both the conviction and sentence. Counsel contended that the appellant took the complainant to a quarry where he removed her pants and did "***bad things***" or defiled the complainant. P.W.2 who was present cried and ran away. Shortly thereafter, P.W.1 reported the incident to P.W.3 who took her to the Chief and also took her to

hospital. P.W.2's evidence was corroborative to that of P.W.1. P.W.5 examined P.W.1 (***the complainant***) one day after the offence and found the genitals to have been soiled, a tear of the hymen and spermatozoa. The pants of the complainant were also blood stained. Counsel submitted that the medical evidence was consistent with the complainant's evidence on the occurrence of the offence. Counsel emphasized that the incident occurred during the day time and the complainant knew the appellant before. Therefore, there was no possibility of mistaken identity.

In response to the State Counsel's submissions, the appellant submitted that the mother of the complainant was his mother in law. He submitted that there was a grudge – existing between them from the time his father died. He emphasized that he was relying on his written submissions.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences – see **OKENO –VS- REPUBLIC [1972] E.A. 32.**

The brief facts are as follows-

On 6th October, 2006 in the afternoon, two minors, **MWG P.W.1, and GN** P.W.2 came home from *[particulars wthheld]* Primary School. They were all standard 1 pupils aged 7 years and 6 years respectively. They come from *[particulars wthheld]* area in Kiambu District. On arrival at home, and in the absence of their parents or guardians, the appellant, who was a neighbour at home, asked the two girls to go with him to a quarry to carry for him some stones. The girls did so. As the girls were giving the appellant stones, the appellant grabbed **MWG** P.W.1, and removed her pants. When P.W.2 saw this, she ran home crying in order to inform other people about the incident. According to P.W.1, the appellant then defiled her. When people including, P.W.3 ***SWW***, the guardian of the complainant came to the quarry, they neither met the appellant nor the complainant. When they went home, they met the complainant, P.W.1 lying outside the house. The complainant informed them that the appellant had defiled her. A report was made to the police. P.W.1 was examined medically by P.W.5 ***DR. SAMSON GITONGA*** from Kiambu District Hospital the next day 7th October, 2006. The doctor found soil particles around the vulva and anal area of the complainant. The doctor also found a minor tear of the hymen, and the mouth of the same was reddish. Laboratory examination of a vaginal swab established presence of spermatozoa. The appellant was arrested and charged with the offence.

When the appellant was put on his defence, he gave an unsworn statement. His defence was that on 7th October, 2006, he left the quarry at 2 pm. He got home at 8 pm and slept. At 10.30 pm he was woken up and police arrested him and escorted him to Githunguri Police Station. He denied committing the offence. It was his defence that there was a grudge between his family and that of the complainant due

to a land boundary dispute.

Faced with this evidence, the learned magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt for the main charge.

I have re-evaluated the evidence on record. The complainant, P.W.1, was clearly defiled. That in my view, is established by the doctors findings. The doctor found the hymen broken, and spermatozoa traces, when he examined the complainant the following morning.

The evidence that connects the appellant to the offence is that of two minors, both of tender years. One of them is the complainant P.W.1, aged about 7 years. The other is P.W.2 aged about 6 years. With regard to the weight to be given to such evidence, the proviso to section 124 of the Evidence Act **(Cap 8)** states-

124……

*"**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of that victim and proceed to convict the person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

Though the victim is a minor, and her companion P.W.2 who saw the appellant removing pants of the complainant was also a minor, in my view there is every reason to believe their story. Though the appellant alleges a land boundary grudge, he did not raise it during the prosecution case. Secondly, the two young girls were the ones who consistently mentioned the appellant as the culprit. They were not shaken at all. At that age of 7 and 6, it is very improbable that they knew of the so called land boundary dispute anyway. The evidence about the defilement was corroborated by that of the doctor (PW5) who found tangible evidence to establish defilement. There was penetration, even if it was slight. It is my finding that, indeed the prosecution proved its case against the appellant beyond any reasonable doubt. I will uphold the conviction.

On sentence, the appellant was sentenced to life imprisonment. Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006 provides that any one who commits an offence of defilement on a child of 11 years or below shall be sentenced to life imprisonment. There is no dispute that the complainant was below the age of 11 years at the time of commission of the offence. The sentence of life imprisonment is the mandatory sentence provided by law.

I will uphold the sentence.

Consequently, and for the above reasons, I dismiss the

appeal of the appellant and uphold both the conviction and sentence.

Dated and delivered at Nairobi this 12th day of June, 2008.

GEORGE DULU

JUDGE.

In the presence of-

Appellant in person

Mrs Obuo for State

Mwangi Court clerk.