

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 160 of 2007

JAMES KAROKI WANGECHI APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by S. N. MBUNGI, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 335 of 2007 at KANGEMA)

JUDGMENT

In the lower court the appellant was charged with *Attempted defilement of a child contrary to Section 9(1)(2) of the Sexual Offences Act No. 3 of 2006*. After trial the appellant was convicted and sentenced to 10 years imprisonment. He brings this appeal against conviction and sentence.

This court is duty bound to reevaluate the evidence of the lower court. That duty is susitanly set out in the case of *OKENO vs REP (1972) EA 32* in that case the court of appeal had the following to say:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958)E.A. 424.”

PW 1 was the mother of the complainant. She normally purchased milk from the appellant's mother. The complainant was by then 6 years old. PW 1 sent the complainant to the appellant's mother's home to get milk on 4th February 2007. This was about 6.20 p.m. The following morning as she was washing the complainant she noticed that her vagina was swollen and whitish. The complainant told her that the appellant had defiled her. PW 1 took her to Kangema Health Centre. She was treated and discharged. PW 2 was the Clinical Officer from Kangema Health Centre. He said that he examined the complainant on 6th February 2007 and found that her vagina had laceration and puss cells. He also noted that it had whitish discharge. No spermatozoa was seen. He filled the P3 form which he submitted in evidence. On being questioned he said that the whitish discharge was from the complainant's own body and that the puss cells were resultant effect of the laceration. In his opinion it was a blunt object which caused the laceration. He confirmed that such laceration could have been caused by a penis. The complainant because of her age submitted an unsworn statement. She said that she was six years old attending standard one class. She confirmed that she knew the appellant and knew his home. She normally went to their home to collect milk. On 4th February 2007 she had gone to get milk but did not find the appellant's mother at home. It was only the appellant who was at home. He lifted her up and placed her on his bed in his house. He placed his penis in her vagina and when she would scream he would remove it and insert it again. After that he told her to put on her clothes and to go home. That evening she did not tell anyone about that incident but on the following day she told her mother. PW 4 police officer received a report about that incident. He issued her with a P3 and she was taken to Kangema Health Centre. PW 4 confirmed that the complainant mentioned that she was defiled by the appellant. Having been found to have a case to answer the appellant gave a sworn statement. He described his activities of the 5th/6th February 2007 which related to his normal activities and his casual jobs. He said that he was arrested on 7th February 2007 at 3 p.m. in support of his appeal against conviction and sentence the appellant argued that his constitutional rights as embodied in *Section 72(3) (b)* of the constitution were violated because he was detained in custody from 7th to 9th February 2007. That constitution provides that when a person is charged with a non capital offence they ought to be presented before court within 24 hours of their arrest. The jurisprudence of the court of appeal cases relating to this section in the constitution is that a person's constitutional rights if violated entitles them to either an acquittal or the quashing of a conviction. See the following cases;

• *Criminal Appeal No. 35 of 2006 Paul Mwangi Murungu v Republic*

- *Criminal Appeal No. 120 of 2004 Albanus Mwasia Mutua Vs. Republic*
- *Criminal Appeal No. 119 of 2004 Gerald Macharia Githuku Vs. Republic*

In this case the appellant was arrested on 7th February 2007 at 3 pm. The 24 hours period would have expired at 4 p.m. on 8th February 2007. One needs to consider how practicable it would have been to take the appellant to court at 4 p.m. on 8th February 2007. In all probability the courts sessions would by then have ended. The appellant was taken in my view as soon as was reasonably practicable. The appellant's constitutional rights were not therefore violated. That line of argument by the appellant is rejected. I have re-examined the prosecution's case against the appellant and I find that that evidence well met the required criminal standard of proof. The learned magistrate who had the opportunity to hear first hand the evidence of the witnesses and to observe them stated in the considered judgment;-

'..... the complainant vividly recalled the events of that day. She was very consistent on what she told the court. She looked so innocent to lie to the court. Though she gave unsworn evidence I believed her evidence. She knew the accused very well.'

The learned magistrate rejected the appellant's defence. The complainant was observed by the magistrate and was noted to be honest. The complainant named the appellant as the one who attempted to defile her. She knew him even by name. The mother's evidence was corroborated by the Clinical Officer's evidence. Although the appellant denied involvement in the offence, in his defence he gave details of what he did on the 5th, 6th, and 7th February 2007. He did not however say what he did on the 4th of February 2007 the day the offence was committed. I too reject the appellants defence and I do find that the prosecution well proved a case against him. The sentence that was passed against the appellant was within the provisions of the law and I do also reject his appeal against sentence. The appellant's appeal is hereby dismissed.

DATED AND DELIVERED THIS 28TH DAY OF JULY 2008

MARY KASANGO

JUDGE