



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII**

Criminal Appeal 1 of 2008

BEN JOSEPHAT WANJALA APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(From original and conviction in the Resident Magistrate's Court at Kilgoris Criminal
Case No.89 of 2007 by W. N. KABERIA Esq., RM)**

JUDGMENT

The appellant was charged with defilement of a girl contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act 2006. The particulars of the offence are that on the 30th day of January, 2007 at I village in Transmara District, the appellant had unlawful carnal knowledge of E.N, a girl aged 12 years.

The appellant was tried, convicted and sentenced to 20 years' imprisonment. The appellant was aggrieved by the said conviction and sentence. Through his advocates, Reuben Masese & Company, he filed a petition of appeal and raised the following grounds:

“1. The learned magistrate erred in and fact in

handing down judgment against the weight

of evidence.

2. The trial magistrate erred and fact in convicting

the appellant on insufficient evidence and

without the initial treatment notes as ordered

on 17/4/07.

3. The learned trial magistrate erred in law and

fact in not recalling PW2 to testify and appellant

be given an opportunity to cross-examine her

which led to a miscarriage of justice.

4. *The trial magistrate erred in law and fact by not giving the appellant an opportunity to be represented by an Advocate who was then on record.*
5. *The trial magistrate erred in law and fact in convincing the appellant on uncorroborated evidence.*
6. *The conviction and sentence meted out to the appellant is harsh and exceedingly excessive in the circumstances.”*

This being the first appellate court it is mandated to re-examine and re-evaluate the evidence that was tendered before the trial court and arrive at its own finding; see OKENO VS REPUBLIC [1972] E.A. 32.

The evidence before the trial court can be summarised as hereunder:

The complainant, E.N (PW1) was a girl aged 12 years. On 30th January, 2007 at about 5.00 p.m. she was playing with her siblings in a field near their home. The appellant called PW1 and said that he wanted to send her to his hotel to take sugar there. At that time the appellant was outside the home of PW1. When PW1 responded to the appellant's call, the latter pulled her into their house, blocked her mouth and proceeded to defile. The complainant bled from her vagina and her stomach became painful. After the incident PW1 slept until her mother returned from a hospital where she had taken a baby for treatment. PW1 told her mother, F.K, PW2, that she had a stomachache but did not tell her that she had been defiled until at about 8.00 p.m. The mother gave her some herbs to the bleeding before she reported the incident to the police.

PW2 corroborated the evidence of PW1 in all material aspects. She added that before the matter was reported to the police, she mobilised her neighbours, a watchman and the complainant's teacher who went to the appellant's house on the material night and woke him up. The appellant offered PW2 Kshs.2000/= as an inducement to forbear reporting the matter to the police but she refused to accept the money and proceeded to report the matter to the police. At about 5.00 a.m. the following morning the appellant was arrested.

Lemiso Richard Kaankano, PW3, a clinical officer at Lolgorian sub-district hospital examined the complainant on 31st January, 2007. She was still bleeding and her hymen was broken. That was sufficient medical evidence that she had been defiled.

In his unsworn defence, the appellant denied having defiled the complainant. He advanced an alibi defence.

In his submissions, Mr. Nyariki for the appellant stated that PW2 was not cross-examined by the appellant and that occasioned failure of justice. He added that the complainant's age was not properly assessed. He further submitted that the appellant was not medically examined to obtain evidence that could link him to commission of the offence, which he was charged with. In his view, the appellant's conviction was unsafe.

Mr. Kemo, Senior Principal State Counsel, submitted that the offence was committed in broad day light by a person who was well known to the complainant. He added that the evidence of PW1 was corroborated by PW2, PW3 and PW4. He submitted that there was overwhelming evidence against the appellant.

I have carefully considered the record of appeal and the brief submissions by both counsels. It is not in dispute that the appellant was well known to the complainant. His shop was near the house where the complainant was living with her mother. The offence was committed in broad daylight. There was no possibility of any mistaken identity. This was a case of recognition, not identification of the appellant. Recognition of an assault is more assuring and reliable than identification of a stranger; see ANJONONI VS REPUBLIC [1980] KLR 59.

PW1 bled profusely. Her clothes were soaked in blood including the bed sheet that she was lying on. However, her panty was washed by her mother. When PW3 examined PW1 on 31st January, 2007 she was still bleeding from the vagina and her hymen was broken.

In my view, there was sufficient evidence assessed her age as 12 years. All the evidence pointed at the appellant as the only person who had defiled PW1. The fact that PW2 was not cross-examined, having been stepped down to enable her get some hospital documents did not materially prejudice the appellant. This is because even if her evidence were to be disregarded completely, the evidence of PW1, PW3 and PW4 was sufficient to sustain a conviction.

All in all, I am satisfied that the appellant's conviction was safe and I dismiss his appeal against conviction.

As regards the sentence that was handed down by the trial court, the same is in accordance with the provisions of section 8(3) of the Sexual Offences Act, 2006. I cannot interfere with the same. Consequently, this appeal is dismissed in its entirety.

DATED, SIGNED and DELIVERED at KISII this 22nd day of July, 2008

D. MUSINGA.

JUDGE

Delivered in open court in the presence of:

N/A for the Appellant

Mr. Kemo, Senior Principal State Counsel for the Republic.

D. MUSINGA

JUDGE.