REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 8 of 2006

[From the original conviction and sentence in Criminal Case No.2235 of 2004 Senior

Resident Magistrate's Court, Molo R. KIRUI (S.R.M)]

GEORGE NGUGI NJENGA ……. ……..…….. APPELLANT

VERSUS

REPUBLIC …….……..…….. RESPONDENT

JUDGMENT

The appellant, *George Ngugi Njenga* was charged with the offence of defilement of a girl under the age of sixteen (16) years contrary to **Section 145 (1)** of the **Penal Code** and an alternative charge of **indecent assault of a female** contrary to **Section 144(1)** of the **Penal Code.**

After the trial, the appellant was acquitted of the first count but he was found guilty of the alternative count and sentenced to five years imprisonment with hard labour. The particulars of the alternative count stated that on the 16th day of August 2004 at ***[Particulars withheld]*** Estate, Elburgon in Nakuru District with Rift Valley province the appellant unlawfully and indecently assaulted **A W G** by touching her private parts, a girl under the age of 16 years.

The appellant pleaded not guilty to the charges and after a full trial before the Senior Resident Magistrate, Molo, he was convicted of the alternative count and sentenced to five years imprisonment. Being dissatisfied with the conviction and sentence by the trial magistrate, the appellant has appealed to this court and raised several grounds of appeal as follows;

1. That the learned trial magistrate erred in law and fact in making a finding that the prosecution had proved a case against the appellant beyond reasonable doubt while this had not been proved.

2. That the learned trial magistrate erred in law and fact in convicting the appellant for the offence of indecent assault while the ingredients for such an offence as set out under Section 144 (1) of the Penal Code were neither established or proved.

3. That the learned trial magistrate erred in law and fact in convicting the appellant for the offence of indecent assault while no evidence was tendered in this regard.

4. That the learned trial magistrate erred in law and in fact by acquitting the appellant of the

offence of defilement and convicting him for indecent assault while under the circumstances of the case the two alleged offences were inseparable.

5. That the learned trial magistrate erred in law and fact in not attaching weight to the doubts that were raised by the prosecution witnesses.

6. That the learned trial magistrate misdirected his mind and arrived at the wrong decision when he held that the complainant was speaking the truth while there was no independent evidence to corroborate this.

7. That the learned trial magistrate erred in law and in fact in not appreciating the offence was allegedly committed in a crowded estate and the prosecution was unable to explain why no other person within the area was called to support the case.

8. That the learned trial magistrate erred in law and infact in dismissing the evidence of DW 2 when the said evidence was not countered or challenged in cross examination and when the said evidence was instrumental in shedding light into the truth surrounding the alleged offence.

9. That the learned trial magistrate erred in law in considering extraneous matters in reading his finding especially with regard to the question of the sexually transmitted injection while such matters were irrelevant and their consideration would have raised doubts as to the appellant's guilt.

10. That the learned trial magistrate erred in law in allowing himself to be influenced by matters that were not tendered as evidence in the case.

11. That the learned trial magistrate misdirected his mind and erred in law in delivering a speculative judgment that was not premised on the analysis of evidence.

12. That the learned trial magistrate erred in law in imposing a harsh sentence and not considering the appellant's circumstances including health.

In further exposition of the above grounds, the learned counsel for the appellant, ***Mr. Kahiga*** submitted that the prosecution failed to prove the case of indecent assault. There was no evidence whatsoever at least to prove the alternative charge of indecent assault and in his submission, there cannot be a convicted by extension. Counsel further submitted that the evidence before the trial court did not point to the guilty of the appellant in respect of the alternative count. The evidence tendered before the court was to prove the offence of defilement and since the prosecution failed to prove the offence of defilement, the court should have considered whether there was evidence against the appellant to convict him with the offence of indecent assault.

Counsel faulted the two line judgment by the trial court in which the learned trial magistrate analyzed the evidence of indecent assault. He argued that the court should have set out the evidence which it relied on to arrive at its conclusion and failure to do so, renders the judgment incompetent.

The nature of the offence and circumstances of the case should have lead the court to find that the appellant had no case to answer. It is doubtful from the evidence that the complainant was indecently assault because the evidence of **PW 1**, the clinical officer who examined the complainant found that the bacteria which was found with the appellant were different from those detected from the complainant. There were no investigations conducted in this case. The complainant was taken to the police station by the mother and the neighbours were never interviewed by the police. Counsel therefore asked this court to allow the appeal and quash the conviction.

This appeal was opposed by ***Mr. Koech*** the learned Senior State Counsel on behalf of the state. He submitted that the evidence adduced to prove both the counts was intertwined. There was overwhelming evidence of defilement; however the trial court convicted the appellant on the count of indecent assault

which did not require another set of evidence. As regards the sentence, the Senior State Counsel submitted that the same is lenient considering the seriousness of the offence.

This being a first appeal, this court is mandated to re-consider and re-evaluate the evidence and arrive at its own determination on whether to uphold the conviction, and in doing so to bear in mind that the court never saw or heard the witnesses and give due allowance for that. [See the case of **Njoroge vs Republic [1987] KLR page 19**.]

I now wish to review the evidence that was considered by the trial court briefly. The complainant **PW 3** is a girl child aged five years. She was found too young to be sworn as a witness. She told the court that knew the appellant who is called George. *"He called me to his house, he removed me the underpants and told me not to cry. Then he inserted his thing into me here (showing her private parts). He did that three times and I felt pain. After he left me I went home. When I told my mother she took me to the police. She also took me to hospital. I do not know the name of the hospital. I know that man. He lives next to our house. He is called George. I do not know his other names."*

PW 2, *G W* is the mother of the complainant. She told the court that on 16th August 2004, at 5.00 p.m. she called out her daughter (the complainant) who emerged from the appellant's house. She noticed the child was walking with some difficulty and when she asked her what had happened, the complainant told **PW 2** that the appellant had asked her to sleep with him on his bed in his house. That is when **PW 2** inspected the complainant's private parts and noticed some interference. She took the complainant to the police where she was issued with a P3 form which she used to take child to the hospital. The complainant told **PW 2** that it was George who was neighbour who had defiled her.

PW 1 was the clinical officer at Elburgon hospital and on 16th August 2004, the complainant was brought into the hospital three hours after the assault. After examination she found tenderness on both lips, her vaginal appeared normal but the urine test revealed bacteria which shows the complainant was infected with gonorrhea. According to this witness, it was very hard to tell whether she was raped because the vaginal appeared normal and due to the infection, she suspected there could have been rape.

This is the same clinical officer who examined the appellant two days later and after urine test, the results revealed bacterial cells and according to **PW 1** there was a slight difference between the bacteria cells found in the appellant and those found with the complainant. She said the laboratory technicians could explain the slight difference but they were never called as witnesses.

G G, **PW4**, is the father of the complainant. He was away when the complainant was defiled but he found she had been taken to hospital and set out to look for the appellant whom he arrested and escorted him to Elburgon Police station. The appellant was re-arrested by **PW 5**, ***P.C Julius Tiang.***

It is on the basis of the above evidence that the appellant was found to have a case to answer. Put on his defence, he gave a sworn statement of defence and also relied on the evidence of his wife. He denied having had any sexual intercourse with the complainant and stated that he was framed up by the complainant's mother in a bid to avoid repaying Kshs.200/- which was lent to her by the appellant's wife.

The trial court considered the defence which was dismissed as far fetched as it was the trial court's view inconceivable that **PW 2** could have made up a case of defilement just to implicate the appellant over a small debt which was not even owned to him but to his wife. The court therefore believed the evidence by **PW 2** and **PW 3** which was found sufficient to support the alternative charge of indecent assault.

This appeal raises the issue of credibility of the witnesses especially the complainant and her mother. The trial court accepted the evidence of the complainant and also that of the mother and this court cannot fault that decision which was based on the trial court own assessment of the credibility of the witness.

The trial court had a greater advantage than an appellate court in assessing the credibility of the

witnesses. It was held in the case **Republic Vs Oyier [1985] KLR page 353;**

"***The first appellate court could not interfere with those findings by the lower court which were based on the credibility of witnesses unless to reasonable tribunal could make such findings or it was shown that there existed errors of law.***"

The other issue raised in this appeal is regarding the conviction of the appellant of the alternative charge when the evidence that was adduced was meant to prove the main count of defilement.

According to **Collins Concise Dictionary**, "*indecent assault is defined as an offence of subjecting a person to a form of sexual activity, other than rape against her will.*" The indecent assault can therefore be taken to mean "*any contact of the genital organs with any part of another person's body against that person's will.*"

The task of this court is to re-evaluate the evidence and establish whether the evidence before the trial court supported the alternative charge. Evidence of children in sexual offences is admissible in criminal cases. According to **Section 124 of the Evidence Act Cap 80 of the Evidence Act**, it is provided that:–

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

The complainant was able to explain how she was sexually assaulted. She was able to identify the appellant by his name and that he was a neighbour. This was supported by the medical examination which showed that the complainant's private parts were tender although there was no penetration. The complainant also had been infected with a venereal disease. The complainant was seen leaving the house of the appellant when her mother discovered that she was walking in difficulty and she was in pain.

In view of the above evidence, am satisfied that the trial court properly analyzed the evidence and the appellant was properly convicted on the alternative charge of indecent assault as opposed to the main count since the trial court was satisfied there was no penetration.

For the above reasons, the appeal is dismissed, the conviction and sentence is hereby upheld.

Judgment read and signed on the 9th of February 2007.

MARTHA KOOME

JUDGE