



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 198 of 2005

WILLIAM NG'ANG'A GITAU..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Resident Magistrate L. Wachira at the Thika Law Courts, in Criminal Case No. 7126 of 2004, dated 6th April, 2005)

JUDGEMENT

The charge brought against the appellant was defilement of a girl contrary to section 145(1) of the Penal Code (Cap.63, Laws of Kenya)

The particulars were that on 3rd August, 2004 at **[Particulars withheld]** Village in Thika District, he had carnal knowledge of P W, a girl under the age of 16 years. The appellant faced an alternative charge: that he committed indecent assault on a female, contrary to section 144(1) of the Penal Code. The particulars of the alternative charge were that the appellant, on 3rd August, 2004 at **[Particulars withheld]** Village in Thika District, unlawfully and indecently assaulted P W, by touching her private parts.

Five witnesses gave testimony against the appellant. PW1, a girl of 15 years of age, was sworn and testified that on the material day, at about 1.00 p.m., she was returning home from **[Particulars withheld]** Primary School. When she got close to bushland near **[Partuiculars withheld]** Camp, she met the appellant, who was well known to her. The appellant was living in a shared room with PW1's brother, and he had previously worked on PW1's family land. This time when PW1 met him by the bushland, he was carrying a hoe on his shoulder. When he said a word of greeting to PW1, she did not reply, but walked on, not harbouring any fear of the appellant. The appellant followed up his unanswered greeting by first removing the shoes he was wearing, then telling PW1 that he knew her as **M M** daughter, and she had no reason to run away from him. She felt afraid and took to her heels, whereupon the appellant gave chase, caught up with her, grabbed her and held her aloft on his shoulders. He took her into the bush, laid her down, removed her underwear and inserted his penis into her private parts even as he choked her with a scarf and held a knife to her right ear. During the chase, PW1 had dropped her school papers on the road; and these attracted a motor cyclist who stopped to pick them up; and his proximity to the bush *locus in quo* now gave the appellant anxiety, and he got off his prey, and took off. The motorcyclist saw PW1, and she told the motorcyclist that she had been raped by somebody known to her. Some women passers-by helped PW1 to get a motor vehicle and get home. At home she found her sister whom she told what had just happened. Her sister took her to the Police station, where she was asked to go to hospital; she was later treated and given medication at Thika District Hospital. PW1 testified that this was the first

time she had a sexual encounter, and she felt as if she had cuts in her body.

Subsequently the appellant was arrested, after PW1 took Police officers to his abode.

Cross-examined by the appellant, PW1 testified that she knew him well because he was at that time living in the same house with her brother, and he in the past, used to have his meals at her parent's home. She testified:

"I know you only as **Ng'ang'a**. I even used to bring for you food."

The complainant's sister gave her testimony as PW2. She is 18 years old. She was at home when PW1 came to her and complained that she had been chased by a man who had in the past, been cultivating on their family land; the man caught PW1, tied her with cloth material, dragged her into the coffee bush, and defiled her. The complainant had been experiencing difficulty in walking, as she came home to PW2. She took the complainant to Gituamba Police post, to report the matter; and the Police asked them to go to hospital for PW1 to be attended to. The two ladies went to Thika District Hospital, and then returned to the Police Station. And in the night the accused was arrested.

The complainant's mother, **L W**, gave testimony as PW3. She had been at work on 3rd August, 2004 when, at 7.00 p.m. she received a report that the complainant had been defiled by **Ng'ang'a**. The complainant became unwell following the incident, and was treated at Thika District Hospital. The appellant used to be PW3's gardener, and she was quite familiar with him.

On cross-examination by the appellant, PW3 testified that she had employed him in 2003, to cultivate her land. She further testified that even she herself had, on another occasion, been the victim of the appellant's sexual attack, and that only the appearance of another man at the scene had scared off the appellant.

Dr. John Kisiangani, PW4, testified that she examined the complainant at Thika District Hospital at night on 4th August, 2004, in respect of an alleged defilement which had taken place a number of hours earlier on, on 3rd August, 2004. PW4 found the complainant's clothing soiled, though it had no blood stains. He found the complainant to be in fair general condition, though with tenderness of the neck region, of the abdomen, of the chest and ribs. The injuries found were about two days old, and he assessed these to have been caused by human hands. He classified these injuries as harm, and prescribed post-exposure prophylaxis for HIV, and also antibiotics. The nature of the harm identified was rape. PW4 assessed the complainant's age as 15 years. He found no vaginal lacerations, but hymen was missing; and there were numerous pus cells, and spermatozoa. From the presence of stains and from the laboratory evidence of spermatozoa, PW4 concluded that the complainant had undergone actual sexual intercourse.

On cross-examination, PW4 thus testified:

"Sperms were found [and so the act of sex took place]. There were no photographs of who did it. I do not know you. I do not know who raped her, but I have evidence to show that somebody did. The rest I leave to the Police....Had they brought you I would have tested you also."

PW5, No.70929, **Police Constable Protus Irungu**, of the Gituamba Police Post testified that he had been at work at 4.00 p.m. on the material day. He received a report from a woman, that her daughter had been defiled. He booked the report in the Occurrence Book, and sent the complainant to Thika District Hospital for treatment, issuing a P3 form to be filled in by the doctor. He took statements, and went with the complainant and one **Police Constable Mugwita**, to the house where the appellant lived, at Ndura Scheme, House No.3. PW5 found the appellant in a neighbour's house, and he was identified by the complainant before being arrested. PW5 took the appellant to the Police post and duly charged him with the pertinent offence.

When, on the basis of the evidence, the learned Magistrate put the appellant to his defence, he elected to make an unsworn statement and to call two witnesses.

The appellant said in his unsworn statement that he had been unwell on 3rd August, 2004 and so he had stayed at home. He was unwell for some time; but on 4th August, 2004 he had gone to his neighbour's house to watch television, and it is then that the Police officers came along and arrested him. He said he had learned for the first time from the Police officers that it was being alleged he had committed rape. He said the claim was false.

The appellant's first witness, **Ng'ang'a Njuguna**, made a short testimony in which he said that he was unwell on the material date; he woke up belatedly at 10.00 a.m.; he went to the local shopping centre where he stayed with the appellant and PW2 the whole day; and he later met the two again.

DW2, **Njau Njuguna**, gave an equally short testimony which shed rather limited light on the matter the subject of the charge. He said the appellant had called him, on the material day, at 8.00 a.m., and the two had sat together until mid-day. He left the appellant with DW1; he went to work in the farm, and returned at 5.00 p.m. to find only DW1. He testified that he did not know what the appellant could have done during the hours when he wasn't with the DW2.

From the evidence, the learned Resident Magistrate gave a judgement the main thrust whereof runs as follows:

“Upon evaluation of the evidence on record, I find that PW1 was able to clearly narrate what happened to her and by whom. The medical evidence...[adduced] by the doctor corroborates her evidence. This Court finds that the prosecution was able to fully prove their case of defilement against the accused. I find the accused guilty as charged for defiling a minor and convict him as by law provided.”

After taking into account a matter of record, that the appellant was a first offender, the learned Magistrate sentenced him to a fifteen-year term of imprisonment.

The appellant comes before this Court on appeal pleading as follows:

- (i) that his defence and mitigation was “totally ignored” by the trial Court;
- (ii) that no medical examination was carried out on him, to establish that he committed the offence charged;
- (iii) that there was bad blood between himself and the complainant's mother, and the trial Court did not take that into account;
- (iv) that the learned trial Magistrate was biased when she passed sentence;
- (v) that the sentence meted out by the trial Court was “very harsh and excessive.”
- (vi) That the prosecution witnesses gave contradictory evidence.

Learned counsel **Mrs. Kagiri** noted that the appellant, in his written submissions, has raised the further point that the trial process was defective because the Court had not recorded the language in which the plea had been taken, and in this regard he invoked s.198 of the Criminal Procedure Code (Cap.75) and s.77(2) of the Constitution.

Mrs. Kagiri submitted, quite meritoriously, in my view, that when plea was taken on 6th August, 2004 every element of the charge had been explained to the appellant in a language that he understood; and the appellant then pleaded not guilty. So, it was urged, and I would accept this submission, that even though the record did not record the specific language – Kiswahili – which was in reference, the issue of merit was the fact of adequate explanation having been availed to the appellant, and to which he consciously pleaded as he saw fit. And since the plea entered was “not guilty”, this by itself meant that the appellant had suffered no prejudice. Moreover, during the whole trial, the trial Court had taken care to record the

language in which each witness spoke. The language used during the trial was Kiswahili; and it is relevant that even during this appeal, it has been recorded that the language of choice of the appellant is Kiswahili – and this is the basis on which the instant appeal has been conducted. I agree, in these circumstances, and after a review of the issues of merit, that the trial of the appellant’s case was not defective.

To the appellant’s claim that he was only “a victim of circumstances” when he ended up being convicted, learned counsel recalled the particularity and conscientiousness of PW1’s evidence, which left no doubt that she, as a young girl of 14 years of age at the time the offence was committed, was the subject of unlawful carnal knowledge and defilement by a person who was well known to her; a person who had lived together with her brother; a person who had been employed by her mother; a person whom she herself had on several occasions served food. The offence was committed in broad daylight, admitting of no possibility of mistaken identity.

Learned counsel submitted that the appellant’s claim that there was some grudge in the background to PW1’s complaint against him, had not been shown by evidence; it had not been the subject of any credible testimony, and it had no relevance to the merits, of the judgement of the trial Court. This submission, in my view, has clear merits.

Mrs. Kagiri submitted, and quite meritoriously, with respect, that the medical evidence adduced in this case properly corroborated the complaint of defilement of PW1, which was the basis of the charge. PW1 had from the beginning complained of having been defiled by the appellant, and all reports of the incident remained perfectly consistent upto the time she reported to the Police station, and right through till she came before the doctor (PW4) who gave positive evidence that she had been defiled, and injured in the process.

Learned counsel submitted that even though the testimonies of PW2 (complainant’s sister) and PW3 (complainant’s mother) might be perceived as hearsay evidence, insofar as such evidence did not arise from personal perception, it would be admissible as evidence of the first report of the complainant. A first report by a complainant carries the *bona fides* of a claim to have been the victim of criminal injury; and the consistency of a first report with subsequent events is excellent proof of the veracity of the original claim. Therefore, the fact that the complainant fully identified the suspect to a number of people at the very beginning, and the ensuing turn of events, revealed that, truly, the complainant had been defiled; and this is eminently admissible in the proof that the person who did the defiling was none other than the accused.

Learned counsel submitted that the defendant’s two witnesses were essentially alibi witnesses; but the burden of the testimony of these witnesses was that they could not account for the whereabouts of the appellant on the material date, at the material time; and thus, these witnesses added no value to the defence case, and had no shaking impact on the prosecution case. **Mrs. Kagiri** submitted that, contrary to the appellant’s claim, the trial Court fully considered the defence case, but it was a case that did not shake the prosecution evidence.

Learned counsel urged the Court to uphold both conviction and sentence. In the words of counsel:

“Fifteen years’ imprisonment was awarded, and the appellant says it is excessive. But this is a very serious offence. There is now a new law, but the appellant was charged under the old law, which provides for a maximum of life imprisonment. The trial Court was considerate in awarding fifteen years, especially after noting that violence was unleashed on the complainant, and the appellant was armed with a dangerous weapon. This constitutes aggravated circumstances, to be taken into consideration in sentencing. The learned Magistrate took all that into account.”

I am in agreement with learned counsel’s argument, in the course of which the focussed and, in my view, conscientious testimony of the complainant has been assessed. That evidence is fully corroborated by the medical evidence adduced by PW4. While it is true that the Court relied most on the testimony of one eye witness, namely the complainant, it is clear to me that that evidence may be regarded as flawless,

most particularly in relation to the identification – indeed, *recognition* – of the appellant as the culprit. That evidence is effectively reinforced by the testimonies of the other witnesses; and I have no doubt at all that the person who defiled the complainant on the material date was none but the appellant.

It follows that the claim by the appellant that he should have been medically tested along with the complainant, to confirm that he had committed the defilement, is of no consequence – once the identification and recognition of him as the defiler had already taken place.

I do not consider the defence proffered by the appellant to have been conscientious or weighty-enough defence which would shake the solid foundations of the prosecution case. Since the appellant had elected to make an unsworn statement, there was no way, under the law, of testing the veracity of his allegations. His two witnesses shed no light at all on his claims – and so the total defence evidence utterly failed to shake the prosecution case which stands on firm grounds, and would lead to a quite safe conviction, as the verdict.

I do not agree that the trial Court did not take into account the appellant’s mitigation statement. What he said when accorded the opportunity to address the Court in mitigation, was this:

“I did not do it. I ask to be given a non-custodial sentence so that I serve the state and my family. The charges, I still say, are a fabrication.”

Even though such a mitigation address, in its construction, would appear essentially vulgar, the Court still took it into account, and in its judicious exercise of discretion, awarded a fifteen-year term of imprisonment rather than a lifetime in jail. It follows, in my view, that it is not a valid claim coming from the appellant, that the sentence meted out was “very harsh and excessive.” I have also seen no evidence that the learned Magistrate had shown bias when prescribing the penalty.

Accordingly, I hereby *dismiss* the appellant’s appeal, uphold the conviction, and *reaffirm* the sentence assigned by the learned trial Magistrate. There was no need, as the learned Magistrate apparently realised, to make any finding on the lesser alternative charge, given the reliable evidence adduced in respect of the main charge.

Orders accordingly.

DATED and DELIVERED at Nairobi this 30th day of May, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mrs. Kagiri

Appellant in person