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

Criminal Appeal 364 of 2006

PETER GITAU MUCHENE…….APPELLANT

VERSUS

REPUBLIC ……..……..PROSECUTOR

(From original conviction and sentence in Criminal Case No. 52 of 2006 of the Principal Magistrate's Court at Kikuyu – L.M. Wachira RM)

J U D G M E N T

PETER GITAU MUCHENE, the appellant, was charged before the subordinate court with the offence of defilement of a girl contrary to section 145(1) of the Penal Code. The particulars of the offence are that on 2nd December 2005 at [*particulars witheld*] village in Kiambu District within Central Province had unlawful carnal knowledge of **AWT** a girl under the age of sixteen years (aged 8 years). In the alternative, he was charged with the offence of indecent assault of a female contrary to section 144(1) of the Penal Code. The particulars were that on 2nd December 2005 at [*particulars witheld*] village in Kiambu District within Central Province, unlawfully and indecently assaulted **AWT** a girl under the age of 14 years by touching her private parts.

After a full trial, he was convicted on the main count and sentenced to serve seven (7) years imprisonment. Being aggrieved by the decision of the subordinate court, he has appealed to this court, against both conviction and sentence.

At the hearing of the appeal, the appellant relied on written submissions which he had tendered.

Learned State Counsel, Mrs. Gakobo, opposed the appeal and conviction and sentence. Counsel submitted that the prosecution adduced that the evidence to prove the charge. Counsel contended that the complaint, PW1, gave evidence that she was called by the appellant who was a neighbour and told to remove her pants and biker and inserted his penis into her private parts. PW1 informed her mother PW2 about the incident, and PW2 took the complainant for medical examination. PW2 confirmed that PW2 was a neighbour. The offence was committed at 1 pm during the day, therefore there was no possibility of mistaken identity. Counsel added that the doctor, PW4, found bruises in the private parts of PW4, which was evidence of sexual assault or defilement. Counsel further submitted that PW1 was truthful and since section 124 of the Evidence Act (Cap.80) did not require corroboration of a child's evidence in sexual offences, the conviction was safe. The defence of the appellant counsel contended, was considered by the learned magistrate but there was no basis for the magistrate to believe that defence.

Counsel further argued that through the appellant claimed that he was not given a Kikuyu interpreter,

the record of proceedings clearly showed that the language used in court was English/Swahili and the appellant did not ask for a Kikuyu interpreter nor complain that he did not understand the language. He also participated in the proceedings and cross-examined the witnesses in detail. On sentence, counsel submitted that the offence carried a maximum sentence of life imprisonment. Therefore the sentence of 7 years imprisonment was neither harsh nor excessive.

This being a first appeal, I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences – see **OKENO –VS- REPUBLIC [1972]EA 32**.

I have re-evaluated the evidence on record. Having re-evaluated evidence on record, I will have to allow the appeal. Firstly, the complainant is a child of tender years being aged only 8 years. Indeed, there is no requirement that her evidence in a trial on sexual offences should be corroborated. However, her evidence should be believable. Where there are circumstances for other evidence that shows that evidence of such child is not believable, then it cannot be a basis for sustaining a conviction. This offence is alleged to have been committed on 2/12/2005. The appellant was a next door neighbour as confirmed PW2, the mother of the complainant. The complainant and her mother do not state when the complainant told her mother about the incident. PW3 said that she was told by PW2, the mother of the complainant, that someone was giving her child money. Again no date is given. The description of that "***someone***" or his name was not given to PW3 or in evidence . The report to the police was made on 8/1/2006 as per the evidence of PW5. This medical examination by PW4 was done on 9/1/2006. Both dates were more than a month after the alleged incident. The evidence by the complainant and other prosecution witnesses leaves so many gaps that one cannot really connect the injury in the private parts of the complaint, PW1, with an incident that occurred on 2/12/2005, and also connect the said injury to the appellant. It is quite possible that the complainant mentioned the name of a neighbour, the appellant, when she was confronted by her mother, apparently in January 2006, to avoid giving the true story and disclose the actual person who had had sexual intercourse with her. The evidence on record does not in my view, prove that the appellant was the one who committed the offence.

Secondly, crucial witnesses were not called to testify. The complainant stated as follows in examination in chief ?

"**I screamed when he was doing bad manners. People from the neighbourhood came. Some of them are called Ciiku and her grandmother mama Kabiji and mama Njeri. Those people entered the house."**

The people mentioned above were clearly important and crucial witnesses. They were not called by the prosecution to testify in court. No explanation was given for the failure to call these witnesses to testify. In **BUKENYA & ANOTHER –VS- UGANDA [1972] E.A. 549**, the Court of Appeal for East Africa, held that the prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that the evidence of uncalled witnesses would have tended to be adverse to the prosecution case.

In our present case, with the evidence on record, court I make that adverse inference that if the witnesses who were mentioned by the complainant as having responded to her screams were called to testify, their testimony would have been adverse to the prosecution case. Therefore the conviction of the appellant cannot be safely sustained. On that ground also the appeal will succeed.

Consequently and for the above reasons, I allow the appeal quash the conviction and set aside the sentence of the subordinate court. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 7th day of November, 2007.

George Dulu

Judge

In the presence of

Appellant in person ?

Mrs. Kagiri for State

Eric – court clerk