



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Criminal Appeal 572 Of 2003**

**JOSEPH MAINA MWENJA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Joseph Maina Mwenja was charged with the offence of **defilement of a girl contrary to Section 145(1) of the Penal Code**. The particulars of the offence were that on the 16<sup>th</sup> of September 2003 at [*particulars withheld*] in Laikipia District, the appellant had unlawful carnal knowledge of JW, a girl under the age of sixteen years. The appellant was alternatively charged with indecently assaulting the said JW contrary to **Section 144(1) of the Penal Code**. It was alleged that the appellant had unlawfully and indecently assaulted the said JW, a girl of under the age of fourteen years by touching her private parts and removing her pants. When the appellant was arraigned before the trial magistrate, he pleaded not guilty to both counts. After a full trial, he was found guilty on the main charge and was duly convicted as charged. He was sentenced to serve ten (10) years imprisonment. Being aggrieved by his conviction and sentence, the appellant has filed an appeal to this court.

In his petition of appeal, the appellant has raised several grounds challenging his conviction by the trial magistrate. He was aggrieved that he had been convicted upon the trial court relying on the fabricated evidence of the prosecution witnesses and especially that of the father of the complainant; He faulted the trial magistrate for relying on insufficient and hearsay evidence to convict him. He was further aggrieved that the trial magistrate had wrongly relied on circumstantial evidence to convict him yet the said evidence did not satisfactorily point to the appellant as the only person who could have perpetrated the offence. The appellant was aggrieved that the trial magistrate had relied on evidence that did not identify and place him at the scene where the offence was committed. The appellant was further aggrieved that the trial magistrate had not considered his mitigation and the fact that he was severely beaten when he was arrested and thus sentenced him to serve a harsh and excessive custodial sentence.

At the hearing of the appeal, the appellant, who was acting in person, made oral submissions urging this court to allow his appeal. He reiterated the grounds of appeal that he had enumerated in his petition of appeal. Mr Koech, Learned State Counsel opposed the appeal. He submitted that the prosecution had proved its case against the appellant to the required standard of proof beyond any reasonable doubt. He further submitted that the sentence meted out on the appellant was in fact lenient considering the nature of the offence that the appellant was charged with and convicted. Before addressing the issues raised on this appeal, I will briefly set out the facts of this case.

PW2 JWM was with the complainant, JW (PW1) at her curio shop on the 16<sup>th</sup> of September 2003 at about 4.00 p.m. PW1, a minor girl of aged six years at the time had just arrived from school. As PW2

was selling curios, she let PW1 go outside the shop to play with other children. At 5.00 p.m. when PW2 closed her shop, she looked for PW1 but could not find her. She went to her home thinking that maybe PW1 had proceeded there. PW2 did not find her at her house. She came back to her curio shop. On her way back, she met with the appellant. From her evidence it is apparent that PW2 knew the appellant. The appellant volunteered information to the effect that he had seen PW1 in the company of three women.

PW2 went towards where she was directed by the appellant that she could find her daughter (PW1). She found the complainant with the three women. She saw the complainant crying. The complainant told her that she was feeling pain in her private parts. Upon examination of her daughter's private parts, PW2 saw that her daughter had been sexually assaulted. She saw what she thought were spermatozoa on the private parts of complainant. She reported the incident to the police on the same day. She was told to take the complainant to hospital where she (PW1) was examined by Dr John Weru (PW5) of the Nyahururu District Hospital. He confirmed that the complainant had indeed been sexually assaulted. He confirmed that the hymen was torn and the vaginal walls bruised. There was a whitish vaginal discharge, which the doctor confirmed to be spermatozoa. He treated and later discharged the complainant from the hospital. The P3 form duly filled was produced as prosecutions exhibit No. 1.

PW3 Rose Njeri Njuguna and PW4 Juliet Owour both testified that as they were walking home on the material day, they saw the appellant emerge from the bushes by the side of the road with the complainant. The complainant was crying whilst dragging one leg. When the appellant saw PW3 and PW4, he ran away and escaped from the scene. PW3 and PW4 then took the complainant to her mother and advised her to check if she had been defiled. PW6 Corporal Peter Mboko investigated the case. He also re-arrested the appellant when he was brought by the parents of the complainant to the police station.

When the appellant was put on his defence, he denied committing the offence that he was charged. He gave what could be said to be an alibi defence. He testified that as he was herding cattle the pasture, he was apprehended by the father of the complainant and beaten to the extent that he was seriously injured. He testified that he had lost his hearing because of the beating. He denied that he had defiled the complainant.

This being a first appeal, this court is mandated to reconsider, re-evaluate and reassess the evidence adduced in the trial before the trial magistrate's court so as to reach a determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of witnesses (*See Njoroge -vs- Republic [1987] KLR 19*). The issue for determination in this case is whether the prosecution proved its case against the appellant to the required standard of proof beyond reasonable doubt.

As rightly pointed out by the appellant, the evidence adduced by the prosecution against him was circumstantial evidence. As was held by the Court of Appeal in *James Mwangi -versus- Republic [1985]KLR 327*, in a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt. In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other coexisting circumstances which would weaken or destroy the inference.

In the present appeal, the appellant was seen by PW3 and PW4 emerging from the forest while holding the complainant who was crying. The appellant ran away when he saw PW3 and PW4. PW3 and PW4 saw that the complainant, a girl of five years, limping. They took her to her mother PW2 who upon examining her private parts saw spermatozoa oozing therefrom. She realised that her child had been defiled. She reported the incident to the police. The police advised the complainant to be taken to Nyahururu District Hospital where she was examined by Dr John Weru. In his testimony before court the doctor established that the hymen was torn. There was a whitish discharge from the vagina. The vaginal wall was bruised and when he took a high vaginal swab he found that the spermatozoa were present. The P3 form showing the finding of the doctor was produced in evidence by the prosecution.

From this evidence it is clear that the complainant was defiled. The issue for determination by this court is whether the prosecution evidence established that it was the appellant who defiled the complainant. Nobody saw the appellant defile the complainant. However the complainant in her evidence testified that the appellant called her as she was playing outside her mother's curio shop, took her to the nearby bushes removed her pants and had sexual intercourse with her. She testified that she screamed. She testified that immediately they emerged from the bush with the appellant she saw PW3 and PW4 who were accompanied by another woman. She was crying. She told them she had been defiled by the appellant. From her testimony, it is apparent that the complainant knew the appellant. This court is aware that evidence of a child in most cases has to be corroborated.

In the instant case, the circumstantial evidence adduced by the prosecution corroborates the complainant's evidence. PW3 and PW4 saw the appellant emerge from the bush with the appellant. The appellant was crying. She was walking with a gait that suggested she had been sexually assaulted. When the complainant's mother examined her private parts, she saw that the complainant had been defiled. She saw spermatozoa. When the complainant was taken to hospital, Dr Weru confirmed that indeed the complainant had been sexually assaulted. When the appellant was put on his defence, he denied that he has defiled the complainant. The only evidence that the appellant adduced in detail related to the circumstances of his arrest. The appellant did not discharge the onus placed on him to at least explain what he was doing with the complainant in the bushes and why he ran away abandoning the complainant when he saw PW3 and PW4.

The fact that it was incumbent for the appellant to give an explanation on the evidence pointing to him as adduced by the prosecution witnesses does not imply that the burden of proof shifted to him. On the contrary, if he was innocently emerging from the bushes with the complainant, then he would be in a position to give a reasonable explanation.

After carefully re-evaluating the evidence on record and also considering the defence offered by the appellant, this court is of the view that the prosecution established its case against the appellant on the charge of defilement to the required standard of proof beyond reasonable doubt. I have also considered the submission made by the appellant of this appeal and the grounds of appeal in his petition of appeal. I find that the said submissions do not raise any issues that would dent the otherwise strong case that the prosecution established against him. The allegations that there existed a grudge between the appellant and the complainant's father was not proved. In the circumstances therefore I find no merit in the appeal against conviction. I consequently dismiss the appeal on conviction.

I will not interfere with the sentence meted out on the appellant by the trial magistrate. In the circumstances of this case, the said sentence was extremely lenient. I will let the sleeping dogs lie. The conviction and sentence by the trial magistrate is hereby confirmed. The appellant shall serve the sentence imposed of ten years imprisonment. It is so ordered.

DATED at NAKURU this 1<sup>st</sup> day of February 2006.

**L. KIMARU**

**JUDGE**