



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

**Criminal Appeal 86 of 2000**

N K W.....APPELLANT

**Versus**

REPUBLIC.....RESPONDENT

*(Being appeal against Conviction and Sentence of C. P. Mwangi, Senior Resident Magistrate, In the Chief Magistrate’s Court at Nyeri)*

**JUDGMENT**

The Appellant was charged with incest by male contrary to *Section 166(1)* of the Penal Code particulars alleging that on the night of 24<sup>th</sup>/25<sup>th</sup> June 1999 at unknown time at **[particulars withheld]** Village in Nyeri District within Central Province the Appellant being a male person had carnal knowledge of NMN a female who was to his knowledge his daughter.

In count two the Appellant was charged with failure to seek medical treatment contrary to *Section 44(1)* of the Public Health Act, Cap. 242 Laws of Kenya particulars alleging that on 24<sup>th</sup>/25<sup>th</sup> June 1999 at **[particulars withheld]** Village in Nyeri District the Appellant while suffering from sexually transmitted disease (gonorrhoea) failed to seek medical treatment.

P.W.1, Dr. Njagi Moses from the Provincial General Hospital Nyeri told the court that he examined a five year old child, NMN alleged to have been defiled by her father. The examination on 28<sup>th</sup> June 1999 and the child was in fair general condition and had healing bruises on the right cheek and also a bruise on the right fore arm and the right ear. The injuries were about one week old and had not been treated by any doctor. Classified as harm. Since the crime was alleged committed on 24<sup>th</sup>/25<sup>th</sup>, injuries of about one week old would seem to be too old.

On the side of sexual assault the doctor said he

***“found external genitalia was normal. There was whitish discharge from her birth canal------. The laboratory investigation on the girl showed there was a few spermatozoa and was suffering from gonorrhoea. I made conclusion that the girl had a sexually transmitted disease which we treated.”***

Concerning the Appellant, the doctor said that the Appellant was taken to him on 29<sup>th</sup> June 1999 and

***“I found his external genitalia was normal and I sent him to the hospital. From the laboratory he was found he had a urethra infection which we treated.”***

During cross-examination when talking about the child, the doctor said the injuries were on the body but not in the private parts but the private parts had an infection. The doctor added:

*“We assessed you too and you had a similar illness.”*

The only illness the doctor had mentioned in relation to the Appellant during the doctor’s evidence in chief was “a urethra infection.” When that doctor therefore said

*“We assessed you too and you had a similar illness,”*

what did he mean? Did he mean gonorrhoea the child was found to have? If so, why had the doctor not been clearer on that? Gives the impression of a loosely speaking person who would not care about the truth of his word. Otherwise a proper construction of his evidence should be that while he found the child already suffering from gonorrhoea only three days after the alleged incest, he found no such gonorrhoea which the Appellant who had only “a urethra infection” which was treated.

Another thing to note is that the Complainant was a child only five years old but had no injuries on her genitalia. The Appellant did not also have injuries on his genitalia. The general injuries found on other parts of the body of the child were about one week old – meaning ranging from five days old to ten days old. The three days of the alleged incest are out.

Furthermore, if by 28<sup>th</sup> June 1999 the child was already suffering from gonorrhoea, the doctor did not explain but it would appear that she had the disease before 24<sup>th</sup> June 1999. The doctor did not also say how old the spermatozoa the child had were and it would appear that the whitish discharge was associated with the presence of gonorrhoea. Otherwise the doctor should have been made to explain because it is wrong for the court to assume facts.

The Prosecutor ought to have known that the offence in count one being a rape related offence and the complainant not only having been a child but also having given an unsworn statement as her evidence, the doctor’s evidence was very very important and had therefore to be carefully adduced to provide the needed corroborative evidence. For a prosecutor who studies the case he has to prosecute and who finds out the case he has to prove against the accused in order to obtain a conviction, that fact could not have escaped him. Surprisingly that was not the case here and as a result my analysis of the doctor’s evidence done above leaves this court with no corroborative evidence.

The Complainant in her unsworn statement gave her story and thereafter every other witness was a witness who was telling the court what the Complainant had told him or what he heard from a person who had heard from the Complainant – so that it all goes to the pool of evidence which cannot corroborate the evidence of the Complainant.

Take P.W.3 Monica Nyambura Ndiritu – a farmer from Kigwandi at her home at 1.00 p.m. on 25<sup>th</sup> June 1999.

*“The child told me the father put her on the bed and lies on her-----.”*

From P.W. 4 H W the separated mother of the Complainant:

*“I heard the accused defiled the child. I was told by P.W.3. I went to see the child.”*

P.W.5 Police Constable Alice Muceke only escorted the Complainant and the Appellant to hospital for medical examination. P.W. 6 Assistant Chief S K received the news from P.W.3 and P.W.7 who told him

*“-----a young child had been defiled by her father.”*

P.W.7 a Field Officer with Family Planning, Hellen Wandia was in her house when she was called by

P.W.3 who said

***“a child belonging to the accused had told her that her father had been defiling her. I went with her to where the small girl was and asked her to tell me what was happening to her. She told me her father would move her to his bed, put off the light (candle) and then he defiled her. She said she would feel pain and then the father would rub her.”***

Those were the characters who surrounded the child complainant after the child had emerged from her disappearance and before that child made her unsworn statement during the court hearing – so that at the end of the prosecution’s case in court the offence in count one alleged to have been a crime committed on one day looked to be an offence which the Appellant used to commit on a number of occasions, if not daily – suggesting an exaggerated story to fix the Appellant.

It is what is contained in counts one and two in the charge sheet that was to be proved. In count one the offence having been committed during the night of 24<sup>th</sup> and 25<sup>th</sup> June 1999. What the Complainant told the court as recorded happened:

*“On a date I can’t remember we were sleeping with my father. While sleeping my father defiled me.”*

That was on one day and therefore when P.W.3 met with the Complainant on 25<sup>th</sup> June 1999 at 1.00 p.m., P.W.3 should have explained to the court the time during which the Appellant had been looking for the Complainant.

According to the Assistant Chief, the Complainant had been seen:

*“quite a number of times sleeping in people’s toilets, at the verandahs or on top of a tree.”*

If that is the case and the Complainant was found on 28<sup>th</sup> June 1999 already suffering from gonorrhoea why should it be said it must be the Appellant. No wonder that the doctor could not be categorical and indeed it cannot honestly be said from his evidence that he found the Appellant to have been suffering from gonorrhoea. The Assistant Chief went on to say:

***“I reported the matter to the Chief and took two A/P’s. I went with them to the accused’s house. Inside his house were two male children who were locked up, in a chicken cage. They had food and a basin to use as a toilet. When I asked him why he had locked up the children that way he told me it was because their mother had run away. I asked him if there was another child. He said yes a girl who he said had become hard headed like the mother and he had taken her to the grandfather. He said the two in the cage had been married with the mother. I pitied the children and decided to take them with me. We also took the accused with us.”***

If that was true, it suggests the Appellant had some social problems which required expert assistance and not criminal prosecution. What the Assistant Chief said the Complainant had been doing could not have been said of the night of 24<sup>th</sup> and 25<sup>th</sup> June 1999. Further it suggests the Complainant was a spoilt child who could go to sleep in people’s toilets, in verandahs or on top of a tree instead of going to seek assistance, if she needed it, from houses of relatives and friends. I get the impression that much was in this case which the court was not made to know. The assistant chief referring to the Appellant as a fighter and drug peddler of bhang.

The Appellant an ignorant man did not know how to defend himself. Nevertheless he put up a defence in which he did not accept he committed the offence. On count one, I come to the conclusion that it was unsafe to convict. Count two was not proved as I have pointed out the doctor did not specifically say he found the Appellant suffering from gonorrhoea. There was no evidence to prove the second count and the trial magistrate erred in finding that count two had been proved.

From the above therefore, I do hereby allow this appeal. Quash conviction of the Appellant on each

count and set aside the sentence on each count. The Appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 28<sup>th</sup> day of February 2005.

**J. M. KHAMONI**

**JUDGE**