REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 26 OF 2014

MAXWEL BUNDI WACHIRA… ………………..…………APPELLANT

-VERSUS-

REPUBLIC………………......………..…..………............RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (E. H. Keago) at Baricho, Criminal

Case No. 638 of 2014 delivered on 16th June, 2014)

JUDGMENT

1. The appellant **Maxwel Bundi Wachira** was charged with the offence of defilement contrary to ***Section 8 (1) (2)*** of the **Sexual Offences Act No. 3 of 2006** vide Principal Magistrate's Court Baricho Criminal Case No. 457 of 2013. The facts are that on 11th May, 2013 at [particulars withheld] Township in Mwea West District within Kirinyaga County, intentionally and unlawfully caused his penis to penetrate the vagina of B. M. M. a child aged 11 years. After a full trial the appellant was convicted and sentenced to life imprisonment. The appellant being aggrieved by the conviction and sentence filed this appeal.

2. The evidence presented at the trial was that on 11th May, 2013 the complainant B.M.M. who is a girl aged eleven years went to take shower at river Nyamindi. When she returned home her mother disciplined her. The mother then left the house to go and buy paraffin. The complainant fearing more beating escaped from the house and went to hide near a field. While hiding in the field, the appellant Maxwel Bundi Wachira met her there and took her to his house. During the night the appellant removed the clothes of the complainant using force and tore the clothes which were a top and trouser. The appellant then penetrated the vagina of the complainant with his penis. The appellant threatened the complainant with a knife before defiling her. He then forced her to sleep on a sofa set. The following morning the appellant gave the complainant Ksh.100/- and sent her away. A neighbour spotted the complainant leaving the house of appellant and reported to her mother. The complainant's mother (P.W.3) went and confronted the appellant to tell her where the complainant was. The appellant informed P.W.2 and P.W.5 that he had given her Kshs.100/- to go to Baricho.

3. In the meantime the complainant had gone to her grandmother's house where her clothes were washed. She also revealed to her aunt that she was defiled. The matter was reported at Kagio Police Station. The complainant was treated and a P.3 form was filled on 13th May, 2013 by **John Mwangi** (P.W.1) who is a Senior Clinical Officer. The appellant had reported at Kiamaciri Police Post that the mother of the complainant had stabbed him with a knife which he handed over to the Police. The complainant identified the knife as the one that appellant had used to threaten her. On 20th May, 2013 the appellant

was arrested and charged.

4. The appellant Maxwel Bundi Wachira gave a sworn defence and told the court that he had met P.W.3 in December 2012 and they had business dealings where he was a broker for rice. They also became friends, exchanged phone numbers and used to meet at Calabash Club to have drinks. Thereafter they disagreed and he avoided P.W.3. On the night of the incident he was at Mwea and came to Kagio at 10.00 p.m. On 12th May, 2013 P.W.3 went to his house at 7.00 a.m. She informed her that he was supplying rice to another woman and having sex with her. P.W.3 became furious and stabbed him with a knife. P.W.3 threatened her that she would not stay at Kagio. He reported at Kagio Police Station. He was treated at Baricho Health Centre and a P.3 form was filled. He was later called and told P.W.3 wanted to reconcile or he would be framed for rape. She also demanded Ksh.10,000 to have her withdraw the charges. He was then arrested and charged.

5. The appellant filed grounds of appeal. However, on 6th December, 2016 he was allowed to rely on additional grounds in his submissions. He raised the following supplementary grounds of appeal.

> ***1. That the learned magistrate erred in both law and fact while convicting me on reliance to P.W. 2, 3 and P.W.4's evidence which was riddled with lots of doubts and inconsistencies this contravening section 163(1)(c) of the Evidence Act Cap. 80 Laws of Kenya.***
>
> ***2. That the learned trial magistrate erred in both law and fact while convicting me on charge that weren't adequately proved to meet the needs of justice as spelt in section 214 of the C.P.C. cap 75 Laws of Kenya, and under Article 50(2)-(a) of the Constitution.***
>
> ***3. That the learned magistrate erred in law while not considering that my rights were breached thus contravening Article 50-(2)-(c) of the Constitution.***
>
> ***4. That the learned magistrate erred in both law and fact while convicting me without considering that there arose an ill motive between me and P.W.3.***
>
> ***5. That the learned magistrate erred in law while rejecting my sworn defence that wasn't challenged by the prosecution side as per law requires in section 212 of the C.P.C. Cap 75 Laws of Kenya.***

6. The appellant faults the trial magistrate for relying on the evidence of P.W.2, 3 and 4 which was riddled with lots of doubts and inconsistencies in contravention of **Section 163(1)-(c)** of the **Evidence Act Cap. 80 of the Laws of Kenya**. This being a first appeal I have evaluated the evidence of the witnesses as is required. In **Okeno -V- Republic (1972) E.A. 36** it was held that a first appellate court has an obligation to re-evaluate all the evidence given at the trial and come up with its own independent conclusions. The Court must make allowance for the fact that it never saw the witnesses as they testified.

7. I have re-evaluated the evidence adduced before trial court. The evidence by P.W.2 B.M.N.M. the complainant who is a minor aged eleven years was that on that material night the appellant took her to his house and defiled her. Her age was confirmed by the production of a birth certificate SN. […], exhibit 3 which shows that she was born on 22nd June, 2002. She gave details of how the appellant forcefully removed her clothes tearing them. The clothes a trouser and top MF1-4a and b were shown to court and were visibly torn. The appellant then defiled her. The appellant threatened her with a knife, exhibit marked MF1-5. There is no dispute that this knife belonged to the appellant as the appellant admitted that it was recovered from his house. It is the evidence of the complainant that in the morning the appellant gave her Kshs.100/- and told her to go to her grandmother's home in Baricho. The minor proceeded to the home of her grandmother.

8. It is noted from the evidence that after the complainant left her mother's house on 11th May, 2013 in the evening she did not meet her mother until she was found in her grandmother's home. The mother had looked for her in vain.

9. It is an independent witness who spotted the complainant leaving the house of appellant in the morning and reported to her mother. The witness **Ester Wanjiru Njeri** (P.W.4) went and informed R.N.M. (P.W.3), who is the complainant's mother. R.N.M. went and confronted the appellant. It is then that the appellant informed her that he had given the complainant Ksh.100/- and told her to go to Baricho.

10. The complainant's aunt **Peninah Waruguru Kibaria P.W.5** confirmed that it is the accused who told them that he had given the child Ksh.100/- to go to Baricho. P.W. 5 confirmed that they had looked for the complainant the previous evening but they never found her.

11. Having considered the evidence of these witnesses that is P.W.2, 3, 4 and 5, I find that it has no inconsistencies or doubts. It is noted that it is an independent witness, that is, P.W.4 Ester Wanjiru Njeri who did not even know that the complainant had gone missing the previous night, who spotted her leaving the house of appellant at 6.00 a.m. and alerted her mother.

12. This evidence shows beyond doubts that the complainant left the house of appellant early in the morning. The evidence by P.W.4 corroborates the evidence of the complainant. P.W.4 testified that she knew that the house where she spotted the complainant early that morning belonged to the appellant. There is no dispute that the house belonged to the appellant. I find that the evidence by the four witnesses is cogent and the trial magistrate was right to rely on the evidence. The trial magistrate found that the circumstances of the case reveal that the complainant spent the night in the appellant's house.

13. Based on the evidence of P.W.2, 3, 4 and 5 the finding of the trial magistrate cannot be faulted. It cannot be said that the magistrate never keenly examined the evidence that was adduced by P.W.2, 3 and 4. Indeed the paragraphs of the magistrate's judgment which I repeat here show that the magistrate analysed the evidence. It is stated in the judgment of the trial magistrate:

> ***"The evidence of the person who committed the act is direct by P.W.2 and is corroborated by the evidence of P.W.4 who saw the accused close the door upon releasing the complainant on 15th May, 203 at 6.00 a.m.……***

14. The evidence is clear as to what the P.W. 3 heard the complainant was doing for which she punished her. The complainant said they had gone to bathe in the river which made the mother to punish her. It is a wild allegation by the appellant that it is the children of the neighbourhood, who had defiled her. The complainant was clear that no other person had defiled her on that day other than the appellant. P.W.4 was clear that she is the one who saw the complainant that early morning. There is no evidence that there was another person called Sofia who was not called.

15. I agree with the submission by the State that the evidence was overwhelming and without contradiction. Evidence of P.W.2 is well corroborated by that of P.W. 3 and 4 that the complainant spent the night in the house of the appellant as she did not sleep at home during which time she claims she was defiled by the appellant after which she was seen leaving the house at 6.00 a.m.

16. Though the accused tried to say he had a grudge with the mother of the complainant, it is clear that what he stated in his defence was not put to the witnesses. Indeed during cross-examination the accused admitted that he did not cross-examine the complainant's mother about the rice business and the tenancy nor did he cross-examine the witness he referred to as Kimizo on the disagreement. This is a fact which shows that the defence was an after-thought. There was no reason why the trial magistrate could have doubted the witnesses. The trial magistrate was right to rely on the testimony of the witnesses. The accused did not demonstrate how **Section 163(1) (c)** of the Evidence Act applied. No previous statement was brought to the attention the court.

17. The second ground is that the charge was not adequately proved to meet the needs of justice as spelt in ***Article 50(2)(a)*** of the **Constitution**. This is based on the evidence of the clinical officer P.W.1 who stated:

> ***"On cross-examination (sic) of the genitalia her hymen was broken though not freshly". A***

broken hymen will just heal like any other wound. Its membrane and not much of tissues tear. From the medical evidence it was not easy to tell whether there was defilement or not."

18. I have considered the evidence of the clinical officer John Mwangi (P.W. 1) who examined the complainant (P.W.2) and filled a P. 3 form. He testified that the complainant presented a history of defilement by somebody known to her. He found a broken hymen though not freshly. There was no discharge. H.V.S. was not done. The patient was put on anti retroviral drugs, antibiotics and post exposure and counseling was done. He relied on the clinical notes from Sagana Health Centre. He produced the treatment notes and the P. 3 form as exhibits 1 and 2.

19. The complainant identified the appellant as the person who defiled her. This was corroborated as I have already pointed out by P.W.4 who saw her leaving the house of appellant. It was her (P.W.2) evidence that she was defiled. The treatment notes exhibit 1 show that she was treated on allegation of defilement and an impression of defilement was arrived at.

20. Treatment then followed. At the time of treatment, the treatment notes indicate that seminal fluid was seen. The complainant did admit that she was defiled before by another boy in the toilet but she stated categorically that no other person had defiled her on the material day. As submitted, the fact that she had been defiled before does not vitiate the evidence before court which leads to the appellant as the person who defiled her on the material day.

21. The Court is to consider the law applicable. ***Section 2*** of the **Sexual Offences Act** provides:-

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

As pointed out above the complainant stated that she was defiled and gave an account of how the appellant defiled her. She gave this history to the person who treated her and the clinical officer. The clinical officer did not rule out defilement. Since some tests were not carried out he could not say there was defilement or not.

22. The unshaken evidence by the complainant is that the appellant penetrated her. The evidence of the clinical officer cannot be taken in isolation. There was evidence on treatment notes which were produced as exhibits that there was seminal fluid seen. There is evidence by complainant that there was penetration and there is evidence that the clothes the complainant was wearing on the material night were torn and the complainant was treated. In the case of **Oiruri Mose -V- Republic Court of Appeal (2013) eKLR** the Court had this to say:

> ***"In any event the offence is against penetration of a minor and penetration does not end in release of sperms into the victim……………….***
>
> ***So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ."***

Thus all the prosecution needed to proof was that there was penetration.

23. The treatment notes exhibit 1 which is not challenged by the appellant is that there was seminal fluid and impression was that there was defilement. It followed the treatment of the complainant with a cocktail of drugs and was required to be examined after one month. I find that this piece of medical evidence which was not shaken corroborates the evidence of the complainant that she was defiled.

24. The complainant was truthful as she admitted that she had been defiled before by a boy in the toilet before this incident. It is not possible that the complainant would have been treated with all these drugs and be ordered to go for review after one month that is on 12th June, 2013 as is evidence on exhibit 1 if there was no defilement.

25. The evidence of the clinical officer in view of the definition of penetration given above, given the evidence of the complainant and the treatment notes, the ingredients of the offence are demonstrated. It is not expected that the appellant would defile the complainant in the open for there to be witnesses to the fact of penetration. The Court can only rely on the evidence of the victim. She was cross-examined and maintained that the appellant is the one who defiled her and no other person had defiled her that day other than the appellant.

26. The treatment notes and P3 form show that she stated that she was defiled by a person known to her. The appellant was living in a plot alone as other tenants had moved out when the plot flooded. This the appellant admits. This is the plot where the complainant was seen leaving at 6.00 a.m. by P.W.4 who got shocked and informed her mother. The evidence of the complainant is reliable.

27. Though the trial magistrate did not expressly record reasons for believing the complainant as provided under ***Section 124*** of the **Evidence Act**, he indicated that her story as to who defiled her was consistent. The trial magistrate stated as follows:

> ***"On the first issue, the complainant stated that she was defiled on the night of 11th May, 2013 in a house of someone who was known to her. She repeated the same story to her aunt, police and before court. She equally told that (sic) the clinical officer who examined her for purpose of filling the P. 3 form.***
>
> ***The complainant girl (sic) stated she was defiled by the accused who was well known to her. It is the finding of this court that indeed she was defiled."***

28. The section requires corroboration of the evidence of a child of tender years. It provides:

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim, the court shall receive the evidence of the alleged victim and proceed to convict the accused if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim was talking the truth."***

29. Where reasons were not recorded, the evidence must be corroborated. I find that the evidence was afforded corroboration by the witnesses and the medical evidence as I have pointed out. The prosecution discharged its burden of proof.

30. The 3rd ground the appellant submits that ***Article 50 (2) (c)*** of the **Constitution** was contravened as the trial magistrate failed to supply him with proceedings to enable him prepare his submissions prior to defending himself. That he was not availed defence exhibits which thus cushioned a failure of justice against him and denial of fundamental rights.

31. The record shows at page 20 line 2-3 the appellant requested for proceedings. The magistrate ordered that he be supplied upon payment of requisite fees. The appellant never informed the trial magistrate thereafter that he did not get the proceedings. He went ahead and gave his defence. The trial magistrate allowed him to produce his defence exhibits at the time of cross-examination. The prosecution could not accord him his own exhibits. ***Article 50(2) (c)*** Supra provides that the accused has a right to fair trial. There is nothing demonstrated to show the trial was not fair. The appellant never informed the court that he was not supplied with proceedings. His rights were not violated. He was given a chance to be heard. There was no miscarriage of justice and no injustice was suffered.

32. The fourth ground the appellant submits that the court never considered that the matter revolved from ill motive against him by P.W. 3 following aborted partnership of business of selling rice to her which prompted her to assault him. I find that the trial magistrate considered the matter which accused raised only in his defence. He concluded that it was an after-thought as it was not put to witnesses where they were cross-examined and had laid no basis during the prosecution's case. The trial magistrate rightly found that the assault alleged was after the defilement and he found that the treatment notes and P. 3 form which appellant produced show the incident happened on 12th May, 2013 at 7.00 a.m. That this is the

same time the said witness stated that he went to the house where the daughter was seen leaving that morning and demanded to know her whereabouts. That it is after that demand that the appellant enabled them to trace the girl to Baricho. That the complainant's mother may have reacted on learning that her daughter was seen in the house of the appellant.

33. It is clear from the proceedings that the appellant did not lay the basis of his defence when he cross-examined the two prosecution witnesses. Such defence was not plausible. The grudge could not have arisen out of the assault as this happened well after the defilment. The appellant stated that the complainant was demanding Kshs.10,000/- to have her withdraw the charges. It shows he had been charged. I find the trial court was right to find that the defence was not credible.

34. The defence of alibi was disapproved. The complainant told the court that she met accused that night and he took her to his house. This is corroborated by P.W.4 who saw the appellant in his house at 6.00 a.m. opening for the complainant to leave. It has been proved that was his house and it was known to witnesses, the complainant knew the appellant before as well as his house. The appellant admitted that he lived in that plot which had no other tenants. I find that the defence of alibi was dislodged.

35. In his submission, the appellant raised the issue that the trial magistrate did not conduct a *voire dire* examination. This is indeed the case. This does not vitiate the entire evidence of the prosecution. The complainant was eleven (11) years at the time of this incident as proved with a birth certificate. The prosecution discharged the burden to proof her age. The Court was required to satisfy itself that the child understood the nature of the oath and the need to tell the truth. The witness as is clear from the proceedings was sworn. She was cross-examined by the defence counsel. The court could verify the truth of the evidence of the witness as she was cross-examined.

36. Voire dire examination is provided under ***Section 19* of Oaths and Statutory Declarations Act.** It provides that if the court is receiving the evidence of a child of tender age, it must be of the opinion that he/she is possessed of sufficient intelligence to understand the oath and the duty of speaking the truth. In the case of **Maripett Loon Komok -V- Republic (2016) eKLR** the Court of Appeal held:

> ***"It follows from a long line of decisions that*** *voire dire* ***examination on children of tender years must be conducted and that failure to do so does not*** *perse* ***vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that; "In appropriate case where*** *voire dire* ***is not conducted, but there is sufficient independent evidence to support the charge……… the court may still be able to uphold" the evidence to uphold the conviction."***

Further in **John Otieno Oloo -V- Republic (2009)eKLR** the Court of Appeal held –

> ***"It goes without saying that if a witness who does not understand the nature of oath is made to swear her evidence will have higher probative value than if the same evidence was given unsworn."***

37. In this case the complainant was sworn. There is independent evidence which corroborated the evidence of the complainant. As such there is sufficient evidence to uphold the charge. It is also true to say that the evidence of the complainant is of probative value as she was sworn and was cross-examined.

38. The appellant also raised the issue that the charge sheet was defective as it shows he was charged in court on 14th March, 2013. P.W. 6 **P.C. Joseph Soita** admitted that there was an error as the accused was arrested on 20th May, 2013 and produced in court on 21st May, 2013. The appellant in his defence said he was arraigned in court on 21st May, 2013. He was arrested and charged in court as provided under ***Article 49*** of the **Constitution**. He did not suffer any injustice. ***Section 382*** of the **Criminal Procedure Code** provides that no finding or sentence of a court of competent jurisdiction shall be set aside on account of error if no failure of justice was occasioned.

39. The appellant also raised the ground that a witness Ester Wanjiku listed on the charge sheet was not called. ***Section 143*** of the **Evidence Act** provides that no particular number of witnesses shall in the absence of any provision of law to the contrary are required to proof a charge. **Julius K. Mutunga -V- Republic C.A. 31/2005 UR** held it is the discretion of the prosecution to call witnesses and court will not interfere with that discretion. Failure to call the witness does not weaken the prosecution case. In this case the witness was called.

40. The appellant raised the issue that the knife which was brought to this Court was not related to the case. I find that this is not true as the complainant gave evidence that she was threatened with a knife. She gave the report to P.W. 6 who recovered the knife after the accused reported he was stabbed with it.

41. In conclusion I find that the evidence adduced was overwhelming. The conviction was proper in the circumstances. The complainant was eleven (11) years old at the time the offence was committed. The sentence passed was appropriate upon conviction under ***Section 8 (1) (2)*** of the **Sexual Offences Act**. The conviction and sentence was appropriate. I find that the appeal lacks merits. I dismiss it.

Dated and delivered at Kerugoya this 24th day of March, 2017.

L. W. GITARI

JUDGE

24.3.2017

Read out and signed in open Court, in the presence of M/S Kiarie, State Counsel for State, Appellant present and Court Assistant Naomi Murage this 24th day of March, 2017.

L. W. GITARI

JUDGE

24.3.2017