REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 215 OF 2011

JOSHUA GICHUKI MWANGI....................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Appeal against conviction and sentence imposed in Criminal Case Number 218 of 2011,

Republic vs Joshua Gichuki Mwangi at Karatina, delivered on 17.10. 2011

by L. Mbugua, P.M.).

JUDGEMENT

The appellant herein seeks to quash the conviction and sentence passed against him by the Learned Principal Magistrate in criminal case number **215 of 2011, Republic vs. Joshua Gichuki Mwangi at Karatina.** In the said case the appellant was charged with the offence of defilement of a girl contrary to Section **8 (1) (3)** of the Sexual Offences Act.[1]

The particulars of the offence were that on the **8th** day of March 2011 at about 2200HRS at [particulars withheld]Location in Mathira West District within Central Province, intentionally caused his penis to penetrate the vagina of **J W M** a child aged **15** years

The appellant faced an alternative charge of indecent act with a child contrary to Section **11 (1)** of the Sexual Offences Act.[2] It was alleged that on 8th March 2011 at [particulars withheld] Location in Mathira West District within Central Province unlawfully and intentionally indecently assaulted **J W M** a girl under the age of 15 years by touching her buttocks.

In support of its case the prosecution called a total of five (5**)** witnesses whose evidence is summarized below. In determining this appeal, this court fully understands its duty to review, re-visit and re-analyse the evidence tendered in the lower court in line with the decision of East African Court of Appeal in the case of **Okeno v. R**[3] where it was stated as follows:-

> *"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination*[4] *and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.*[5]*It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings*

and draw its own conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.[6]*"*

In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions.[7] It is the function of this court as a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, if should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses**.**[8]

I now turn to the evidence adduced before the trial court:-

PW1 was a one **Mary Wambui Wachira,** of Karatina District Hospital. He designation or profession was not stated in the proceedings so it's unclear whether she was a Doctor or a clinical officer. She produced the P3 on behalf of the Doctor who prepared. In my view it was necessary for the prosecution to lead evidence on her qualifications and work so as to lay the basis on her capacity or otherwise to produce the P3 on behalf of the Doctor who prepared it. This court is now left guessing on the weight to attach her testimony. This witness whose designation and qualifications do not form part of the record produced the P3 form. Her evidence was that the child was raped, she had changed her clothes, her hymen was absent.

PW2, J W a minor aged 15 years at the time of giving evidence and as the law demands the Learned Magistrate conducted a *Voire Dire* and was satisfied that the minor was well apprised of the meaning of an oath and allowed her to give sworn evidence. She testified that the appellant lied to her mother that her father had had said they go together to cut Napier grass and that her mother allowed her to go with him, that he left her with the donkeys only to return at 10pm, he slapped her, threatened her with a knife and led her to his home and on the way he abandoned the donkeys, led her to a bushy place, slapped her and sexually assaulted her. He led her to his home, beat up his wife asking her to sleep on the floor so that he could sleep on the bed with her. The wife screamed, his family members came and in the midst of the scuffle she fled and spent the night with a another woman. On her way home the next day she met her father and family members looking for her. She informed them of her ordeal, was taken to the Police Station, then Karatina Hospital where she was treated. She was also issued with a P3 form which she identified in court.

PW3 B M N testified that on 8.3.11 at around 4pm he sent PW2 and her brother to the shop, but only brother returned and upon asking his wife informed him that the appellant had informed PW2 that her father had asked that she accompanies her to cut Napier grass which was not true, he tried to look for them in vain and went back home. At around 11.30 pm he was woken up by people among them the appellants wife who informed him that she left the appellant and PW2 in their house, but on arrival he found she had fled. On 9.3.11 they found PW2 at a mechanics place, and then they took her the Police Station where she was issued with a P3form. They also took her to the hospital. He confirmed that the child was born in 1996.

PW4 No. 91143 PC Dorine Ndinda was assigned to investigate the case and charged the appellant in court. She produced the OP3 form and a copy of the birth certificate. **PW5 PC No. 233065** re-arrested the appellant after he was brought to the station by members of the public for allegedly defiling PW2. He issued the P3 form

The trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence and complied with the provisions of Section **211 C.P.C**. The appellant opted to give sworn defence and to call no witnesses. He denied the offence and insisted that his family hatched a grudge and wanted to burn his house, that the complainants' father came and said he was seen with his daughter, that he has no parents and his family members implicated him because they were after his land.

The learned magistrate in her judgement analysed the evidence of all the witnesses and the above defence and concluded that the minor was defiled and that the appellant was the culprit. The Magistrate concluded

that the appellant was guilty as charged and convicted him on the main count. After hearing the accused in mitigation the learned magistrate proceeded to sentence the appellant to **20 years imprisonment.**

Aggrieved by the above verdict, the appellant appealed to this court seeking to quash the conviction and sentence and put forward 4 grounds which in my view can be reduced to two namely, **(a)** Whether there was sufficient evidence to sustain the conviction. **(b)** Whether the appellants defence was considered. At the hearing of the appeal, the appellant submitted written submissions which he adopted.

Learned State Counsel **Miss. Kitoto** opposed the appeal and urged the court to uphold the conviction and sentence and submitted that there was overwhelming evidence to support both the conviction and sentence. He argued that the case was proved as required and that the sentence imposed is lawful.

I have carefully considered the submissions made by the appellant and the state counsel. I have also reviewed the evidence on record and the relevant law. I propose at this stage to examine the ingredients of the offence of defilement so as to link it up with the evidence adduced and determine whether indeed the offence was proved. Section **8 (1) & (3)** of the Sexual Offences Act[9] provides that:-

> ***8(1)*** *A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

> ***8(3)*** *A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.*

Section **8 (1)** cited above provides the key elements of the offence of defilement. These are **"Penetration,"** and **"Child."** The act defines **"penetration"** as partial or complete insertion of the genital organs of a person into the genital organs of another person while **"child"** has the meaning assigned thereto in the children Act. Before we exit the definitions it is extremely important that we bear in mind the category of persons defined in Section **2** of the act as **'vulnerable person'** which *means a child, a person with mental disabilities or an elderly person and 'vulnerable witness'* shall be construed accordingly. I find no difficulty in concluding that the two minors in this case were vulnerable persons.

Section **8 (1)** defies the offence of defilement and therefore before section **8 (3)** comes into play, the prosecution must prove the offence of defilement was committed. As stated above, an important element of defilement is penetration. I have no reason to doubt the account of PW2 and in so doing I take into account the learned magistrate who had the benefit of seeing PW2 also believed her evidence. The child's father also testified that the appellants wife went to call him and informed him that she had left the appellant at her home with PW2. This collaborate the account of PW2.

To me this evidence is cogent and was not rebutted and is sufficient to positively link the appellant with the offence.

I now address the question of medical evidence. As pointed out earlier, I am disturbed that the magistrate never gave details of PW1 in that there is no mention as toi whether she was is a Doctor or her clinical officer or a medic duly qualified to produce the p3 form which had been prepared by another Doctor who is said to have been the one who examined PW2. This omission makes it difficult for this court to attach weight to this testimony because the court cannot assume that the witness was competent nor can this court determine whether the prosecutor led the witness to give evidence on her competence in the medical field. I therefore find it unsafe to attach weight to the testimony of this witness.

Even without considering the presence or otherwise of medical evidence, it is my view that an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. In this connection, I find the evidence of PW2 was sufficient to connect the Appellant with the offence. My position in this regard is fortified by the holding of the court of appeal in **Martin Nyongesa Wanyonyi vs Republic**[10] citing **Kassim Ali vs Republic**[11] where the court stated:-

> *"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can*

be proved by oral evidence of a victim or circumstantial evidence"

As to whether the defence of the Appellant was considered, rrom the judgement, the court considered the appellants defence, and to my mind the defence offered did not rebut the cogent evidence tendered by the prosecution witnesses. I have again considered the said defence and I find that the learned Magistrate arrived at the correct decision. A close examination of the defence offered clearly shows that it does not create doubts on the strength of the prosecution case. In my view, the defence did not rebut the serious allegations made in support of the charges against the appellant. The upshot is that the learned magistrate correctly analysed the evidence and properly convicted the appellant. I find no merits in all in the grounds of appeal. Hence, I hereby up hold the conviction.

PW2 was 15 years at the time of the offence. It is clear that she is a child within the definition in the Children's Act and her age bracket was within the provisions of section **8 (3)** and that she was a vulnerable person within the above cited definition. Commenting on the age of a victim in cases of this nature the court of appeal in **Kaingu Elias Kasomo vs Republic**[12] had this to say:-

> *"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".*

On the sentence, Section **8 (3)** of the Sexual Offences Act provides that a person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than twenty years which is the minimum sentence prescribed under the law. The appellant was sentenced to **20** years imprisonment.

I have considered the law, and the seriousness of the offence and the age of the victim at the time of the offence and I find no reason to interfere with the said sentence.

The up-shot is that the appeal against conviction and sentence is dismissed and the conviction and sentence are hereby up held.

Dated at Nyeri this **11th** day of **November** 2015

John M. Mativo

Judge

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[1] Act No. 3 of 2006

[2] Ibid

[3] {1972) E.A, 32at page 36

[4] See Pandya vs Republic {1957}EA 336

[5] See Shantilal M. Ruwala vs Republic {1957} EA 570

[6] See Peter vs Sunday Post {1958}EA 424

[7] Shantilal M. Ruwala V. R (1957) E.A. 570

[8] see Peters V. Sunday Post (1958) E.A. 424

[9] Supra

[10] Criminal Appeal no. 661 of 2010,(Eldoret), D. K. Maranga, D. Musinga & A. K. Murgor JJA

[11] Criminal Appeal No. 84 of 2005 (Mombasa)

[12]Criminal Appeal no. 504 of 2010 cited in Martin Nyongesa Wanyonyi vs Republic, Criminmal Appeal no. 661 of 2010