



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 194 OF 2011**  
**NJAGI NDWIGA JOHN.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

***(BEING AN APPEAL FROM THE SENTENCE AND CONVICTION OF M.W. WACHIRA CHIEF  
MAGISTRATE EMBU IN CRIMINAL CASE NO. 23 OF 2011 ON 31<sup>ST</sup> OCTOBER, 2011)***

**J U D G M E N T**

NJAGI NDWIGA JOHN alias NGAI MAGATI the appellant was charged with the offense of defilement contrary to Section 8(1) (2) of the Sexual Offences Act number 3 of 2006.

The particulars are that:-

***On the 21<sup>st</sup> day of December, 2010 in Embu Municipality within Embu County intentionally caused his penis to penetrate the vagina of MW a child aged 10 years.***

In the alternative charge, the appellant was charged with the offence of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act number 3 of 2006**. The particulars are that:-

***On the 21<sup>st</sup> day of December, 2010 in Embu county intentionally touched the vagina of MW a child aged 10 years with his penis.***

The matter proceeded to full hearing and the appellant was convicted and sentenced to life imprisonment. He was aggrieved by the judgment and he filed this appeal raising the following grounds:

1. ***The appellant pleaded not guilty before the trial magistrate.***
2. ***The learned trial magistrate erred in law and facts by failing to consider that the appellant was not supplied with prosecution documents to help him prepare for his defence.***
3. ***That the learned trial magistrate erred in both law and facts for convicting the appellant without following the fact that he was not examined by the doctor to prove that he was not the one who was in the act.***
4. ***The learned trial magistrate erred in both law and fact by rejecting the appellant his right of cross-examining PW1 who was the complainant in his case.***
5. ***That the trial magistrate erred in both law and fact by failing to consider the contradiction present in prosecution witness.***

The case of the prosecution is that PW1 aged 10 years then was going to visit her grandfather. She was with her younger sister. On the way, she saw a man behind them. He held her mouth and clothes. He dragged her to his house and locked her there. She had known this man as “Ngai”. He removed her dress and pant and defiled her severally. She wore her clothes and went home. When the grandfather came, she reported to him.

She was taken to Karau health center then Kianjokoma Hospital then Embu Provincial General Hospital for treatment and examination. She identified the appellant as the Ngai who defiled her. The matter was reported to the police.

The appellant in his unsworn defence denied the charge saying he was framed. His wife (DW2) testified that her husband did not commit the offence. That he was not at home that day. She however admitted she could not know where he had gone as she was not with him.

The appellant presented the Court with written submissions that mainly challenge the medical evidence. Ms. Ing'ahizu for the state opposed the appeal. She said there was defilement and the court had believed the witnesses who testified.

This is a first appeal and this Court has a duty to re-evaluate the evidence and come to its own conclusion. I am also alive to the fact that I did not see nor hear witnesses and I should give an allowance for that. The Court of Appeal in the case of *MWANGI VS REPUBLIC [2004] 2 KLR 28* held thus:

- 1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.***
- 2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.***
- 3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; 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 had the advantage of hearing and seeing the witness.***

I have considered the submissions by both the appellant and the state, the grounds of appeal and the evidence on record. The prosecution called a total of four (4) witnesses. The learned trial magistrate appreciated that PW 1 was a child of tender years. She thus conducted a *voire dire* examination to satisfy herself that the minor could testify and how she could testify. This witness said she had been defiled. The medical evidence by Dr S. Mwangi (PW 4) confirmed that prior to examining the child on 23.12.10 he confirmed she had been treated at Karau hospital vide medical card number 9129/2010 (exhibit 1). The card (exhibit 1) shows the child was seen on 21.12.10 3.27 p.m. His examination confirmed that the child had been sexually assaulted. Her hymen was missing and she had a smelly discharge. The learned trial magistrate correctly found that the child had been sexually assaulted.

The next issue to determine is whether the appellant is the person who defiled PW1. Before I answer that issue, I will first deal with the grounds of appeal.

### **Ground 2**

This issue was never raised in court. He did not apply for these statements. The record shows he examined the witnesses. At one point, he was represented by Ms. Njeru who later withdrew.

### **Ground 3:**

The appellant was arrested on 02.01.11 while the offence was committed on 21.12.10. There would

have been no need of having him examined. By the time PW1 was examined on 23.12.10 no spermatozoa were seen save for grand positive bacteria.

**Ground 4:**

This allegation is false. He was given an opportunity to cross-examine witnesses and he did cross examine PW1 as is borne by the record at page 9 lines 1 – 9.

**Ground 5:**

There are no contradictions noted in the evidence by the prosecution witnesses. **Section 124 of the Evidence Act** provides:

***“Corroboration required in criminal cases notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

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

In this case, PW1 is the only eye witness. This is what the learned trial magistrate states about her in the judgement at page 29 lines 14 – page 30 lines 1 – 5

***“In the proceedings before taking the evidence of the complainant child M W, the court tested the child, by asking her questions which were recorded. She gave answers that were also recorded. Arising from that examination, the court was satisfied that the child understood the importance of telling the truth even though she did not understand the nature and seriousness of an oath.***

***In my view, this court tested the child PW 1, and concluded that she is telling the truth. This court saw the child, observed the child and the manner the child answered questions and the court is satisfied the child is of the age of 10 years as stated by the doctor in the P3 form. Her evidence is admissible under Section 124 of the Evidence Act. She could not have mistaken the accused because she knew him before the date of defilement. She knew him by his alias name N. The accused is her neighbour”.***

This minor did not keep quiet with whatever had happened to her. She immediately reported to her grandfather (PW2) when he came. She even told him she was in a lot of pain. She was taken by PW2 to Hospital. The hospital card (exhibit 1) shows she was treated on 21.12.10 3.37 p.m. There is no doubt that PW1 was a credible witness. She knew the appellant as he was a neighbour. She knew his name.

The appellant's defence was a mere denial. DW2's evidence did not assist him as she was not with him as he did his errands.

My finding is that the learned trial Magistrate analyzed the evidence well and arrived at the correct decision. The sentence is also lawful. I dismiss the appeal and uphold the lower court decision.

Right of appeal explained.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF NOVEMBER 2013.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Ms. Ingahizu for State**

**Appellant**

**Njue CC**