



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

Criminal Appeal 7 of 2008

(From original conviction and sentence in Criminal Case No. 4612 of 2006 of the PM's Court at Nyahururu – H. M. Nyaberi {R. M.})

JOSEPH NDEGWA MUGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Joseph Ndegwa Mugo was charged with the offence of **defiling a girl under the age of 11 years** contrary to **section 8(2) of the Sexual Offences Act**. He also faced an alternative charge of **indecent act with a child** contrary to **section 11(1)** of the same Act. He was tried before the Resident Magistrate, Nyahururu and was convicted on the main charge. He was sentenced to 20 years imprisonment and now appeals against both conviction and sentence. In his petition of appeal, which is in the nature of mitigation, he raises the following grounds of appeal:

- 1) *The learned trial magistrate erred in law and fact in accepting and upholding the medical evidence adduced whilst it flowed with contradictions and doubts..*
- 2) *The trial magistrate erred in law and fact in finding the evidence adduced of identification was well established whereas the conditions for positive identification were not favourable thus creating a high chance of mistaken identity.*
- 3) *That the trial magistrate erred in finding the prosecution's case sufficiently established whilst some essential witness was not summoned to testify.*
- 4) *That the learned trial magistrate erred in law and fact in rejecting his defence.*

The appeal was opposed by the State which was represented by the learned State Counsel Mr. Mugambi. The learned State Counsel submitted that the conviction was based on sound and reliable evidence of the complainant and that of PW3, the mother of the complainant who corroborated her evidence. **PW3 M.N.W** saw the appellant coming out of the house where the offence was committed. PW3 described the offender to members of the public both by features and his manner of dress. Counsel further submitted that the medical officer confirmed the injuries inflicted on the complainant. Further, Mr. Mugambi submitted that the appellant's defence of a frame up was rejected for good reasons.

Responding to the State's submissions, the appellant pleaded with this court to reduce the sentence. He stated that he was remorseful and would not commit such an offence again. The particulars of the

offence in respect of which the appellant was convicted were that; on the 2nd day of November 2006 at Nyandurua District within Central Province, had carnal knowledge of Maureen W.N a girl under the age eleven (11) years.

My review of the proceedings of the lower court shows that a total of six witnesses testified for the prosecution. **PW1 Sammy Mahugu**, a doctor attached to the Ol Kalou District Hospital testified that on 2nd November 2006 he examined the complainant, M.W.N aged 5 years. The mother gave him the history of the girl's defilement. The girl reported to the doctor that "***she was approached by the suspect who held her down and carried out forceful vaginal penetration.***" Medical examination performed on the complainant revealed that the labia majora was swollen and had dried up clear fluid on the surface. There was blood in the vaginal cavity and surface. When taking a high vaginal swab the doctor observed pain and tenderness. The examination revealed the presence of spermatozoa and red blood cells. The hymen was perforated. The complainant was put on Antiretroviral drugs (A.R.V.s) for a period of 28 days. The degree of injury was classified as grievous harm. PW1 further testified that he also examined the appellant on the same day after he had been beaten by members of public.

PW2, M.W.N (the complainant) testified in Kikuyu. She told the trial court that she could recall a day when the appellant found her alone at home and asked whom she lived with. She told him that she lived with her mother and M. She also told him that her mother had gone to the forest. The appellant got hold of her hand and took her to their kitchen. He removed her pant and did what the complainant referred to as '*tabia mbaya*' (bad behaviour) to her. She stated that she felt pain and cried. After defiling her the appellant asked her to give him a cup of water. When her mother came the appellant ran away and her mother "*chased him*". She then told her mother that "the person did to me a bad thing". The complainant was taken to hospital by a police vehicle from Kipipiri police station. The complainant identified the appellant in court as the person who did the bad thing to her.

PW3, M.N.W the complainant's mother testified that on 2nd November 2006 she had gone to Manuka Forest to fetch firewood, leaving her daughter, M.W, aged 5 years at home. She returned home at about 3.00 p.m. and dropped firewood outside her house. Immediately Maureen came out, holding a cup and with her eyes wide open. She was walking with difficulty with her legs wide apart. PW3 lifted her daughter's dress up and noted that she was not wearing her pant. She saw some fluid flowing from the private parts of the child. Just then she heard some movement in the house. As she called out, thinking it was her nephew, Wanyoike in the house, someone came out running towards the maize plantation. She raised an alarm and people responded. They went in search of the person, whom PW3 said was wearing a red jacket, a hat and gum boots. She testified that although she did not know him, the appellant was caught by her neighbours who then called PW3 to confirm whether the suspect held by them was the one who had defiled the girl. She was able to identify him since he was wearing same clothes. PW3 went to Kipipiri police station and reported the matter. The police officers from the station drove PW3, the complainant and the appellant to Ol Kalou District hospital where both the child and the suspect were examined.

PW4, Daniel Mbugua testified that on 12th November 2006, at 2.30 p.m. as he was tilling his shamba when he heard screams and shouts coming from a distance of about 500 metres. He rushed to the scene and found some women. They told him that someone had defiled a child and run way. He saw people searching for the suspect. Soon after he heard them say they had caught the suspect. PW4 testified that the suspect, who was wearing a red jacket, was taken to the road whereupon complainant's mother came and identified him as the person who had defiled her child. The suspect was arrested and escorted to Kipipiri Police Station.

PW5 PC Moses Mangare testified that on 2nd November 2006 at about 3.30 p.m. the appellant was brought to Kipipiri police station by members of the public, in the company of the complainant. The appellant's hands were tied with a rope. It was alleged that the accused had defiled a girl, namely M.W. N PW5 re-arrested the suspect and put him in police custody. The complainant was taken to hospital and the matter was taken up by the investigating officer. PW5 identified the suspect whom he re-arrested as the accused (*appellant*) in the dock.

PW6 PC Erick Kimathi Mwirigi testified that on 2nd November 2006 he was at the Crime Office at Kipipiri police station, when the complainant was brought by her mother and villagers, together with the appellant. The mother of the child told him that she had left her child M in the house alone and went to fetch firewood. On coming back the child told the mother that there was a male visitor who asked for drinking water and had defiled her. PW6 took them to Ol Kalou District hospital where a doctor examined the child and the suspect. Their respective P3 forms were completed. He later completed the witness statements and arraigned the suspect in court.

The appellant's unsworn defence was that he had been framed up. He testified that he is a farmer and hailed from M Village. He told the court that on 2nd November 2006 he had gone to K village to look for a goat to buy. On the way he met a group of people who said they were looking for a person wearing a red shirt and who was a suspect in a defilement incident. The appellant was arrested and told he was the one. He was beaten up and escorted to Kipipiri Police Station where he was re-arrested and finally charged. Later the mother of child came and identified him as the person who had defiled her child.

The evidence adduced against the appellant points squarely at him as the person who committed the offence in respect of which he was charged, tried and convicted. He was positively identified by PW1 and PW3. The mother of the complainant corroborated the child's testimony and her description of the appellant led to his arrest immediately after he had ran out of her house. As rightly stated by the learned trial magistrate, the appellant was positively recognized and identified immediately after arrest when the memory of the defiled child and her mother was still fresh, leaving no room for possible mistaken identity. The fact that he defiled the complainant is confirmed by the medical evidence adduced at the trial, which evidence also confirmed that the victim was aged below 8 years. That being the case, I am of the considered view that the charge against the appellant was proved to the required standards and the conviction on the main charge was proper. The court has no discretion in regard to the sentence herein which in any case ought to have been a life sentence.

Accordingly, the appeal fails in its entirety and is hereby dismissed.

Dated, signed and delivered at Nakuru this 2nd day of July 2009

M. G. MUGO

JUDGE

In the presence of:

Mr. Njogu for State

Appellant present in person