



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**CRIMINAL APPEAL 347 OF 2007**  
**BETWEEN**  
**ADAN MURAGURI MUNGARA .....APPELLANT**  
**AND**  
**REPUBLIC .....RESPONDENT**

*(An appeal from a judgment of the High Court of Kenya at Nyeri (Kasango, J.) dated 28<sup>th</sup> September, 2007*

in

**H.C.CR.APPEAL NO. 198 of 2005)**

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**JUDGMENT OF THE COURT**

*Adan Muraguri Mungara* (Adan), now 50 years old, is serving a twenty year term of imprisonment after his conviction for the offence of defilement of a girl contrary to **section 145(1)** of the Penal Code. The charge sheet upon which Adan was tried before Nanyuki Senior Resident Magistrate (R.N. Muriuki) alleged that:

**“On the 19<sup>th</sup> day of September 2004 at in Laikipia district of the Rift Valley Province unlawfully had carnal knowledge of C.N a girl under the age of 16 years.”**

There was also an alternative count of indecent assault on a female contrary to **section 144(1)** of the Penal Code, based on the same facts, but alleging that Adan touched the complainant’s private parts. It is not clear when the charge sheet was placed before the court as it indicates on the face of it that Adan was arrested on 22<sup>nd</sup> September, 2004 and was taken to court on 30<sup>th</sup> September, 2004 while another endorsement thereon shows that he was taken to court on 4<sup>th</sup> April 2005. We shall revert to this aspect later.

In convicting Adan, the trial Magistrate believed the evidence of the complainant and the medical evidence as corroborative of each other and sentenced him to serve thirty (30) years imprisonment. That was the sentence reduced to twenty years by the superior court after upholding the conviction. Adan is now before us on his second and final appeal which may only be urged on issues of law (**section 361** Criminal Procedure Code). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus

entitling this Court to interfere.

What were the facts of the case?

The girl referred to in the charge sheet, **C. N** (C) was either aged eight years according to her mother, **M.N** (PW1) (M) and the Clinical Officer, **Richard Katenya** (PW5), or ten years old according to C herself who was in standard three in L Primary School. She was nevertheless under sixteen years of age as stated in the charge sheet and nothing therefore turns on her age. She testified in court as PW3 without being sworn because she did not understand the meaning of an oath but the trial Magistrate was of the view that she understood the duty of speaking the truth. Her evidence was therefore not tested in cross-examination. All she said in her brief testimony is that on 19<sup>th</sup> September, 2004 she went to visit her aunt, **F. W** (PW2) (F) who was staying in the same plot with Adan. Adan then told her to carry his child called **W** to his bedroom and he followed them. He put C on the bed, removed her underpants and defiled her. She could not scream because her mouth was held and Adan threatened to beat her. She went home and later reported to her aunt, F.

The report, according to F, was not made until after three days on 22<sup>nd</sup> September, 2004 when C passed through her house on her way from school. She informed her that she had pain in her private parts. When she was asked what happened, C said Adan had defiled her on 19<sup>th</sup> September 2004 in his bedroom. F then took C to her mother, M, who took her to Nanyuki Hospital for treatment. She was examined by the Clinical Officer (PW5) who confirmed that she had bruises on the labia minora and labia majora and a thick white vaginal discharge. A urinalysis examination revealed Gonococci infection showing Gonorrhoea. High vaginal swab also revealed Gonorrhoea but no spermatozoa. He concluded that there was sexual intercourse.

Apparently, on the same day, M and F reported the matter to some youth wingers who in company of other members of the public apprehended Adan and frog-marched him to Nanyuki Police Station and found **Pc. James Nderitu** who re-arrested him. It is also apparent that, there was no investigating officer assigned to the case as none testified. But the Clinical Officer testified that he medically examined Adan on 28<sup>th</sup> September 2004 and found his genitalia intact. Urinalysis was also carried out and it revealed moderate pus cells and some gonorrhoea infection. Syphilis test was negative. All this, he stated, was recorded on a P3 form which he produced in evidence.

Adan was not taken to court until 4<sup>th</sup> April 2005. That would be several months after his arrest on 22<sup>nd</sup> September 2004. He strongly denied the allegations made against him and suggested that they had been framed and orchestrated by Faith who was one of his tenants against whom he had levied attachment of her furniture for failure to pay rent. He swore in his evidence that on the day he is alleged to have defiled C, he was working in the shamba of one **N** in Ntrukuma area and only returned home in the evening. James Nyuguto, the person who sought Adan's services that day, testified as (DW2). He swore that he went to Adan's house at 8.30 a.m. and found him with his wife. He gave him some

work of cutting fodder for his cows and he accompanied him in doing that work up to 2 p.m. Thereafter they stayed together until 4 p.m. when Adan left to go home. He gave this information to the police when they arrested Adan on 19<sup>th</sup> September 2004. Adan's wife also testified on oath as (DW1) and was cross-examined. She confirmed that Adan left home in the morning to work in N's shamba at Ntrukuma on 19<sup>th</sup> September 2004 and only returned at 5 p.m. that day. She also confirmed that she had a small child whom she normally left with neighbours when she is attending to her porridge-selling business unless the husband was at home when he would be left with the child. On that Sunday however, she was at home the whole day and did not leave any child with Adan.

As stated by the two courts below, the only evidence tending to connect Adan with the offence charged was that of C and the Clinical Officer. That was the evidence relied on to convict as the rest of the evidence was hearsay. The trial court found that although C's evidence required corroboration in law, she was a credible witness and her evidence was plausible. In rejecting the version of events put forward by Adan, the trial Magistrate stated:

**“The complainant I found had no reason to frame up the accused. It may be true that the accused went to work for DW2. However there is evidence by the Complainant that he defiled her. There is no doubt from the medical evidence that the Complainant was defiled and I find from the evidence on record that it has been proved that the accused is the one who defiled her.**

**The accused in his alibi defence, which I have considered, alleged that he was working in the shamba of DW2. It was on a Sunday. DW2 says the accused was cutting fodder in a shamba next to his (DW2's). The court found that if the accused at any one time left the said shamba and DW2 was not present, then DW2 would not have known where the accused had gone. As for DW1 she stated that she was at home the whole day and although she goes to sell porridge at 10.00 a.m. everyday, on that day, she went to sell porridge at 5.00 p.m. which I found to be doubtful. I found that this evidence by DW1 was not without doubt. The alibiraised by the accused also raised doubts.”**

For its part, the superior court (Kasango, J.) after reviewing the evidence found that both C and Adan were found to be infected with Gonorrhoea and therefore C's evidence was believable. The learned Judge discounted the allegation of frame up, reasoning that Adan did not prove that he carried out any attachment on Faith's property for non-payment of rent. She dismissed the evidence of Adan's wife (DW2) for the reason that, even if she was in her house the whole day, she left him in the house at 5 p.m. The learned Judge however stated, erroneously so, that DW2 left the child with Adan contrary to clear evidence in cross-examination that:

**“On 19/9/04I never left the child with the accused. The accused was at Ntrukuma the whole day.”**

The evidence of Nyuguto (DW3) that he was with the appellant between 8.30 a.m. and 4 p.m. appears to have been accepted by the superior court as it was not discounted.

That is the state of the findings which aggrieved Adan. He was not represented by counsel throughout the trial and before the superior court. He also appeared in person before us and drew up a memorandum of appeal laying out five

grounds. At the hearing of the appeal he submitted a further document entitled “*Supplementary Grounds and written submissions*” in which he listed down five more grounds and his submissions thereon. We do not intend to reproduce those grounds as some of them lack clarity or merely raise issues of fact. There are nevertheless two discernible grounds of appeal put forward by the appellant and which, in our view, are sufficient to dispose of the appeal.

In the first ground, Adan complained that his rights under **section 72 (3)** of the Constitution were violated since he was not taken to court within 24 hours of his arrest as the law requires. We earlier examined the charge sheet upon which the appellant was tried and on the face of it, it indicates that the appellant was not taken before the court until 4<sup>th</sup> April, 2005 which was more than six months after his arrest. There is no indication that he was released on bond to attend court and he says he was not produced in court for that period. In the absence of any evidence from the investigating officer, or any other prosecution witnesses on such glaring omission, we must hold, and now do so, that the appellant’s right to a fair trial was violated.

The second ground was that there was no cogent evidence to support the charge of defilement since the evidence of the child was not tested in cross-examination and was not corroborated by medical evidence as purportedly found by the two courts below.

It is indeed so, that the evidence of C was unsworn but that did not render it inadmissible. The only issue was the weight to be placed on such evidence as against other evidence which was tested in cross-examination. The two courts below also appreciated the law correctly that such evidence could stand on its own for good reasons to be recorded, if there was no corroboration. That is **section 124** of the Evidence Act. It is not clear whether the two courts below were prepared to rely on that evidence solely to convict the appellant. They stated that it was supported by medical evidence confirming that both the complainant and the appellant suffered from gonorrhoea, hence proof beyond reasonable doubt, and the displacement of the appellant’s alibi defence. With respect, we think this is where the two courts went wrong.

We have carefully examined the evidence of the clinical officer (PW5) who testified in court that he had examined the appellant and confirmed that he had gonorrhoea, and that he prescribed medication for him. Unfortunately there is no support in the medical report produced by the clinical officer to support that contention. The report was completed on 29<sup>th</sup> September, 2004 after the appellant was taken to the hospital on 27<sup>th</sup> September, 2004. Under part 4 of that report on “*Male Accused of any sexual offence*”, the clinical officer recorded that there was no abnormality detected (NAD) on the appellant’s penis and completed parts (5) and (6) as follows: -

**“5. Details of specimens or smears collected in examination 2, 3, or 4 of section “C”  
including pubic hairs and vaginal hairs: Hair - intact  
Urinalysis - NAD**

**VDRL - NEG.**

**6. Any additional remarks by the doctor: None.”**

There are documents on record to support those findings. It is therefore surprising that the clinical officer testified that the appellant had gonorrhoea or that he prescribed medication when such testimony was not supported by his own written documents. The appellant denies that he was suffering from gonorrhoea or that any medication was prescribed for him, and we think reasonable doubts are cast on the evidence of the clinical officer. The finding of fact made by the two courts below on that evidence must therefore be interfered with as it was based on an incorrect appreciation of the clinical officer’s evidence.

That leaves the evidence of the complainant which was fairly brief and short on the time of the day when the offence was committed. There was no burden on the appellant to prove the *alibi* he put forward but he explained on oath, and was supported by witnesses, that he was away from the scene of crime when the offence was committed. On this he was largely believed by the superior court except for the erroneous finding that he was left with the child by his wife at 5 p.m. If the evidence of the appellant’s wife was not misconstrued by the superior court, we do not know what that court would have found in respect of her evidence. In our view, the prosecution did not sufficiently displace the *alibi* pleaded by the appellant in this case thus raising serious doubts on the sole evidence of the complainant.

Learned Principal State Counsel Mr. Kaigai was at first inclined to support the conviction of the appellant, but upon examination of the doubtful medical evidence in respect of the appellant, and the sole evidence of the complainant, he conceded that there were reasonable doubts in such evidence. We agree.

In the circumstances the benefit of those doubts should, in law, go to the appellant with the result that his conviction is declared unsafe. We allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. He shall be set at liberty forthwith unless he is otherwise lawfully held.

*Dated and delivered at Nyeri this 14<sup>th</sup> day of May, 2010.*

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**