



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL 146 OF 2008**

**BETWEEN**

**JAMES KAROKI WANGECI .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nyeri (Kasango, J.) dated 28<sup>th</sup> July, 2008*

in

H.C.Cr.A. 160 of 2007)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This is a second appeal by **James Karoki Wangeci**, who was convicted by Kangema Senior Resident Magistrate (S. N. Mbungi) for the offence of attempted defilement of a child contrary to **section 9(1)(2)** of the Sexual Offences Act, No. 3 of 2006 (the Act). Upon his conviction he was sentenced to serve ten years imprisonment which is the minimum sentence under that section. His first appeal to the superior court (*Kasango, J.*) was dismissed, hence this final appeal which may only raise issues of law for consideration.

The appellant conducted his appeal in person and referred us to his memorandum of appeal filed on 2<sup>nd</sup> September 2009 containing four grounds. At the hearing of the appeal, he produced another document referred to as “*Amended and Supplementary Grounds of Appeal*” and simply asked us to look at those documents as he had little else to say. In summary, both documents complain that:

- *there was an original charge sheet relating to the main offence of defilement contrary to section (8)(1)(2) of the Sexual Offences Act but it was substituted without compliance with section 214 of the Criminal Procedure Code.*
- *there was no interpretation of the proceedings in a language understood by the appellant contrary to section 198 of the Criminal Procedure Code.*
- *the appellant was detained beyond 24 hours before being taken to court, thus violating his rights under section 72(3) of the Constitution.*
- *the case was not proved beyond reasonable doubts for the reason that the complainant changed hospitals, the commission of the offence was not reported to the police immediately, and the appellant was not arrested immediately.*
- *the defence of the appellant was not considered.*

We shall revert to those complaints presently.

The facts of the case are fairly straight forward.

The complainant, **M. N. W** (PW3) was a six year old, standard one pupil at K Primary School, Murang'a. On the 4<sup>th</sup> February 2007, at about 6.20 p.m., M was sent by her mother **L. W** (PW1) (L) to go and collect some milk from a neighbouring home where they normally bought milk. It was the home of the appellant whose mother kept some dairy cows. The appellant's mother was not at her house but the appellant was present in his house, all alone. The appellant called M to his house and M left the milk bottle she had in his mother's house. On reaching the appellant's house, the appellant lifted her up and placed her on his bed. He removed her underpants and tried to insert his penis into her vagina. When she screamed in pain he would remove his penis and try to insert it again when she kept quiet. After finishing with her he told her to put on her panties and go home, which she did.

In the meantime, the appellant's mother had come home and found the bottle left by M. She milked the cow and took the milk to L's home. M was nowhere to be found and so both of them went looking for her but met her on the way home. It was about 8 p.m. M did not report her ordeal to them. The following morning, however, as L was washing her, M told her not to touch her vagina as it was paining. She disclosed that the appellant had defiled her on his bed. On checking the vagina, L found it swollen and whitish. She rushed her to Murang'a District Hospital where she was referred to the police for a P3 form and thereafter she took M to Kangema Health Centre where she was treated and discharged.

The matter was reported to **Pc. John Ngumi** (PW4) at K Police Post on 6<sup>th</sup> February 2007 and he commenced investigations. He issued the P3 form and accompanied L and M to Kangema Health Centre for examination and treatment of M. He also obtained a report from the Clinical Officer, Kangema Health Centre, **Paul Mwangi Gathogo** (PW2) confirming that M's vagina had lacerations and whitish discharge. He also saw some pus cells resulting from the lacerations around the vagina. There was no spermatozoa. In his view a blunt object was used to cause the lacerations and there was attempted penetration, which was short of breaking the hymen. A penis, according to him, was a blunt object and could have caused such lacerations.

The appellant was arrested on 7<sup>th</sup> February 2007 and was taken to Court on 9<sup>th</sup> February 2007 to answer a charge of defilement of a child contrary to **section 8(1)(2)** of the Act. That charge was substituted on 29<sup>th</sup> March 2007 with the lesser charge of attempted defilement contrary to **section 9(1)(2)** of the Act. In his defence, he said nothing about the events of 4<sup>th</sup> February 2007 but stated that he left his home on 5<sup>th</sup> February 2007 and went to a place in K where he was performing some casual work. He slept at home the following day but on 7<sup>th</sup> February 2007, he was arrested at 3 p.m. and was surprised to hear that he had defiled a girl. He did not even know the girl, M, although he knew her mother who was buying milk from his mother. At some point, he stated, he differed with her mother for refusing to pay for milk supplies.

The trial court had no doubt that M was a truthful witness and believed her. In assessing her credibility the trial court stated:

***“... the complainant vividly recalled the events of that day. She was very consistent on what she told the court. She looked so innocent to (sic) lie to the court. Though she gave unsworn evidence I believed her evidence. She knew the accused very well.”***

The superior court re-examined and re-evaluated the evidence on record and stated in part:

***“The learned magistrate rejected the appellant's defence. The complainant was observed by the magistrate and was noted to be honest. The complainant named the appellant as the one who attempted to defile her. She knew him even by name. The mother's evidence was corroborated by the Clinical Officer's evidence. Although the appellant denied involvement in the offence, in his defence he gave details of what***

***he did on the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> February 2007. He did not however say what he did on the 4<sup>th</sup> of February 2007 the day the offence was committed. I too reject the appellant's defence and I do find that the prosecution well proved a case against him."***

We now revert to the complaints raised by the appellant in respect of those findings.

The first complaint relates to substitution of the original charge from one of defilement to attempted defilement. The substitution, as noted earlier, was made on 29<sup>th</sup> March 2007 on the application of the prosecution and the appellant is recorded as raising no objection. That was before commencement of the trial. The new charges were then read over to him in Kikuyu language which he understood and he pleaded "Not guilty". Thereupon the trial commenced on the new charges. That is a procedure fully sanctioned under **section 214** of the Criminal Procedure Code and it is our view that the section was complied with. There is no substance in that ground of appeal and, in any case, there was no prejudice caused to the appellant by reduction of the charge facing him to a lesser one. We reject the complaint.

The second complaint was that the language used at the trial was not stated and there was no interpretation. The record however does not bear the appellant out. At the very outset during the plea, the learned Magistrate was careful to record that the proceedings would be conducted in "English/Kiswahili/Kikuyu" and they would be interpreted in those languages. The learned Magistrate was also careful to record the language used by each of the four prosecution witnesses and the appellant, and the court clerk who carried out the interpretation. Once again, there is no substance in that complaint and it is rejected.

Thirdly, the appellant complains about violation of his constitutional rights for being detained beyond 24 hours without being produced in court. The same complaint was raised before the superior court and was dealt with as follows:-

***"In this case the appellant was arrested on 7<sup>th</sup> February 2007 at 3 p.m. The 24 hours period would have expired at 4 p.m. on 8<sup>th</sup> February 2007. One needs to consider how practicable it would have been to take the appellant to court at 4 p.m. on 8<sup>th</sup> February 2007. In all probability the courts sessions would by then have ended. The appellant was taken in my view as soon as was reasonably practicable. The appellant's constitutional rights were not therefore violated."***

We agree with those findings and reject that ground of appeal also.

As for the change of hospitals, delay in reporting to police or in arresting the appellant, these were not matters raised before the two courts below and we do not in our own assessment find them valid. The report to the police one day after commission of the offence and the arrest of the appellant one day after the report to the police cannot signify that the case was not proved beyond doubts as contended by the appellant. The investigating officer explained that the appellant was not readily available as they looked for him before arrest. We reject that complaint.

Finally the appellant stated that his defence was not considered. As stated earlier, the appellant's defence said nothing about the events of 4<sup>th</sup> February 2007, the date on which the offence was committed. He talked about the following day until he was arrested two days later. He also denied that he knew the complainant. In view of the overwhelming evidence adduced by the prosecution and the concurrent findings of fact which we have no reason to disturb, that defence could not stand and was properly rejected by the two courts below.

All in all we agree with learned Principal State Counsel, **Mr. Kaigai** that this appeal is for rejection and we so find. It is dismissed in its entirety.

***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**