



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wangare v Republic (Criminal Appeal 18 of 2018)  
[2023] KEHC 18175 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 18175 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL 18 OF 2018  
J WAKIAGA, J  
FEBRUARY 28, 2023**

**BETWEEN**

**GEOFFREY NDUNGU WANGARE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was charged with the offence of defilement Contrary to Section 8(1) (2) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of which were on the 5<sup>th</sup> day of May 2016 at around 11.00 hours in Gatanga Sub-County of Muranga County intentionally caused his penis to penetrate the vagina and anus of JWM a child aged ten (10) years.
2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual offences Act](#) and was tried convicted and sentenced to life imprisonment on the ground that the Court's hand was tied.
3. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following grounds of Appeal:
  - a) The Trial Magistrate erred in law and fact by convicting him on evidence that was contradictory.
  - b) Section 169(1) of the [CPC](#) in respect of his defence was not complied with.
  - c) The prosecution case was not proved beyond reasonable doubt.
4. At the hearing herein both the Appellant and the Prosecution made oral submissions and on behalf of the Appellant, he submitted that penetration was not proved and further that in sentencing him, the Court did not take into account the period he had served in pre-conviction detention.



5. On behalf of the State, it was submitted that all the elements of the offence were proved. It was contended that penetration was proved through the complainant's evidence as corroborated by the P3 form which confirmed that her hymen was broken and the anal region was interfered with. The Appellant was positively identified as a neighbour and the age of the complainant was proved through the birth notification. The Appellant defence was considered and dismissed. It was contended that there was no requirement for the Appellant to be medically examined.
6. This being a first Appeal, the Court is under a duty to re-evaluate the evidence tendered before the trial Court and to come to its own determination thereon, while giving an allowance that unlike the trial Court, it did not have the advantage of seeing and hearing witnesses as was stated in the case of *Okeno V Republic*.
7. PW1 a minor who was found to understand the meaning of oath, stated that she was at home, when the Appellant whom she knew as Ndungu called her to his house, removed her clothes and put his penis into where she urinates with. He then gave her ten bob with which she bought two cakes. She stated that the Appellant inserted his penis both into her vagina and anus, causing her to feel pain.
8. When her mother noticed that she was struggling to walk, she reported to the chief before taking her to the hospital. In cross examination, she stated that she was with F when the Appellant called her and that she had been sent home for school fee, that is why she was not in school.
9. PW2 JWM stated that she noticed that the complainant had difficulties in walking and when she examined her, she noticed that her vagina was wide open, with discharge and smelling. She then told her what the Appellant had done to her. She produced the immunization card and birth notification to confirm her age.
10. In cross examination, she stated that the child said that the Appellant had defiled her leading to his arrest by a mob. She confirmed that the Appellant had at some stage help to reconcile her and her husband and that the Appellant infected the complainant with STD.
11. PW3 Martha Kimotho a Clinical Officer examined the complainant who had mucus stains in her pants, with a creamy discharge. On the anal region there were stools coming out voluntarily and her hymen was broken. She confirmed defilement.
12. PW4 Samuel Ritui Kariuki, the area Assistant Chief was called and notified by the police, that the Appellant had defiled the complainant, he then looked for him with the help of community policing and arrested him.
13. PW5 PC Jeremiah Mugambi received the complainant with her mother at the station and booked a report of defilement. The complainant was referred to the hospital and her age as per the immunization card was ten years. In cross examination he stated that he recovered the inner wear which was blood stained. PW6 PC Martha Karani produced the original birth notification card.
14. When put on his defence, the Appellant gave unsworn statement and testified that on 6<sup>th</sup> May 2016 he woke up and went to buy chicken feed and was arrested by the Sub Chief and forest guard. He then saw M or mama M who said that her child had been defiled the previous day, he was looked up in the police cell before being taken to Court on the 9<sup>th</sup>. He stated that he needed medical treatment because his private part was swollen.



## Determination

15. In this Appeal, the following issues are identified for determination: (a) Whether the Appellant was positively identified (b) Whether the case against the Appellant was prove beyond reasonable doubt (c) Whether the Appellant defence was considered.
16. On the identification, the Appellant was identified by recognition, he was known to the complainant as Kamau her neighbour and as was stated in the case of *Wamunga v Republic* (1989) KLR 426, where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility error before it can safely make it a basis of conviction.
17. The Appellant was known to the complainant, he called her to his house and defiled her, she gave his name to her mother and the Appellant in his defence confirmed that his penis was swollen. I therefore find that the identification of the Appellant was free from error as the trial Court correctly found that the incidence took place during day time and the complainant knew the Appellant well.
18. On proof of the prosecution case, the age of the complainant was proved through the production of the birth notification certificate and immunization card, while penetration was proved through the evidence of the minor who stated that the Appellant inserted his penis into her vagina and anus and that her mother noticed that she was walking strangely. This evidence was corroborated through the scientific evidence of the Clinical Officer who confirmed that the complainant's hymen was broken and her anal area was affected.
19. I therefore find and hold that all the elements of the offence were proved beyond reasonable doubt and the Appellant's conviction was free from error.
20. On sentence, the Appellants only complaint, is that the Court did not take into account the pre conviction period spent in custody under the provisions of Section 333(2) of CPC, however it must be pointed out the Appellant was given life imprisonment and therefore the said provision is not applicable.
21. The upshot of this is that the Appeal herein lacks merit both on conviction and sentence, which I hereby dismiss and affirm the trial Courts' determination herein. And it is ordered.
22. The Appellant has right of Appeal.

**DATED, SIGNED AND DELIVERED AT MURANGA THIS 28<sup>TH</sup> DAY OF FEBRUARY 2023.**

**J. WAKIAGA**

**JUDGE**

**In the presence of :**

Court Assistant – Carol Mutahi

