



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina v Republic (Criminal Appeal E021 of 2021)
[2022] KEHC 17174 (KLR) (4 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 17174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E021 OF 2021**

SM GITHINJI, J

APRIL 4, 2022

BETWEEN

JOHN MUHIA WAINAINA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in the
Senior Resident Magistrate Court at Lamu Sexual Offence No 14
of 2019 by Hon Victor Asiyo (SRM) dated 21st January, 2020)*

JUDGMENT

1. The Appellant herein, one John Muhia Wainaina was charged in the Lower Court with a main county of defilement, contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars are that on the 10th day of August 2019 at around 22.00 hours, at [Particulars Withheld] area of Shella Location, in Lamu West Sub County within Lamu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of RM a child aged four years.
3. The appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.
4. The particulars herein are that on the 10th day of August 2019 at around 22.00 hrs at [particulars Withheld] area of Shella location in Lamu West Sub-County within Lamu County, the appellant intentionally and unlawfully touched the vagina of RM, a child aged (4) four years with his penis.
5. The prosecution case is that the complainant who gave brief and unsworn testimony as PW-5, was born on May 28, 2015, in accordance to the evidence of her mother who gave evidence as PW-3. The mother is a close friend of PW-1, who is a wife to PW-2.



6. On the 10th day of August 2019, PW-3 allowed PW-1 and PW-2 to have the complainant with them for a sleep over. The couple were not new to complainant who used to visit them for a longer period of even two months. They were used to each other. On this particular night PW-2 placed the complainant to sleep and together with PW-2 went to the shop at around 10.00 p.m. On the way back when they got near the house, before they entered they heard the complainant crying. PW-1 had a torch. On arrival they noted the door to the house was open. They used the torch light to check inside and saw the appellant standing next to the mattress clamping his belt. PW-1 asked him what he was doing in the house and the two started arguing. The appellant slapped PW-1 and PW-2 slapped him back. The two commenced a fight where they wrestled each other. Meanwhile, PW-1 was screaming. The appellant overpowered PW-2 and managed to escape. PW-4, a neighbor heard the screams. He rushed to assist while armed with a torch. Outside he found PW-2 chasing after the appellant, one John Muhia. The appellant however managed to flee.
7. They checked on PW-5 and noted that her inner wear had been removed and was hanging on one leg. On the floor were foreign pair of red slippers and a cell phone. Nyumba kumi elder also turned up at the scene as well as other neighbours. They witnessed how the scene and the complainant was. The elder called the police from Manda Police Station. PW-2 led the police to where the appellant was staying. He was found and arrested. He had no shoes or sandals and was taken to the police station bare footed.
8. PW5 the complainant herein, was dressed in a jeans dress and a panty. The panty was blood stained. She was bleeding at her private part. The dress, pant, phone and slippers were picked by the police as exhibits.
9. PW-6 examined the complainant on June 11, 2019 at about 1.40 a.m. The P-3 form indicates that she had swollen labia majora and reddish labia minora which was blood stained. There was also a perineum tear of about ½ cm, which was tender on touch. The hymen was intact as the force was directed towards the perineum and not the hymen. HIV and Syphilis tests were negative. The Clinical Officer was of the opinion that there was evidence of penetration.
10. PW-7 investigated the case had the appellant charged. Upon being arraigned in court, the appellant requested for return of his phone and the investigating officer was summoned to show cause why it could not be returned. He explained that it was an exhibit in the case.
11. The appellant in his sworn defence stated that he lives at Kibaoni and is a driver. He had gone for work at [particulars withheld] where he was building an underground tank for a White man. He went to a drinking den at [particulars withheld] town centre. He met PW-1 and they took beer together. PW-1 left at 9.00 p.m. They arranged to meet at her place. Before the appellant got to her place he met with PW-2. PW-2 asked him why he was following PW-1. The two fought. He lost in the fight his phone and slippers as they fell off. At 10.00 p.m. the police went to where he was sleeping. PW-1 while in company of another called W pointed at him as the culprit. He was arrested and taken to the patrol base before he was led to King Fahd Hospital. At the Police Station he spoke with the child's mother who promised that the case will be withdrawn. However, police refused to withdraw the case and he was charged.
12. The trial court evaluated the evidence and found that the offence in the main count was proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to life imprisonment.
13. Dissatisfied with the said conviction and sentence, the appellant appealed to this court on the grounds that: -
 1. The charge sheet is defective.



2. The trial court relied on wrong principles in finding him guilty and passing the sentence.
 3. The prosecution case is inconsistent and contradictory.
 4. The evidence adduced by the prosecution is insufficient to warrant a conviction.
 5. The burden of proof was shifted to him.
14. The appeal was canvassed by way of written submissions and both parties filed their submissions.
 15. I have evaluated the offences preferred in the charge sheet, evidence adduced by the prosecution witnesses, appellant's defence, judgment passed, sentence meted, grounds of the appeal and submissions by both sides.
 16. The issues that arise for determination are the usual ones for an offence of defilement, which as was held in the case of *Charles Wamukonya Karani –vs- Republic*, Criminal Appeal No 72 of 2013, are; -
 1. Age of the complainant; whether a child.
 2. Whether there was penetration.
 3. Whether the appellant was the assailant.
 17. According to the evidence of the victim's mother, the victim was born on May 28, 2015. The offence allegedly took place on August 10, 2019. It therefore follows that at the time of the alleged offence, the victim was four years old. Dr Lelai who also assessed the age of the victim on September 11, 2019, indicated she was between 4-5 years old. Though in this case a Birth Certificate was not produced, there is reliable evidence from the mother, which is well corroborated by the evidence of the age assessment, that she was four years old.
 18. In the case of *Richard Wabome Chege –vs- Republic* (2014) e KLR, it was held that the evidence of the mother on age of her child is sufficient evidence in that respect. I therefore find there is sufficient evidence that the child was four years old at the time of the incident.
 19. The next issue is of penetration. Section 2 of the *Sexual Offences Act* defines penetration as; -

“The partial or complete insertion of the genital organs of a person into the genital organs of another person.”
 20. PW-1 and PW-2 got the appellant in their house with the victim. The victim was crying and the appellant was standing next to the mattress clamping his belt. The victim's inner wear had been removed and was hanging on one leg. It was blood stained and the girl was bleeding from the private part. When she was examined by PW-6 on June 11, 2019, he noted that she had a swollen labia majora and reddish labia minora, which was blood stained. There was a perineum tear about 0.5 cm, which was tender on touch. The hymen was intact as the force was directed towards the perineum and not the hymen. The Clinical Officer opined that there was evidence of penetration. Though the foregoing evidence shows that full penetration was not achieved, the evidence is clear that there was partial penetration of which would suffice for the offence.
 21. The third issue is of identification of the perpetrator. PW-1 and PW-2 who had a torch found the appellant at the scene immediately after the act. PW-2 even wrestled with him before he escaped. They were able to recognize him. PW-4 a neighbor, who was attracted to the scene by the screams of PW-1 found the appellant as he was escaping. He had a torch and saw him. He recognized him as John Muhia. To buttress the evidence is the fact that the appellant as he escaped left behind a pair of his slippers and a



phone. In his defence he acknowledges the fact but alleges he left them outside on the path as he fought with PW-2. The recovered items places him at the scene, as he acknowledged during the defence. There is no doubt whatsoever that he is the culprit.

22. His defence was an afterthought. He never raised it during cross-examination of the witnesses and the witnesses had no cause to fix him. The injuries on the victim could not have been inflicted by anyone solely to fix him. The evidence was properly evaluated by the trial Magistrate and the right verdict made. The victim was aged four years and the offence invited the mandatory sentence of life imprisonment. The sentence is legally correct. The appeal lacks merit and is hereby dismissed.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 4TH DAY OF APRIL, 2022.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Mr F.Sirima for State

Appellant in Person

