



**Wambua v Republic (Criminal Appeal E034 of 2021)  
[2022] KEHC 11315 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11315 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E034 OF 2021**

**GMA DULU, J**

**MAY 31, 2022**

**BETWEEN**

**ALBANUS NZANGI WAMBUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original judgment of Hon. Otieno J. (R.M) in Makueni  
Chief Magistrate's Court (S.O) Case No.11 of 2020 pronounced on 16th February, 2021)*

**JUDGMENT**

1. The appellant was charged in the magistrate's court with defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on diverse dates during the month of August 2019 at [Particulars withheld] Village Mumbuni Location within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of MW (name withheld ) a child aged 12 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#), the particulars of which being that on the same diverse dates and at the same place intentionally touched the vagina of the same child with his penis.
3. He denied both offences. After a full trial, he was convicted on the main count of defilement and sentenced to 6 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal through counsel, on the following grounds –
  1. The learned magistrate erred in law and fact in convicting the appellant as she did, when the evidence on record was manifestly insufficient, inconsistent and had glaring gaps and inadequate hence incapable of sustaining a conviction.



2. The learned magistrate erred in law and in fact when she ignored the inconsistency in the evidence tendered.
  3. The learned magistrate erred in law and in fact by taking into account extraneous matters.
  4. The learned magistrate erred in law and in fact by imposing a higher burden of proof against the appellant requiring him to prove his case beyond reasonable doubt.
  5. The learned magistrate erred in law and in fact by rejecting the appellant's defence.
  6. The learned magistrate erred in law and in fact in failing to give due and /or adequate consideration to the appellant's defence.
  7. The learned magistrate erred in law and fact in convicting the appellant against the weight of evidence on record.
  8. The learned magistrate erred in law and in fact by sentencing the appellant as he did.
  9. The learned magistrate erred and misdirected herself in law by selectively applying the evidence tendered and thereby aiding the case of the respondent against the appellant.
  10. The learned magistrate decision does not conform to the relevant law.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the written submissions filed by Muumbi & Company advocates for the appellant, and those filed by the Director of Public Prosecutions. Both sides have relied on a number of decided court cases.
6. This being a first appeal, I am required to give the evidence on record a fresh evaluation and come to my own independent conclusions and inferences. Several cases have dealt with this legal principle. I will however only cite the case of *Okeno -vs- Republic* [1972] E.A 32 in which the Court of Appeal for East Africa stated as follows –
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya -vs- Republic* (1957) E.A 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantila M. Ruwala -vs- R* [1957] E.A 570).
7. Having considered the evidence on record in which the prosecution called three witnesses, and the appellant tendered sworn defence testimony and called one defence witness, and bearing in mind that the burden was on the prosecution to prove the charge against the accused person beyond any reasonable doubt, I am of the view the proof of the elements of the offence is as hereunder.
  8. The first element of the offence is the age of the alleged victim. The alleged victim Pw3 testified that she was born in 2007 and was in standard 8 at Kimumo Primary School. An age assessment report was produced by the Investigating Officer Pw3 PC Purity Karwotha as exhibit 4. However, Pw3 did not say how she came to have possession of that age assessment report nor did Pw1 Stella Ndambi Mwasia the Clinical Officer refer to a medical age assessment.
  9. I also note that none of the parents of the alleged victim testified in court regarding the age of the alleged victim or at all. I thus find that the prosecution did not prove the age of the alleged victim beyond any reasonable doubt.



10. With regard to whether the alleged victim was penetrated sexually, the medical evidence produced by Pw1 was that her hymen was missing and she had a whitish discharge. In my view, even assuming that the alleged victim was sexually penetrated, the prosecution did not prove that she was sexually penetrated on the dates alleged.
11. I now turn to the third element of the offence that is the identity of the culprit. It is clear from the evidence of both alleged victim Pw1 and the Investigating Officer Pw3 PC Purity Karwotha that what triggered a report to the police was an alleged attempt by one Mutuku Kalumba to defile the alleged victim. The said Mutuku has not been arrested, and the case has now been turned on the appellant.
12. Though the proviso to section 124 of the *Evidence Act* states that the evidence of a single witness victim of a sexual offence need not be corroborated to sustain a conviction, in the present case where the initial suspected criminal was Mutuku and not the appellant, and the fact that none of the parents of the alleged victim testified in court, shows that the evidence of Pw2 might not be true, and thus not believable. Even if the parents of the alleged victim came to court, the fact that the initial culprit precipitating a report to the police is known by name as Mutuku and is not the appellant herein, doubts on the allegation against the appellant.
13. I find therefore that the prosecution did not prove beyond any reasonable doubt that the appellant is the culprit I will thus allow the appeal on conviction.
14. As for the sentence, since I will allow the appeal on conviction, the sentence will also be set aside.
15. Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**DELIVERED, SIGNED & DATED THIS 31<sup>ST</sup> DAY OF MAY 2022, IN OPEN COURT AT MAKUENI.**

.....

**GEORGE DULU**  
**JUDGE**

