



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangima v Republic (Criminal Appeal E039 of 2021)  
[2022] KEHC 3195 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3195 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E039 OF 2021**

**A. ONG'INJO, J  
JUNE 23, 2022**

**BETWEEN**

**RAPHAEL JENJEWAWANGIMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of Hon. David Odhiambo Resident Magistrate, delivered on 24th May 2012 in Shanzu Senior Principal Magistrate Court Sexual Offences No. 19 of 2018)*

**JUDGMENT**

1. Raphael Jenjewa Mwangima the Appellant herein was accused in Shanzu, Chief Magistrates Court Sexual Offence Case No. 19 of 2018 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 in 2 counts.
2. Particulars to Count 1 were that the Appellant on the 21<sup>st</sup> day of February 2018 in Kisauni Sub-County intentionally and unlawfully caused his penis to penetrate the vagina NN a child aged 9 years.
3. In the alternative to Count 1 the Appellant was charged with the offence of indecent Act contrary to Section 11(1) of the *Sexual Offences Act*.
4. The particulars to Count II are that the Appellant on the 21<sup>st</sup> day of February 2018 in Kisauni Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of (CW) CW a child aged 8 years.
5. The 2<sup>nd</sup> Count also had an alternative of indecent act contrary to Section II (1) of the *Sexual Offences Act* No. 3 of 2006. The trial court took evidence of the complainants guardian, the doctor and investigating officer and placed the Appellant on his defence.



6. Upon the Appellant giving sworn evidence the trial Magistrate concluded that the offence of defilement in the 2 courts had been established beyond all reasonable doubt and the Appellant was convicted and sentenced to serve 20 years jail term.
7. Being aggrieved and dissatisfied with the conviction and sentence the Appellant lodged Petition of Appeal on the following amended grounds:-
  - i. That the trial Magistrate failed in law & fact by not seeing that the identification parade evidence was insufficient.
  - ii. That the trial court erred both in law & fact when it failed to observe that the prosecution evidence was marred with massive contradictions.
  - iii. That the trial court erred in fact by failing to see that the conduct of the complainant was incompatible with that of a minor who had been defiled.
  - iv. That the trial court erred in both law & fact when it failed to see that the matter in question was a frame up resulting from disagreement with colleagues at work.
  - v. That the trial Magistrate imposed a sentence that did not take into consideration his mitigation.
8. The Appellant prayed that his appeal be allowed.
9. The prosecutions case was that PW 1 the guardian to the two complainants – PW 1 EW was at home on 21/02/2018 when she realized NN was crying. That NN told her, her teacher was doing bad manners to her. That the teacher would sleep with her on the floor when other student were out. PW 1 went to the school and saw the classroom which had tiles on the floor. PW 1 examined the child and saw she had blood in her private part. PW 1 reported at Kiembeni Police Station and she was referred to Coast General Hospital. She took both children to hospital and there were examined & P3 and PRC forms filled. The 2 children were put on drugs and the teacher was summoned to the police station and arrested. PW 1 said the teacher/Appellant herein was known to her.
10. In cross examination she said the children identified him as the one who did bad manner on them.
11. PW 2 Dr. Fatuma Swaleh produced P3 & PRC forms for the minors. She said it was Dr. Nafua who examined the minors and filled the forms – Exhibits P1 or P2.
12. PW 3 the Investigating Officer – P.C. Elizabeth Mwinyi of Kiembeni Police Station Gender Desk said PW 1 went with the Complainants to the hospital on 23/02/2018 and reported they had been defiled in school by someone known to them.
13. That the children were taken to Coast General Hospital for examination and treatment and later she took them to Gender Desk where PRC form was duly filled. That she recorded statements and later accused was arrested and charged.
14. PW 3 took the minors for age assessment and she produced the Reports EX P5 & 6 for NN and CW respectively. PW 3 said they didn't get any witness from the school where the incident occurred but she relied on the statement of the children and the doctor. PW 3 said she asked the Administrator of the school to go to the station but didn't attend.
15. Appellant was placed on defence and he gave sworn testimony. He said he was the Headmaster of the school where the minors were learning. He said he was the only male teacher in the school. He said the other teachers were children of the owner of the school but he was the one who was answerable and



- the other teachers thought he was taking away their responsibilities. That the other teachers planned to fix him with this case. That the Director called and asked what happened. That he went to the police station and he was arrested.
16. Appellant said he was not involved in what happened. He said he had a wife and kids. He said he was so hurt by the accusations that he has to take medicine to sleep. He said the Director of the School was to be his witness but he had not come to court and blocked his calls.
  17. The Appellant in cross examination said he was teaching standard 6 and was receiving school fees from pupils. He said he could go to school early before pupils. He said he was the only male teacher in the school. He said the complainants were aged 4 & 6 years old and had been taken from a childrens home. He said he had no issue with any parent.
  18. This appeal was canvassed by way of written submissions.

### **The Appellants submissions**

19. In his submissions the Appellant said that the complainants identities and age, were inconsistent. He said incharge sheet it was NN aged 9 years and CW 8 years were alleged to have been defiled whereas PW 3 the Investigating Officer in her testimony referred to complainants as MN and CW aged 4 and 6 years.
20. The Appellant argued that contradiction between evidence of PW 1 and PW 3 was material and it created confusion as to whether he was charged with the offence that he allegedly committed against a person who was presented in court or not. Appellant said that the complainant herself said she was NW and not NN as in the charge sheet.
21. The Appellant faulted the prosecution for failing to clearly explain how the 2 complainants were defiled in a classroom without any other person noticing. He argued that the complainants evidence was in sharp contrast to the report made to police in regard to where she schooled at the time of the alleged incident and her evidence cannot sustain a conviction.
22. The Appellant submitted that from the evidence of PW 2 it was not clear if the 2 complainants have defiled on the same day and at what time. He said PW 1's testimony discloses several grey areas on the truth of the matter as pertains to scene of the commission of the offence.
23. The Appellant also submitted that the prosecution withheld crucial evidence by not calling the owner of the school or any other person in the school who witnessed the alleged ordeal against the complainants. The Appellant relied in the holding on *Bukenya vs Uganda* [1972] E.A. 549 where it was held that the prosecution is duty bound to make available all witnesses necessary to establish the truth even if their evidence may be inconsistent to its case.
24. The Appellant submitted further that the trial Magistrate failed to ask himself what evidence was in possession of the owner of the school which the prosecution failed to tender.
25. Regarding the testimony of PW 1 as an intermediary the Appellant submitted that the observation of the trial Magistrate at page 2 paragraph 4 of the judgment puts to question the probative value of the prosecution case and it can be constrained that the minors didn't testify even through their guardian as an intermediary. He argued that he was convicted on evidence that was not adduced in court and that his right to fair trial under Article 50(2) (K) was breached.
26. The Appellant argued that shoddy investigations were conducted by the investigating officer and many grey areas was left out in the prosecution case thus weakening it further.



27. The Appellant also submitted that the trial court included a 3<sup>rd</sup> charge of Indescent Act with a minor, for an offence which was committed at [Particulars Withheld] area against a child PN aged 2 years.
28. Appellant argued that the trial Magistrate was not keen and included a strange charge in the judgment concerning his defence the Appellant argued that his colleagues at work conspired to undermine his position as the Head of the School by having him charged. He said failure to call the owner of the school and his colleagues to testify was a manifestation of how investigations were conducted with partiality.
29. He urged the court to find that the questionable evidence of the complainants, coupled with shoddy investigations and the omitted crucial evidence was as a result of a made up case against him.
30. The Respondent relied on grounds of opposition dated 22<sup>nd</sup> March 2022 to the effect that:
  - i. Identification of the Appellant was established
  - ii. The age of the minor was proved at the trial court
  - iii. The fact of penetration was proved
  - iv. The trial court guaranteed the Appellants right to a fair trial
  - v. The prosecution proved its case beyond reasonable doubt
  - vi. The period spent by the Appellant in custody was considered during sentencing
  - vii. The sentence meted by the trial Magistrate was lawful.

### **Analysis and Determination**

31. Having analyzed and re-evaluated the evidence which was before the trial court as held by Court of Appeal on *David Njuguna Wairimu vs Republic* [2010] eKLR and warning myself that I neither saw or heard the witnesses testify, the issues for determination by this court are:-
  - i. Whether the Appellant was properly identified as the perpetrator of the sexual offence
  - ii. Whether the identity of the Complainants was clear
  - iii. Whether prosecution evidence was marred with massive contradiction and inconsistencies
  - iv. Whether the Appellant was framed up due to disagreement in school with colleagues
  - v. Whether the sentence imposed did not take into consideration the Appellants mitigation.
32. For the prosecution to prove the offence of defilement the key ingredients to be proved were settled in the holding in *Charles Wamukoya Karani vs Republic* CR. Appeal No. 72 of 2013 as:-Age of the complainantProof of penetrationIdentification of the assailant
33. From the charge sheet herein, it is shown the Complainant in Count I was 9 years old and the complainant in Count II is indicated to be 8 years old, when the minors were unable to testify even through an intermediary their guardian PW 1 EW testified and said they were 9 and 5 years respectively. She said she had taken them from an orphanage .The PRC form indicated their ages as 6 and 4 years old. Age assessment was conducted and it was established that the complainants were 9 and 8 years respectively as per EXP 3 & 6.
34. There was therefore no doubt as to the ages of the complainants. They appeared before the trial Magistrate who assessed them to be vulnerable and ordered that their guardian testifies on their behalf.



35. PW 1 testifies on their behalf. The Appellant was the Headteacher at the school where the 2 children were learning and from the evidence on record he confirmed he knew the complainants as pupils in his school, claiming an appeal that there was confusion in prosecution case as to who was the complainant is therefore an afterthought.
36. Even if the age of the children victims of Sexual offence was not ascertained, they fell within the age brackets that is provided for under Section 8(2) of the *Sexual Offences Act*. From the evidence of PW 1 & PW 3 there is no mention that the complainants were in class 6. The Appellants claim that the age and identity of the complainants was not clear is therefore not a ground that can be sustained.
37. On the second ingredient as to whether there was penetration, PW 1 said she found the 1<sup>st</sup> complainant crying and she told her that her teacher had done bad manners to her.
38. PW 1 said she knew the teacher and the Appellant he was the only male teacher in the school. PW 1 said she examined the 2 children in their private parts and saw blood stains. She reported at Kiembeni Police Station and then proceeded to Coast General Hospital & PRC forms were filled after the children were examined and treated EXP 1 & 2.
39. Dr. Nafasa Seif examined the Complainants on 11<sup>th</sup> March 2019 for purposes of filling P3 forms – she found the 1<sup>st</sup> complainant had a broken hymen with an old scar and healed abrasions on the vagina – Ex. P3 – Dr. Fahima produced P3 on behalf. She also examined the 2<sup>nd</sup> complainant and found her hymen was intact but she had bruises on the vagina.
40. There was therefore complete insertion of the genital organs of the perpetrator into the vagina of the 1<sup>st</sup> complainant that led to rupture of her hymen and partial insertion of the perpetrators genital organ into the genital organs of the 2<sup>nd</sup> complainant that led to her having bruises on the vagina. This court finds that the ingredient of penetration was therefore proved by the prosecution.
41. The offence of defilement is not one that would ordinary be committed in full glare of the public like pick pocketing, assault or robbery with violence and the Appellants demand for an eye witness is such a tall order for the prosecution to be expected to meet.
42. It is not indispute that the complainants were pupils in the school where the Appellant was the Headteacher. Had it been that they were not defiled the child would have given a different reason why she was crying. PW 1 would not have seen blood in her private parts and definitely Dr. Nafisa Seif would not have found that one had a ruptured hymen with an old scar or even a bruised vagina for the 2<sup>nd</sup> Complainant.
43. The trial Magistrate declared the complainants as vulnerable witnesses due to their tender age and PW 1 would not have been expected to tell the court what the children did not tell her. The fact remains that it was established that the 2 children were sexually abused.
44. The children told their guardian PW 1 that it was their teacher who defiled them in class. They also told PW 3 the investigating officer that it was their teacher who defiled them.
45. The Post Rape Care Forms which were filled in respect of each of the complainants also indicates the survivors allege that on several occasions the school teacher has been putting his penis in their vagina and anus threatening them not to say. While examining the children for purposes of filling P3 forms. Dr. Nafisa Seif also indicated the children were defiled by a known person.
46. There was no evidence that the guardian of the minors or even the Investigating Officer – PW 3 had any nexus with the conspiracy theory advanced by the Appellant as having been framed by his colleagues at work because he was having more responsibilities than them.



47. The accused did not question PW 1 or even PW 3 concerning the alleged conspiracy to frame him. He admitted he had no grudge with PW 1 & that the Complainants were able to distinguish between a male and female teacher for which he said he was the only male teacher in the school.
48. This court therefore finds that although the complainants didn't testify because of their tender ages, the court properly declared them vulnerable and ordered that their guardian testifies on their behalf.
49. I am guided by the holding of Hon. Justice Ochieng in *Kennedy Chimwabi Mubikoto vs Republic* High Court at Eldoret in Criminal Appeal No. 51 of 2011 where it was held:-

“Which the mother of the little girl gave evidence, she was deemed to be giving evidence on behalf of that little girl...

Therefore for all intents & purposes, when the mother of the little girl gave evidence she did so as a legally recognized intermediary, for and on behalf of the little girl. Such evidence was admissible”.

50. Similarly in the case of *M.M. v Republic* [2014] eKLR, it was held that:-

“Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to find a conviction would occasion serious miscarriage of justice, what fair hearing would a child victim aged 6 months, like that in the case of *Robinson Tole Mwakuyanda V.R. H.C. Cr. Appeal No. 227 of 2007*, get if the courts were to insist on the evidence of such a child, who on accident of his/her tender age cannot speak?

51. I do find that the testimony of PW 1 as intermediary to the complainants herein who had been threatened by the Appellant not to say what he had done to them was proper and admissible.
52. This court finds that the Appellants appeal has no merit and it is dismissed. The Appellant may appeal against the decision herein within 14 days.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF JUNE 2022**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

Ogwel – Court Assistant

Mr. Ngiri for State/Respondent

Appellant – present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

