



REPUBLIC OF KENYA



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**Wafula v Republic (Criminal Appeal 6 of 2020)
[2022] KEHC 12484 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 6 OF 2020**

**LK KIMARU, J
JULY 25, 2022**

BETWEEN

YONAH WAFULA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of conviction and sentence of Hon. V. Karanja
(Senior Resident Magistrate) in Bungoma Chief Magistrate's Court
Criminal Case (S.O) No. 136 of 2019 delivered on 29th January 2020)*

JUDGMENT

1. The Appellant YW, was charged with the offence of defilement of a child contrary to Section 8 (1) as read together with Section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on 11th June 2019 at [particulars withheld] village within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of SS, a child aged eight (8) years old. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on 11th June 2019 at [particulars withheld] village within Trans-Nzoia County, the Appellant intentionally caused contact between his penis and the vagina of SS, a child aged eight (8) years old. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted on the main charge and sentenced to serve twenty five (25) years imprisonment.
2. The Appellant was aggrieved by his conviction and sentence. He has appealed the trial court's decision on grounds that the trial court relied on insufficient evidence and evidence procured as a result of poor investigations. He lamented that the trial court rejected his defence. He urged this court to reconsider his sentence as he had been rehabilitated. He will endeavour to set a good example to the society if



- the court sets him at liberty. He urged this court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.
3. The Appeal was heard on the basis of the parties' rival written submissions. The Appellant took full responsibility for the crime. As a result, he focused his appeal on the sentence that was imposed on him. The Appellant was remorseful. He submitted that he had been rehabilitated and urged this court to grant him a lenient sentence. He annexed various certificates in regard to completed courses in the field of theology. He also urged this court to take into account that he was arrested at the age of eighteen (18) years.
 4. Miss. Mumu, Learned Prosecutor for the State, submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. She further submitted that contrary to the Appellant's assertion, the trial court convicted the Appellant based on sufficient and adequate evidence. She added that the trial court did not fall in error in rejecting the Appellant's defence. Finally, she submitted that the sentence was lawful and should not be disturbed as the Complainant was a child of tender years. She urged the court to uphold the conviction and affirm the sentence.
 5. The Prosecution called a total of five (5) witnesses in a bid to establish the charge preferred against the Appellant. The Complainant SS, (PW1) had known the Appellant as the brother to her friend I. She was eight (8) years old at the time of the sexual assault. On 11th June 2019 at 4:00 p.m., the Complainant was playing with I. When I left, the Appellant suddenly emerged. He pulled the Complainant into a maize plantation. He removed her dress and proceeded to sexually assault her. She felt pain. After he was done, the Appellant gave the Complainant Kshs. 100. The incident was witnessed by PW2, JN the Complainant's twin brother.
 6. On that material day, PW3 JGM, the Complainant and PW2's mother had travelled to Uganda. PW2 then informed PW3, about what had transpired when she returned on 13th June 2019. She then reported the matter to the area chief. A meeting was held in the presence of the Appellant who admitted the offence. The minutes of the meeting held in the presence of the village elder produced in evidence as Prosecution Exhibit 1.
 7. The Complainant was referred to Kitale County Hospital. She was seen on 14th June 2019 by PW4, Gichuki Gabriel, a clinical officer. He observed that there was tenderness on her right hip. She was limping. Her hymen was torn. Her genitalia was hyperemic. She was in pain. His conclusion was that the Complainant had been defiled by actual penetration. He produced the P3 form and treatment notes as Prosecution Exhibits 2 and 3 respectively. The Complainant was further subjected to an age assessment. The outcome captured in the age assessment report, Prosecution Exhibit 4, revealed that the Complainant was eight (8) years old at the time of the incident.
 8. The incident was reported on 13th June 2019 at Matisi Police Station. The investigating officer, PW5, PC (W) Ray Orao collected the evidence and recorded witnesses' statements. He then arrested the Appellant who was subsequently arraigned in court to answer to the present charges.
 9. After close of the Prosecution's case, the trial court found that the Appellant had a case to answer. He called two (2) witnesses. DW1, the Appellant testified that he was an eighteen (18) year old form two (2) student at [particulars withheld] School at the time of the offence. His testimony was that he was on 11th June 2019 accused by PW3 of committing the offence. He was coerced into admitting the offence. He was subsequently arrested and take to Matisi Police Post. He denied committing the offence.
 10. DW2, Elimina Wekesa, the village elder initiated a meeting following a sexual assault complaint. He testified that he was informed by PW3 that the Complainant had been defiled by the Appellant



sometime in June 2019. PW2 witnessed the incident. The Appellant apologized during the meeting. The Appellant was later arrested.

11. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (See *Njoroge -vs Republic* [1986] KLR 19). In the present appeal, the issue for determination by this court is whether the Prosecution discharged its burden to the required standard of proof being beyond any reasonable doubt, that the Appellant committed the offence that he was charged with.
12. In order to sustain a conviction on a charge of defilement, the Prosecution must establish all of the following three ingredients:
 1. Age of the Complainant
 2. Penetration
 3. Identification of the perpetrator
13. The first ingredient is age of the Complainant. The trial court relied on the age assessment report that estimated that the Complainant at eight (8) years old at the time of the offence. This court holds that the Prosecution established beyond any reasonable doubt that the Complainant was a child within the meaning ascribed to the term under Section 2 of the *Children Act*.
14. The second ingredient is that of penetration. Section 2 (1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
15. The Complainant's testified that she was sexually assaulted on 11th June 2019 in a maize plantation. PW4 in his evidence observed tenderness on the Complainant's right hip. Her hymen was torn. Her genitalia was hyperemic. She was in pain. His conclusion was that she had been defiled by actual penetration. This court is satisfied that the ingredient of penetration was proved to the required standard in light of the above evidence. The complainant's and the medical evidence proved there was penetration.
16. The last ingredient that the Prosecution had to establish was the identity of the perpetrator. The Complainant testified that she was sexually assaulted on 11th June 2019 in a maize plantation. The incident was witnessed by PW2, the Complainant's twin brother. The Appellant was positively placed at the crime scene. The trial court was satisfied that the evidence of the Complainant, corroborated with PW2's testimony, was truthful. Consequently, this court holds that the Appellant was the perpetrator of the offence and shall not disturb that finding.
17. The upshot of the above reasons is that this court finds that the Prosecution established the ingredients of defilement to the required standard of proof beyond any reasonable doubt. The conviction by the trial court is thus hereby upheld.
18. The Appellant was under the *Sexual Offences Act* sentenced to serve twenty (25) years imprisonment. In his mitigation at trial, the Appellant stated that he was a first offender. He was an eighteen (18) year old student. He prayed for a non-custodial sentence to allow him to go back to school and pursue a law degree. On appeal, the Appellant submitted, in addition to the above that he was remorseful. He had been rehabilitated. He had pursued several theological courses. His desire was to be a good role



model in the society. Taking into account the above, the appeal against the sentence succeeds. This court shall interfere with the sentence meted out by the trial court by substituting the same with a determinate sentence of Twenty (20) years imprisonment. The period of sentence shall run from the date the Appellant was arraigned in court on 18th June 2019.

It is so ordered.

DATED AT KITALE THIS 25TH DAY OF JULY 2022.

L KIMARU

JUDGE

