



REPUBLIC OF KENYA



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**Wamalwa v Republic (Criminal Appeal 45 of 2019)
[2022] KEHC 12477 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 45 OF 2019
LK KIMARU, J
JULY 25, 2022**

BETWEEN

LEWIS WANYONYI WAMALWA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of conviction and sentence of Hon. P.K. Mtai
(Senior Resident Magistrate) in Kitale Chief Magistrate's Court
Criminal Case (S.O) No. 152 of 2018 delivered on 10th May 2019)*

JUDGMENT

1. Lewis Wanyonyi Wamalwa, the Appellant herein, 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 September 11, 2018 at [Particulars Withheld] village farm in Kapomboi Location within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of ANS, a child aged four (4) 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 September 2018 at [Particulars Withheld] village farm in Kapomboi Location within Trans-Nzoia County, the Appellant intentionally caused the contact between his penis and the vagina of ANS, a child aged four (4) 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 thirty (30) years imprisonment.
2. The Appellant was aggrieved by his conviction and sentence. His Petition of Appeal challenged the probative value of the evidence of PW1. He sought for a re-trial on the ground that he was only furnished with the witnesses' statements at the close of the Prosecution's case. He faulted the trial court for relying on insufficient and fabricated evidence. 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' written submissions. The Appellant submitted that the *voir dire* examination conducted on the Complainant did not sufficiently confirm that the Complainant would tell the truth in her testimony. As a result, the Complainant's evidence ought to have been disregarded. He submitted that the medical evidence presented by the Prosecution was inconclusive. He added that the failure to adduce treatment notes from Power Plaza Clinic into evidence cast doubt on the sufficiency of the medical evidence. He suggested that the investigators ought to have taken his DNA samples for analysis to either include or exclude him from culpability. He urged that the witnesses gave contradictory evidence regarding the crime scene, the clothes that the perpetrator had worn on the date of the offence, the circumstances of the offence and the names of the witnesses. He added that the absence of photographic evidence rendered the investigations shoddy. As a consequence of the foregoing, the Appellant alleged that he suffered grave prejudice at trial. He maintained that the charge sheet was defective as it omitted the words 'unlawfully' and 'intentionally' in the particulars of the charge. Finally, he submitted that the sentence did not accord with the Muruatetu principles arguing that the sentence meted out by the trial court had been made mandatory in its nature.
4. Miss. Mumu, Learned Prosecutor, submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. She submitted that the P3 form and medical treatment notes were properly adduced into evidence as no prejudice was occasioned upon the Appellant. She disputed the Appellant's allegations that he was furnished with witnesses' statements at the close of the Prosecution's case noting that the Appellant was at all times material to the trial ready to proceed with the case. Furthermore, he thoroughly cross examined all of the Prosecution's witnesses. She further submitted that the Appellant's defence was rightly rejected as weak. She further urged the court to find the trial court's sentence lawful. The court should therefore uphold the conviction and affirm the sentence that was imposed on the Appellant.
5. The Prosecution called a total of eleven (11) witnesses in a bid to establish the charge preferred against the Appellant. The Complainant ANS, (PW1) was born on June 24, 2013. She was a student at [Particulars Withheld] in Kapomboi. She was on 11th September 2018 going to school at 8:00 a.m. when the Appellant grabbed her from behind. He then took her to a maize plantation where he sexually assaulted her. She felt pain.
6. During the commission of the act, PW3 Rael Jepkorir Kiyech, the Complainant's neighbour noticed some commotion in the maize plantation as she was walking by. She then approached the scene where she found the Appellant in a red cloth with the Complainant who was crying. When asked him what he was doing, the Appellant explained that he had escorted the Complainant to relieve herself. However, on her further observations, PW3 noticed that the Complainant had been sexually assaulted. She then picked the Complainant and took her home. While on their way to the Complainant homestead, PW3 noticed that the Complainant was walking with an ungainly gait.
7. PW3 and the Complainant found the Complainant's grandmother PW5 JK at home. PW5 was then informed of what had transpired. She confirmed from general observations that the Complainant had been sexually assaulted. She took the Complainant to Power Plaza clinic where PW2 NW, the Complainant's mother, joined them. PW2 then notified her husband, the Complainant's father JWS, PW4 about the incident. She then took the Complainant to Endebess for further medical treatment.
8. The Complainant was seen by Lilian Akinyi PW11, a clinical officer based at Endebess Sub-County Hospital. On general observation, she noticed that the Complainant suffered bruises and lacerations in her vagina. Her hymen was broken. She had spermatozoa and blood stains on her vaginal walls.



Her conclusion was that the Complainant had been defiled. The treatment notes and P3 form were produced in evidence as Prosecution Exhibit 2 and 3 respectively.

9. On that same day while in hospital, PW6 Margaret Ayago, a neighbour was notified that the Appellant had sexually assaulted the Complainant and was on the run. She was given a description of his physical attributes. When she returned home, PW6 identified the Appellant. He came running to her house. He stated that he was looking for her neighbour. PW6 ushered the Appellant to her house. He was given water since he was panting. Suddenly, an angry crowd showed up to her house. She refused to open the door because she feared that the Appellant would have been harmed.
10. Meanwhile, PW9, APC Edwin Munanga based at Cypress AP Post was called and informed that the Appellant had been locked up in PW6's house. He was accompanied by PW4 when he went to PW6's house. He then arrested the Appellant and took him to Endebess Police Station. PW7, Corporal Mariam Membe, the investigating officer, received the Appellant. She collected the evidence and recorded witnesses' statements. She then charged the Appellant with the present offence.
11. After close of the Prosecution's case, the trial court found that the Appellant had a case to answer. He was placed on his defence. His sworn testimony was that he was framed by PW1 on the night of 11th September 2018 following a dispute. He added that he was chased by unknown persons and sought refuge at his neighbour's home. He was locked inside the house. He was willing to send Kshs. 5,000.00 to a sergeant but those efforts were hindered when a KPR official intervened. He was then taken to Endebess Police Station. He was later charged with the present offence. He denied committing the offence.
12. 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 v 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.
13. 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
14. The first ingredient is that of the Complainant's age. The trial court relied on common sense to establish that the Complainant could not have exceeded ten (10) years of age. PW2, the Complainant's mother testified that the Complainant was born on June 24, 2013. This court agrees with the findings of the trial court that the Complainant was a child of tender age within the meaning ascribed to the term under Section 2 of the *Children Act*.
15. 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."



16. The Complainant's testified that she was sexually assaulted on September 11, 2018 while on her way to school. PW11 noticed that the Complainant suffered bruises and lacerations in her vagina. Her hymen was torn. She also had blood stains and spermatozoa on her vaginal walls. The trial court found that the broken hymen was a sign of penetration. In the P3 form, PW11 indicated that the Complainant had been defiled. This court holds that the Prosecution had established the ingredient of penetration to the required standard of proof beyond any reasonable doubt.
17. The last ingredient that the Prosecution had to establish was the identity of the perpetrator. The Complainant testified that on 11th September 2018, while going to school, the Appellant grabbed her from behind. He then took her to a maize plantation where he sexually assaulted her. She felt pain. While this was unfolding, PW3 who was passing by, noticed some commotion in the maize plantation. On approaching the scene, she found the Appellant dawned in red clothing, with the Complainant who was crying. The Appellant was well known to PW3 prior to the incident of the fateful day. Upon inquiry, the Appellant explained that he had taken the child to relieve herself. However, PW3 observed the Complainant and noticed that she had been defiled. As she escorted the Complainant to her homestead, PW3 noticed that the Complainant was walking with an ungainly gait.
18. The trial court relied on direct and circumstantial evidence in finding that the Appellant was the perpetrator. The trial court was satisfied that the witnesses and, in particular, the Complainant was telling the truth. This court finds that the Appellant was positively identified as the perpetrator and shall not interfere with the findings of the trial court.
19. This court has considered the Appellant's grounds in support of his Appeal. On whether the charge sheet was defective on account of the omission of the words 'unlawfully' and 'intentionally', this court holds that the omission of the words did not vitiate the substance of the charge. The charge was read out to the appellant in a language he understood. He, as a result, answered to the charge. That ground fails. The upshot of the above is that this court finds that the Prosecution established the ingredients of defilement to the required standard of proof beyond reasonable doubt. Consequently, the Appellant's appeal against the conviction lacks merit. It is hereby dismissed.
20. The Appellant was under the *Sexual Offences Act* sentenced to serve thirty (30) years imprisonment. In his mitigation at trial, the Appellant stated that he was a young man and a sole breadwinner for his family. The trial court took into account the fact that the Complainant was a child of tender years. Accordingly, this court finds that the sentence meted out was lawful. The appeal against the sentence fails and is hereby dismissed. However, the sentence shall be computed from the date the Appellant was arraigned in court i.e on September 13, 2018.
21. It is so ordered.

DATED AT KITALE THIS 25TH DAY OF JULY 2022.

L KIMARU

JUDGE

