



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 28 OF 2018**

**(Appeal arising out of conviction and sentence of Hon. D. Wangeci (Senior Resident Magistrate)**

**in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 87 of 2017 delivered on 22<sup>nd</sup> March 2018)**

**ROBERT WANJALA WAFULA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Robert Wanjala Wafula**, 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 **24<sup>th</sup> July 2017** at Kiminini Shopping Centre within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of **CN** (the complainant), a child aged **three (3) years**. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged and sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for proceeding with the trial yet he had not been supplied with witness statements by the Prosecution. He was aggrieved that he had been convicted on the basis that the age of the complainant had been established yet no documentary evidence was produced to establish this fact. He took issue with the fact that his defence was dismissed by the trial court without any reason being ascribed. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, both the Appellant and the Respondent (Prosecution) presented to court written submissions in support of their respective opposing positions. Whereas the Appellant argued that the Prosecution had failed to establish the charge brought against him to the required standard of proof, the Prosecution on the other hand argued that it had established all the ingredients in support of the charge and therefore the trial court's verdict should not be interfered with. This court shall consider the contrasting arguments in the appeal after briefly and succinctly setting out the facts of this case.

PW1, EK, is the complainant's mother. At the material time, she was operating a restaurant at Kiminini Shopping Centre. As the complainant was not yet of school going age, PW1 stayed with her at her (PW1's) place of work. The complainant was three (3) years old at that time. PW1 recalled that on 24<sup>th</sup> July 2017 at about 1.00 p.m., she noticed that the complainant was not playing with her friends outside the restaurant. She went outside to establish her whereabouts. She was told by one of the children that someone had taken the complainant towards the direction of the latrines. She went to the latrines and saw the Appellant. PW1 testified that she had known the Appellant for a period of seven (7) years prior to the incident. The Appellant earned a living by performing casual work at the Shopping Centre. She recalled that the Appellant was holding the complainant whom he had undressed. The complainant's trouser and panty were on the floor. When the Appellant saw PW1, he dropped the child and ran away. PW1 observed the complainant's vagina. She saw some fluids on the vagina. The same fluid was also present on the floor. It had wetted the complainant's panty. The complainant by that time was unconscious. PW1 raised an alarm. Members of the public came. They chased the Appellant and apprehended him. They took him to Kiminini Police Post where the Appellant was received by PW3, PC Daniel Polo. He was arrested and detained at the said police station pending investigations.

Meanwhile, PW1 rushed the complainant to Kiminini Cottage Hospital (a private facility) where she was treated and discharged. PW1 was advised by the police to take the complainant to Kitale County Hospital where the P3 form would be filled. She did so on 25<sup>th</sup> July 2017. The complainant was seen by PW2, John Koima, a clinical officer based at the said hospital. This is what PW2 observed:

***"I examined the clothing presented by the mother. There were stains on a white creamish panty. The hymen was bruised and***

*intact but vulva swollen. The laboratory report do not show anything. All the tests turned negative. The high vaginal swab did not show presence of spermatozoa. She was on medication, antibiotics and also PEP... I conclude that there was evidence of defilement based on bruises on the labia and swollen vulva and the history.”*

PW2 produced the P3 form and the medical treatment notes earlier prepared at Kiminini Cottage Hospital. PW2 produced the birth notification form to establish that indeed the complainant was three (3) years old at the time of the incident.

PW3 upon completion of investigations, established that there was sufficient grounds to charge the Appellant with the offence which he was convicted of. When the Appellant was put on his defence, he exercised his constitutional right and kept quiet. The trial magistrate therefore convicted the Appellant on the basis of the Prosecution's evidence which she formed the opinion that it had established the charge brought against the Appellant to the required standard of proof.

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's 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 established to the required standards of proof that the Appellant committed the offence that he was charged with.

For the Prosecution to sustain the charge of defilement, it must establish that the following three ingredients to the required standard of proof:

**1. Age of the complainant**

**2. Penetration**

**3. Identification of the perpetrator**

On the complainant's age, PW1, the complainant's mother, testified that the complainant was three (3) years old. Her evidence was buttressed by the production of the birth notification form in evidence. This was produced by PW2. This court finds that the evidence of PW1 was sufficient enough to prove age of the complainant. This position has been fortified by the Court of Appeal in **Nyeri C.A. Criminal Appeal No. 61 of 2014 Richard Wahome Chege -vs- Republic (unreported)** and **Nyeri C.A. Criminal Appeal No. 100 of 2013 J.W.A. – vs- Republic (unreported)**. The evidence of the complainant's mother coupled with the production of the complainant's birth notification form was sufficient to prove the complainant's age. This court holds that the age of the complainant was established to the required standard of proof.

The next ingredient is penetration. PW1's testimony was that on 24<sup>th</sup> July 2017, she found the Appellant red handed holding the complainant who was undressed. Upon close examination of the complainant's vagina, PW1 saw some fluids. This was consistent with the fluids she saw on the floor right next to where the complainant was left unconscious by the Appellant. The fluids had also wetted the complainant's panties. PW2 testified that he medically examined the complainant on 25<sup>th</sup> July 2017. It was his evidence that there was proof of defilement as the labia was bruised and the vulva was swollen. The testimony of the complainant's mother coupled with medical evidence indeed established that the complainant was sexually assaulted. This court therefore finds that there was evidence of penetration on account of the testimony of the two witnesses.

The third element is the identification of the perpetrator. According to the evidence of PW1, she caught the Appellant in the act. The complainant was undressed. The Appellant in turn dropped the complainant on the ground and ran away. He left the complainant unconscious. PW1 thereafter alerted her neighbours. The Appellant was accosted by members of the public and taken to Kiminini Police Post. She further testified that the Appellant was well known to him for a period of seven (7) years prior to the incident. It was her evidence that the Appellant earned a living by performing casual work at the Shopping Centre where her restaurant was situated. She was able to identify the perpetrator by name and further stated that she used to see the appellant carrying luggage and fetching water for the customers at the Shopping Centre at a fee. It was uncontroverted evidence that PW1 properly identified the Appellant. This court thus finds that the Prosecution indeed established this element of identification to the required standard of proof.

At trial, the Appellant elected to invoke his constitutional right to remain silent. The grounds put forth in this appeal as well as the written submissions have been considered by this court. The Appellant cannot therefore put forth a ground of appeal that his defence was not considered. He did not put forward any defence the trial court would have considered. This court finds that indeed the Prosecution established the ingredients of defilement to the required standard of proof beyond reasonable doubt. The Appellant's appeal against the conviction lacks merit. It must fail. It is hereby dismissed.

The Appellant was under **the Sexual Offences Act** sentenced to imprisonment for life by dint of the provisions of **Section 8 (2)** which states: **“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”**

In the present appeal, it was clear to the court that the trial court committed no error in principle or applied the wrong considerations in meting out the said sentence. The trial court further considered the mitigating factors raised by the Appellant. The Appellant did not show remorse for the offence that he committed. This court notes that **Section 8 (2)** of the **Sexual Offences Act** is couched in mandatory terms. The sentence was legal. Since this court found no reason to interfere with the conviction, it shall not disturb the sentence either. The Appeal against the sentence is dismissed as it does not have merit.

It is so ordered.

**Dated at Kitale this 27<sup>th</sup> day of July, 2021.**

**L. KIMARU**

**JUDGE**