



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CRIMINAL APPEAL NO. 57 OF 2019**

**FAITHRICH WABWILE WANJALA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(An appeal arising from the original conviction and sentence by Hon C.L Adisa (RM) in Bungoma CMC's S.O No. 66/2017 delivered on 15<sup>th</sup> May, 2019)

**JUDGMENT**

1. The Appellant was charged in the subordinate Court with the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the **Sexual Offence Act No. 3 of 2006**. The facts were that on 26<sup>th</sup> March, 2017 and 20<sup>th</sup> April, 2017 at [Particulars Withheld] Village Musikoma Location within Bungoma County he intentionally and unlawfully caused his penis to penetrate the vagina of NK (*name redacted*) a child aged 16 years.
2. He faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The facts being that on 26<sup>th</sup> March, 2017 and 20<sup>th</sup> April, 2017 at [Particulars Withheld] Village Musikoma Location within Bungoma County he intentionally and unlawfully caused his penis to come into contact with the vagina of NK (*name redacted*) a child aged 16 years against her will.
3. The Appellant denied the charges whereupon the Prosecution called a total of four (4) witnesses to prove their case. PW1 was the Complainant who stated that she had sex with the Appellant on 2 occasions and became pregnant. In the first instance, the Appellant called her while she was seated outside and took her to [Particulars Withheld]'s where he defiled her, and in the second instance, the Appellant came on a motor cycle and promised to buy her something.
4. PW2 CN, the Complainant's step mother was summoned to school when the teacher realized that the Complainant had become dull. The minor was tested at Bungoma District Hospital where it was confirmed that she was pregnant. She subsequently gave birth to a baby girl.
5. PW3 Alex Masinde a Clinical Officer received and tested the minor at the Bungoma District Hospital. He confirmed that she was pregnant. PW4, Dr. Duncan Wafula conducted the age assessment which confirmed the minor was 16 years old.
6. The Appellant was put on his defence and he gave a sworn statement denying any link with the offence.
7. At the end of the trial, the court found the Appellant guilty and handed him 15 years' imprisonment. Dissatisfied, the Appellant has approached this court on appeal raising the following grounds;

**That the appellant pleaded not guilty to the charges.**

**The learned trial magistrate erred in law and fact by;**

- a. Convicting the appellant instead of one, Fred who was reported by the complainant in the first place.**
- b. Convicting without a DNA report.**
- c. Disregarding the probation report that was produced in court.**

**d. Not considering the investigating officer did not testify.**

**e. Failing to note that the matter was reported 6 months after the incident.**

**f. Overlooking doctor's additional remarks.**

8. The appeal was disposed of by way of written submissions. Both parties filed their respective submissions which have been duly considered by this court.

#### **Analysis and determination**

9. In **Kiilu & Another vs. Republic [2005]1 KLR 174**, the duty of the first appellate court was stated thus:

**An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**

10. Upon careful scrutiny of the record as well as the submissions, the only issue in this appeal is whether the prosecution proved its case to the required standards.

11. The Appellant filed undated written submissions in which he reiterated his grounds of appeal without more.

12. On its part, the State filed submissions dated 8<sup>th</sup> July, 2015 in which it sought to controvert the grounds raised by the Appellant. On the allegation in the second ground that the Appellant was not properly identified, the learned State Counsel drew attention to page 23 of the notes of the trial court where PW1 stated on cross-examination that "*I know your name as Faithrich Wabwile Wanjala...as per the statement the name recorded is FRED. It is Faithrich who impregnated me*". Attention was further drawn to her testimony on re-examination where she stated, "*I know his name as Fred as most people referred to him as Fred. Fred is the one in the dock*". Therefore, that the issue of identification was put to rest at trial.

13. The State Counsel asserted that the key ingredients of the offence of defilement namely, penetration, age of the victim and identification of the perpetrator were properly proved to the required standard of beyond reasonable doubt. That a DNA report was therefore not mandatory to prove the charge of defilement. She further contended that there was no legal impediment to the Appellant producing a copy of the report in evidence as part of his defence if he was convinced that the DNA report would have favoured his case.

14. On sentencing, it was the State Counsel's submission that the fifteen (15) years' sentence imposed on the Appellant was proper since it is the minimum sentence provided for under **section 8(4) of the Sexual Offences Act**. Further that prior to sentencing, the trial court considered the presentence report, the fact that the Appellant was a first offender and his mitigation. She urged that the appeal was lacking in merit and was therefore for dismissal.

15. The ingredients to be proved in a charge of defilement have been restated by several decisions of this court as; age of the complainant, proof of penetration and identity of the perpetrator. Age and proof of penetration are not in dispute in this appeal since the pregnancy must have resulted from a sexual activity.

16. The challenge in this appeal is the fact that the act of penetration occurred on 2 different occasions, approximately one month apart. The Complainant was medically examined on 28<sup>th</sup> July, 2017 and found to be five (5) months pregnant. Taking into account the fact that the first sexual contact was in March, 2017 and assuming that she conceived on that very day, she should have been four (4) months pregnant. If she became pregnant on the latter date of April, she should have been three (3) months pregnant.

17. The question that ought to be answered then is whether the Appellant was responsible for the pregnancy. The minor stated that DNA tests were conducted on herself, the Appellant and also the baby but the results were not produced in court. It is therefore impossible to tell whether indeed the Appellant is the father of the child. The evidence was also silent on the date of birth of the baby in question.

**18. Section 36 of the Sexual Offences Act** allows the court to order for DNA samples to prove criminal culpability of an accused person. The period that lapsed between the day the offence was allegedly committed and the period the Complainant was taken for testing is long and leaves room for doubt.

19. Having perused the record, the only evidence of defilement is the pregnancy and the child who was born out of the pregnancy. The DNA results could have greatly assisted the court in determining whether the Appellant is the father and therefore the culprit. In the Court of Appeal decision in **Williamson Sowa Mbwanga vs. Republic [2016] eKLR**, the court held that:

**"As regards the first ground of appeal, it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured.**

20. It is noteworthy that the person who conducted the DNA was not called to testify and produce the DNA results. While it is trite law that the Prosecution has a free hand in choosing its witnesses, where the Prosecution does not call a necessary witness, the court may draw an inference that had that witness been called, his or her evidence may have been adverse to the Prosecution's case.

21. This position is contained in numerous decisions within our jurisdictions. In **Donald Majiwa Achilwa & 2 Others vs. Republic [2009] eKLR** the Court of Appeal (Bosire, Waki & Onyango Otieno, JJ.A.) held:

**The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case.**

22. This court is alive to the fact that defilement may not only be proved by medical evidence but can also be proved by way of other cogent evidence. However, the **Constitution** under **Article 50** guarantees every citizen the right to be presumed innocent until proven guilty. Any doubt in the Prosecution's case ought to be interpreted in favour of the accused. I can do no better than to state it as Mativo, J did in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR**:

**The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."**

23. Having carefully perused the record and re-evaluated the evidence noting the shortcomings in the prosecution's case as highlighted in the foregoing paragraphs, I am satisfied that there is a reasonable doubt in the Prosecution's case whose benefit should have gone to the accused person.

Reasons wherefore, the appeal hereby succeeds with the resultant order that the Appellant be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 15<sup>TH</sup> DAY OF OCTOBER, 2021**

.....

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Appellant in Person.**

**In the presence of.....State Counsel.**