



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CORAM: D.S.MAJANJA J.**

**CRIMINAL APPEAL NO. 149 OF 2013**

**BETWEEN**

**GODWIN BARASA WAFULA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against the original conviction and sentence of Hon. M. W. Njagi, SRM dated 23<sup>rd</sup> July 2012 at the Magistrates Court at Eldoret in Criminal Case No. 3973 of 2010)**

**JUDGMENT**

1. The appellant, **GODWIN BARASA WAFULA**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act* (“the Act”). The particulars of the offence were that on 28<sup>th</sup> June, 2010 in Eldoret West District within Rift Valley Province, he intentionally and unlawfully caused his penis to penetrate the anus of SMK, a boy aged 5 years.
2. In his appeal titled, “Mitigation Appeal” the appellant raised two issues. First that he was convicted by the trial magistrate who failed to comply with the procedure set out in **section 162** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*. Second, that the prosecution did not prove the offence beyond reasonable doubt. Third, the trial magistrate erred in convicting him on without considering his status of being psychiatric.
3. It is true that when the appellant was initially arraigned in court, he was found not fit to plead and was committed to Mathari Hospital for psychiatric treatment. Before the trial commenced, the court received a Certificate of Capability to Make Defence dated 10<sup>th</sup> September 2012 prepared by the Medical Superintendent certifying that the appellant had been discharged from hospital and was capable of making his defence. I therefore find that at the time the trial commenced on 14<sup>th</sup> March 2013, the appellant was in a position to understand the proceedings.
4. I now turn to consider the substantive evidence against the appellant and in doing so, I am guided by the principle that it is the duty of the first appellate court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] EA 32*).
5. The child, PW 2, testified that on 28<sup>th</sup> June 2010, he was playing near home when the appellant whom he knew as *Godi* called them to go to the forest where he stays. He took him and another boy and told them that if he revealed what he was about to do, he would be cut with a panga. He removed PW 2’s clothes, and put his penis in the anus. PW 2 did not tell his mother, PW 3 immediately.
6. PW 3 recalled that on 13<sup>th</sup> July 2010, he met another woman who told him that PW 2 had been raped by *Godi*. She asked PW 2 about it and he confirmed what the appellant had done. She told the court that the appellant used to herd cattle for one of the neighbours. She took PW 2 to Moi Teaching and Referral Hospital where he was examined by PW 1, a doctor, who filled the P3 Medical Form on 14<sup>th</sup> July, 2010. She observed that there was a healed tear at the anus. The Investigating officer, PW 4, testified that the appellant was brought to the police station by PW 3 on 13<sup>th</sup> July 2010. He recorded statements and took PW 2 for an age assessment which showed he was 5 years old.
7. In his defence, the appellant admitted that on that day, PW 2 followed him and he did not know why.
8. In order to prove the offence of defilement under **section 8(1)** of the *Act*, the prosecution must prove that an accused did an act of

penetration with a child. “Penetration” under **section 2** of the **Act** means, “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

9. Having considered the evidence which was uncontested, I agree that the prosecution proved its case. PW 2 gave an account of what took place while PW 1 confirmed penetration as evidenced by a tear in the anus. The appellant’s defence put him together with PW 2 on the material day and that PW 2 knew him was corroborated by PW 3 who testified that he was working in the locality. In as much as the appellant submitted that he was suffering from a mental illness during the proceedings, any suggestion of insanity at the time he committed the offence was displaced by the fact that he is the one who took PW 2 to the forest, threatened him and proceeded to commit the felonious act. There is no evidence to show that he did not know the nature of the act or that it was wrong for the trial court to consider that he was insane.

10. The child’s age is a question of fact. PW 3 testified he was born on 17<sup>th</sup> December 2005 but that she had not acquired a birth certificate and the clinic card got lost. PW 1 assessed PW 2’s age as 5 years. At any rate, he was below the age of 11 years which attracts one mandatory sentence of life imprisonment under **section 8(2)** of the **Act**.

11. I affirm the conviction and sentence and dismiss the appeal.

**DATED and DELIVERED at ELDORET this 24<sup>th</sup> day of APRIL 2019.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Mumu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.