



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**

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

**CRIMINAL APPEAL NO. 152 OF 2015**

**BETWEEN**

**PETER WAHOME MUNGAI .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence of Hon. T.W. Cherere, CM dated 30<sup>th</sup> October 2015 at the Magistrates Court at Eldoret in Criminal Case No. 1684 of 2015)*

**JUDGMENT**

1. The appellant, **PETER WAHOME MUNGAI**, was charged, convicted and sentenced to 20 years' 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 16<sup>th</sup> January 2015 in West District of Uasin-Gishu County, he caused his penis to penetrate the vagina of FM, a girl aged 14 years.
2. The appellant has now lodged this appeal to challenge his conviction and sentence. He has relied on his petition of appeal and written submissions. He raised that issue that the prosecution did not prove the offence beyond reasonable doubt and the evidence of the witnesses was not corroborated. He also states that there was no clear medical evidence connecting him to the offence and that his defence was disregarded unfairly.
3. Counsel for the respondent's position is that the prosecution proved each element of the offence of defilement and that the appellant was identified as the person who committed the act of penetration.
4. Before I deal with this appeal, I recognise that it is the duty of this court, being a 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*). In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.
5. On the material day, the child (PW 2) and her mother (PW 3) had a quarrel. PW 2 decided to leave home and go to her uncle's place. At about 6.00pm going to 7.00pm, she saw someone walking ahead of her. Since it was not very dark, she was able to recognize him as the person she used to see around Paul's Bakery and Kitale stage selling white vests. She asked him his name and he told her he was "Peter." As they talked she sensed danger and when she tried to run away, he caught her, dragged her into a thicket on

the road and proceeded to sexually assaulted her. After her ordeal she proceeded to her uncle's place where she her aunt to whom she narrated her ordeal. PW 3 was called and they took the child to Moi Teaching and Referral Hospital ("MTRH").

6. PW 3 recalled that on the material evening she had disagreed with PW.2 who decided to leave home. At 7.30pm, her brother called her and told her that PW.2 had been defiled. She organized for a taxi to pick the child and they went to MTRH. PW 2 told her that the person who defiled her used to sell vests at Paul's Bakery and Kitale stage. PW 3 went to the stage but did not see until one day, PW.2 came home and stated that she had seen the person. She proceeded to the stage where she saw the person selling vests. At the time PW.2 was present and confirmed it was him. On 23<sup>rd</sup> April 2015, she telephoned police officers who arrested the appellant.

7. The investigating officer, PW.4 recalled that PW2 and PW3 reported the incident of defilement on 27<sup>th</sup> January 2015. She was issued with the P3 form which was filled by PW.1 who had examined PW 2 on 16<sup>th</sup> January, 2015. She noted that the hymen was freshly torn. She concluded that there was penetration.

8. In his defence the appellant denied that he committed the offence. He stated that he was arrested on 8<sup>th</sup> April 2015.

9. The thrust of the appellant's case is whether the prosecution failed to prove its case reasonable doubt. 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.*"

10. From the evidence I have no doubt that the prosecution proved the act of penetration. PW 2 gave clear testimony of what took place on the material night. Her mother, PW 3, saw her in a state of distress and took her to hospital. Her testimony was also corroborated by that of PW 1, who examined her on the same night and who noted injuries on the vagina consistent with the act of penetration.

11. The key issue raised by the appellant is that of identification. The incident took place at night and I have warned myself of the dangers of convicting of a person on evidence of identification in difficult circumstances. In **Wamunga v Republic [1989] KLR 424** the Court of Appeal stated that;

***[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.***

12. The incident took place between 6.00pm and 7.00pm hence it was not very dark, the evidence shows that the appellant and PW.2 spoke, introduced themselves and given time and proximity of interaction, I find that the circumstances were favourable for positive identification. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see **Anjononi & Others v Republic [1980] KLR 59**). The prosecution case was fortified by the fact that PW 2 was familiar with the appellant as she had seen him before several times as she went to school at the Paul Bakery and Kitale stage selling white vests.

13. Since PW 2 was familiar with the identity of the assailant, an identification parade was would have been ideal but the failure to conduct one was no necessarily fatal to the prosecution case. I am satisfied that PW.2 identified the appellant and described her to PW.3. He was found selling vests where PW.2 said he was and he was then arrested.

14. The totality of the evidence is that the trial magistrate found PW.2 truthful and was satisfied that she was telling the truth. I find that it is the appellant who committed the act of penetration. The conviction is affirmed. Likewise, the sentence being the mandatory minimum sentenced affirmed.

15. The appeal is dismissed.

**DATED and DELIVERED at ELDORET this 23<sup>rd</sup> day of APRIL 2019.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

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