REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 75 OF 2013

[FORMERLY NYERI HCCRA NO. 152 OF 2009]

RICHARD WAHOME CHEGE..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

[Being an appeal from the original conviction by D. Orimba, Senior Resident

Magistrate, Kangema, in Criminal Case No. 126 of 2009 dated 7th July 2009]

JUDGMENT

1. The appellant was adjudged guilty of *defilement* contrary to section 8 (1) and (2) of the **Sexual Offences Act**. He was sentenced to *life* imprisonment.

2. The particulars were that on 13th March 2009 at *K. Sub-Location [particulars withheld]* in Murang'a West District, he *"had unlawful carnal knowledge of TW [particulars withheld] a girl aged 10 years."*

3. The appellant is aggrieved by the conviction and sentence. At the hearing of the appeal, the appellant relied wholly on *amended* grounds of appeal filed with *leave* on 25th July 2018; and, his home made submissions of even date.

4. There are four *amended* grounds of appeal: Firstly, that the trial court did not establish whether the minor understood the meaning of an oath; secondly, that the evidence of PW1 and PW2 was contradictory or doubtful; thirdly that there was insufficient medical evidence to corroborate the charge; and, fourthly, that his defence was disregarded.

5. The appellant also contended that he did *not* follow the proceedings for want of translation. I heard the appellant to say that the charge was *not* proved beyond reasonable doubt; or, that he was not accorded a *fair trial*.

6. The Republic contests the appeal. The position of the State is that all the ingredients of the offence were *proved*; and, that the punishment given was the *minimum* sentence.

7. This is a first appeal to the High Court. I have *re-evaluated* all the evidence on record and drawn *independent* conclusions. I remain cognizant that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] EA 32, ***Kariuki Karanja v Republic*** [1986] KLR 190.

8. The complainant (PW1) was aged 10 years. There is a detailed *voire dire* examination at page 4 of the record containing the *questions* by the court and her *answers*.

9. The learned trial magistrate did not record whether PW1 understood the *nature* of an oath. But he formed the opinion that she could be *affirmed*. But I am satisfied that the trial court largely complied with the procedure of taking the evidence of the minor. ***Johnson Muiruri v Republic*** [1983] KLR 445. Furthermore, the appellant was allowed to *cross-examine* the complainant.

10. PW1 knew the appellant as a resident of her village. She testified that on the material date, the appellant led her behind an incomplete church structure and *penetrated* her. Her testimony went as follows-

> *"I am 10 years old and a pupil at K. [particulars withheld] in Std 4. I do recall on 13.3.09 at 4 p.m., I was on my way from school alone heading home. I was walking on the K. Road [particulars withheld]. I met accused near the church. He held my hand and*

led me behind the church which is under construction.

“He removed my school uniform and underwear; pushed me to the ground and laid [sic] on me after removing his trouser and underwear.

Accused inserted his penis into my vagina. I felt pain and cried.

“Afterwards he released me with a warning not to tell anybody, he threatened to kill me if I tell [sic] anybody of what he did to me.I saw blood coming from my private parts after he released me. My mother was informed by Mama W

11. That narrative was confirmed by her mother (PW2). It is uncertain who informed her of the incident. The complainant said she did not know how *Mama W* learnt of the incident. PW2 had noticed that the complainant was walking with difficulties. She reported the matter to the police at Kangema. She took her daughter for treatment at Kangema Sub-District Hospital. She confirmed that the complainant was aged 10 years.

12. PW3 was Danson Maina, a clinical officer. He testified that the PW1 was aged 10 years. He examined the complainant *seven days* after the incident. Her hymen was broken; and, there was blood oozing from her vagina. He detected pus cells but there were no spermatozoa. HIV was negative. He produced the *P3 Form*.

13. The appellant denied that he defiled the complainant. He alleged that he was framed up by the mother who used to be his lover. He also said that the complainant was couched to lie. I will reproduce his testimony *in extenso*-

“On the 22/3/09, I woke up at 7:30 and after milking I took the cow for grazing. I then proceeded to the farm up to 2:00 p.m. I then came [sic] to Kangema to collect the feeds. I did not defile the complainant as alleged. I was at home where [sic] some boy came and arrested me. I was taken to the police station and later charged with the offence I know nothing about.

“I know the mother to the complainant. She was my lover. I stayed with her for 4 months as a wife. I was getting little money, but she was taking almost all. I decided to leave her. She insulted me after leaving her home.

“This is a case where I am fixed.

The complainant was couched to lie to court.”

14. Under cross examination, he said that he and the complainant’s mother were having an illicit affair; and, that they would have trysts in some lodgings.

When pressed further, he said he did not know her name; and, she never volunteered her name.

15. I find that the combined evidence of PW1 and PW3 established *penetration* as defined in section 2 of the Act. Her hymen was *broken*; and, there was *blood* oozing from her vagina. The clinical officer detected *pus cells* but there were no spermatozoa.

16. The next key question is whether the appellant perpetrated this heinous crime. The issue is intertwined with *identification* of the appellant. The complainant knew the appellant as a resident of her village. She identified him by his name as the person who defiled her in the bushes behind the church building. But as I will discuss shortly, there are serious *gaps* in the *timeline* of events which cast *doubt* on the *veracity* of her evidence.

17. It is not true that the trial court disregarded the defence: it found it to be a *lie*. I find it a little strange that the appellant did not know the name of her “lover” with whom he claims to have cohabited with for *four months*. What is also telling is that he never cross-examined PW2 on the affair. I have reached the conclusion that the claim that he was framed up was a red herring.

18. The appellant’s claim that he was denied a fair trial is equally misplaced. The trial was in *public*. The appellant was present and was granted an opportunity to *cross examine* all the *five* prosecution witnesses. The record shows there was translation from English or Kiswahili to *Kikuyu*.

19. But that said there are some glaring *gaps* in this matter. The offence allegedly occurred on 13th March 2009. The complainant in *cross examination* said that she raised an alarm; and, that *three women* came to her rescue. None of those women testified. The complainant suspected that *MAMA W*disclosed it to her mother. But she did not know how *MAMA W*learnt of the incident

20. As stated, the complainant did *not* disclose the incident to her mother (PW2) *immediately*. It is not clear who informed the complainant’s mother of the incident. Was it *MAMA W*as suggested by the complainant? *MAMA W* did not testify in the matter. PW2 only said that *“sometime in the month of March 2009”*, she noticed that her daughter was walking with difficulties.

21. The matter was *not* reported to the police until *seven days* later on 20th March 2009. This is clear from the evidence of PW4, Police Constable Opanga. That is strange considering that *three women* had rescued the complainant on the *date* of the *incident*. From the narrative by the area chief (PW5), the appellant was not arrested until 25th May 2009.

22. Although there is strong medical evidence on penetration, it is watered down by a belated examination. The complainant was only taken to the hospital *seven days* later on 20th March 2009.

23. All those gaps raise significant *doubts* on the *veracity* of the evidence; elements of the charge; and, the *culpability* of the appellant. The appellant may have *lied* in his testimony, but the *burden of proof* fell squarely upon the shoulders of the Republic. ***Woolmington v DPP*** [1935] AC 462, ***R v Kipkering arap Koske & another*** 16 EACA 135 (1949), ***Bhatt v Republic*** [1957] E.A. 332.

24. In the end I cannot confidently say that the prosecution proved the offence beyond *reasonable doubt*. It must follow as a corollary that the conviction was *unsafe*.

25. The upshot is that the appeal is *allowed*. The conviction and sentence are *set aside*. The appellant shall be released *forthwith* unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 30th day of May 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Ms. Ruth Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.