



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO. 79 OF 2017**

**SIMON NGUI IRUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[Appeal from the decision of M. Wachira, Chief Magistrate, in S.O. No. 30 of 2016 at Murang'a dated 1<sup>st</sup> November 2017]*

**JUDGMENT**

1. The appellant was convicted for *defilement* contrary to section 8 (1) as read with section 8 (2) of the **Sexual Offences Act**. He was sentenced to *life imprisonment*.
2. The particulars were that on 31<sup>st</sup> August 2016 within Murang'a County, he intentionally caused his penis to penetrate the anus of MNR *[particulars withheld]* a child aged *ten years*.
3. The *petition of appeal* raises *six grounds*. I will compress them into *three*: Firstly, that on the totality of the evidence, the conviction was unsafe; secondly, that there was non-compliance with section 200 and 211 of the **Criminal Procedure Code**; and, thirdly, that the entire proceedings were defective in substance and a nullity.
4. The learned Prosecution Counsel, *Mr. Mutinda*, conceded the appeal.
5. This is a first appeal to the High Court. I have *re-evaluated* the evidence on record and drawn *independent* conclusions. There is a caution because I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.
6. Learned counsel for the appellant, *Mr. Wandugi*, submitted that the mandatory provisions of section 200 of the **Criminal Procedure Code** were not complied with. Counsel contended that the *election* whether or not to recall any witness belonged *exclusively* to the *accused*. In this case it was his *counsel* who elected to proceed from where the matter had reached.
7. It was also submitted that there were material *contradictions* between the evidence of the complainant and PW4. While the complainant said he was defiled inside a church, PW4 said the offence was committed in a nearby bush. It was also submitted that the doctor (PW3) did *not* find any injuries on the anus of the complainant.
8. I will commence with the attack on procedures at the trial. The record shows that the convicting magistrate took over the proceedings from R. A. Oganyo, Chief Magistrate. Counsel for the accused told the succeeding magistrate-

*“We can proceed from where we reached. We don't intend to recall any witness”*

9. Section 200 of the **Criminal Procedure Code** requires the succeeding magistrate to explain to the accused, on the record, of the right to recall any witnesses. Section 200 (3) is couched in mandatory terms: the succeeding magistrate *shall inform* the accused person of that right. Where the accused is convicted on evidence not wholly taken by the convicting magistrate, the High Court can overturn the conviction if there is a material prejudice. In that event, a new trial may be ordered.
10. In the instant case, the learned trial magistrate explained the right. The appellant's *counsel* made the *election* to proceed from where the matter had reached. He was emphatic that the appellant did not wish to recall any witness. I am not persuaded that the appellant was prejudiced merely by speaking through his counsel; or, that the *minor slip* vitiated the trial. I am aware of conflicting decisions on the point. See for example, *Rebecca Mwikali Nabutola v Republic*, Nairobi Criminal Appeals 445, 448 & 452 of 2012 [2021] eKLR. In the latter case, there was no compliance at all with section 200 of the Act. The decision can thus be distinguished. In any case, it is not binding on this court.

11. I will now turn to Section 211 of the **Criminal Procedure Code**. At the close of the prosecution's case, the learned trial magistrate found that the appellant had a case to answer. The procedure on conducting his defence was explained. That was on 26<sup>th</sup> July 2017. He said he wished to consult his lawyer. On 1<sup>st</sup> August 2017 his counsel was present. The appellant elected to make an *unsworn* statement. He informed the court that he would not call any witnesses. He proceeded to make an unsworn statement and closed his case.

12. I thus readily find that there was no infraction of section 211 of the Act. I am also *unable* to find that the appellant did not get a fair trial. Grounds 4, 5 and 6 of the petition are without merit and are *dismissed*.

13. I will now turn to the material evidence. The complainant was a minor. After a detailed *voir dire* examination, the court was satisfied that he was intelligent and understood the nature of an oath. I am satisfied that the trial court complied with the procedure of taking the evidence. **Johnson Muiruri v Republic** [1983] KLR 445.

14. The complainant said that on the material day at about 6:00 p.m., he was heading to the shops to deliver milk. He said the appellant grabbed him "*and took me inside a church building...and inserted his penis on [sic] my anus*". His father (PW2) said he believed his son when he said he was sodomized. However, the examining doctor (PW3) stated as follows-

*"On genitalia no tears or obvious bleeding. The anus did not have injuries. No discharge".*

15. Section 2 of the **Sexual Offences Act** defines *penetration* as "*the partial or complete insertion of the genital organs of a person into the genital organs of another person*".

16. On the totality of the evidence I am *not* satisfied that penetration was proved. I have reached the conclusion that the prosecution did *not* prove the charge of defilement beyond reasonable doubt. It must follow as a corollary that the conviction was *unsafe*.

17. 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 28<sup>th</sup> day of October 2019.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Appellant.

Mr. A. W. Kimani holding brief for Mr. K. Wandugi for the appellant.

Mr. S. Mutinda for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.