



**IN THE HIGH COURT OF KENYA AT KIAMBU**

**(CORAM: CHERERE -J)**

**CRIMINAL APPEAL NUMBER 109 OF 2017**

**BETWEEN**

**PETER WAMBUA ROSE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(An appeal from the conviction and sentence in Criminal Case Number 2690 of 2013 in the Chief Magistrate's Court at Kiambu by Hon. P.Gichohi (CM) on 30<sup>th</sup> August, 2017)***

**JUDGMENT**

**Background**

1. **PETER WAMBUA ROSE** (*hereinafter referred to as the Appellant*) has filed this appeal against his conviction and sentence on two counts of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act (*hereinafter referred to as the Act*). The offences are alleged to have been committed on 02.11.13 against **TWN** and **MWW** both girls aged 11 years

**The prosecution's case**

2. The prosecution called 5 witnesses in support of the charges. **MWW**, the complainant in the 2<sup>nd</sup> count told court that on 02.11.13, she had gone to visit her friend **TWN**, the complainant in the first count and that as they were returning home, they met the Appellant who she had never seen before who gagged them, took them to a house far from their homes where he defiled them in turns starting with **TWN** after which he threw them out. It was her evidence that the incident occurred at night but that there was a candle that enabled her to see the Appellant whom he identified to her mother, the following day, in the same house they were defiled.

3. **TWN**, the complainant in the 2<sup>nd</sup> count stated that she was 11 years and in class 3 at [Particulars withheld] Primary School. She recalled that on 02.11.13, she and her friend **MWW**, the complainant in the first count were going home from a crusade when they met the Appellant who gagged them, took them to a house a distance from their homes where he defiled them in turns starting with her after which he threw them out. It was her evidence that the incident occurred at night but that Appellant lit his phone torch that enabled her to see the Appellant whom he identified to her mother, the following day, in the same house they were defiled.

4. **DMN** found complainant's who were his school mates sitted outside Gathanga hospital gate on 03.11.13 at about 06.00 am and escorted them to the home of **TWN**'s parents.

5. CN mother to **TWN** stated that her daughter did not return home on 02.11.13 and that when she and **MWW** were escorted home by **DMN** on the morning of 03.11.13, they informed that that they had been defiled by one Maish whom they identified to her and **MWW**'s father.

6. **DWG** complainant's father recalled that he returned home on 02.11.13 at about 06.45 pm and was informed that his daughter **MWW** had gone for a crusade. That when complainant did not return by 07.00 pm, he went to look for her but didn't find her until the following morning when she and **TWN** led him and **TWN**'s mother to Appellant's house whom they reported had defiled them.

7. **APC ANNE KIHARA** received complainants' reports on 03.11.13 and sent them to Karuri Hospital for treatment. She later arrested the Appellant who was reported to have defiled the complainants.

8. **DR. MWORIA** examined **TWN** and **MWW** on 08.11.13 and found that both had inner wears that were stained with blood, vaginas were painful to touch and hymens freshly broken. He produced their treatment notes as PEXH. 4 and 6 and the P3 forms as PEXH. 3 and 5 respectively.

9. The Appellant in his unsworn defence denied the charges. He stated that he was not at home on the night that the complainants were allegedly defiled and that he had just returned home on the morning of 07.11.13 when **TWN**'s mother went to his house and alleged that he had defiled the complainants herein. In cross-examination however, he conceded that he was at home on the night of 02.11.13 when the offences were allegedly committed.

10. The trial court found both charges proved and sentenced Appellant to life imprisonment.

### **The Appeal**

11. Aggrieved by the conviction and sentence, the Appellant lodged the instant appeal on 29<sup>th</sup> April, 2019. From the grounds of appeal and written submissions by the appellant, I have deduced the following issues: -

**1. Penetration was not proved**

**2. Medical evidence was not authentic**

**3. Prosecution case was marred by inconsistencies and contradictions**

**4. Defence was not considered**

**5. That his right to a fair trial was breached**

**6. Appellant prayed for resentence in the event that the appeal is not successful**

12. When the appeal came up for hearing on 12<sup>th</sup> September, 2019, the Appellant stated that he was wholly relying on his grounds of appeal and written submissions.

13. Mr. Ndombi, learned State Counsel opposed the appeal and stated that the age of the victim, penetration and identity of the perpetrator had been proved beyond reasonable doubt. He also submitted that failure to avail Appellant legal counsel was not mandatory and that the failure did not occasion him any injustice. The state asserted that complainants' evidence was corroborated by the P3 forms; that the evidence on record was consistent and that the defence was rejected as it did not cast doubt on the prosecution case. The state additionally submitted that section 200 (3) of the CPC was complied with and that PW1 and PW3 who was not recalled could not be traced and that the court rightfully adopted their evidence.

### **Analysis and Determination**

14. This is the first appellate court and as such I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

*“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.*”

15. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are the same rounds that the Appellant has raised in his appeal. These are:

**i. Age of the victim.**

**ii. Penetration.**

**iii. Identity of the offender**

#### **Age of the victim.**

16. The trial court found as a fact that **TWN** was born on 29.05.03 and **MWW** on 30.08.03 as shown on their birth certificate and baptism card respectively. That the complainants were on their 11 year as stated in the charge sheet was indeed proved.

#### **Penetration**

17. **Section 2 of Sexual Offences Act** defines penetration to entail: -

**“partial or complete insertion of a genital organ of a person into the genital organ of another person.”**

18. P3 forms **DR. MWORIA** examined **TWN** and **MWW** on 08.11.13 and found that both had inner wears that were stained with blood, vaginas were painful to touch and hymens freshly broken. He produced their treatment notes as PEXH. 4 and 6 and the P3 forms as PEXH. 3 and 5 respectively. Penetration was certainly proved beyond a doubt.

#### **Identity of the offender**

19. Concerning the identity of the offender, complainants stated that they did not know the Appellant before the incident. **MWW** stated that she identified Appellant from the light of a candle whereas **TWN** stated that he saw Appellant after he lit his phone torch.

20. Complainants were the only witnesses to the alleged defilement. Appellant denied the offence. There not being any corroboration of the allegations of defilement by the complainants, conviction may only be founded on a finding under section 124 of the Evidence Act, that the complainants’ victims of sexual offences were, for reasons to be recorded telling the truth as to the allegation of offence.

21. Section 124 of the Evidence act is in the following terms:

**“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material**

**evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

22. The trial court after analyzing the evidence on record and Appellant's admission that he was in his house on the night that complainants were defiled and where they led their parents to arrest the Appellant and on the strength of the medical evidence concluded that the complainants had indeed been defiled and that Appellant had been positively identified as the assailant. I have considered the evidence on record and I am satisfied that the trial court's finding that Appellant was positively identified as the one that defiled the complainants was well founded. The defence was therefore correctly considered and rejected and I have no reason to interfere with that finding.

23. Appellant faulted the state for not providing him with legal counsel. Article 50 of the Constitution states: -

**(2) Every accused person has the right to a fair trial, which includes the right—**

**(g) to choose, and be represented by, an advocate, and to be informed of this right promptly.**

24. The Appellant did not chose counsel and was never availed one by the State throughout the proceedings. Article 50 (2) (h) provides that an advocate ought to be assigned at State expense if substantial injustice would otherwise result. This issue first came up for interpretation before the Court of Appeal in the case of **David Njoroge Macharia v Republic [2011] eKLR**. The Court after reviewing the past and current law stated that as follows: -

**“Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”**

25. The Court of Appeal was of the opinion that where the accused faced a capital offence, then the State ought to consider providing legal representation. In other instances, it would have to be through a case by case examination, such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided.

26. There is no evidence that this case involved complex issues of law or fact or that this was a case of public interest requiring that representation be provided. The Appellant ably conducted his own defence. In my view, this is not a case that legal representation ought to have been provided at State expense.

27. Appellant was sentenced to the mandatory life sentence for an offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006, The Court of Appeal has in several cases including **B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014 [2019] eKLR** considered the constitutionality of mandatory sentences. The court has adopted what the Supreme Court held in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that mandatory sentences are unconstitutional as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion to impose an appropriate sentence.

28. Since mandatory sentences have been declared unconstitutional, I am bound to re-examine the sentence meted on the Appellant having regard to the fact that the legislature had taken the view the offences under the Sexual Offences Act are serious offences that merit stiff sentences and there has to be a good reason to depart from the sentence prescribed by the legislature. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

**[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.**

29. The Sentencing Policy Guidelines require the court, in sentencing an offender to a custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

30. Even though Appellant is a first offender and he had in mitigation stated that he was an orphan, the psychological effect of the offences on the two 11-year-old victims who were defiled simultaneously cannot be underestimated.

31. From the foregoing, the Appeal fails except on the issue of sentence. The life sentence imposed on the Appellant is substituted with a sentence of **15 years** on each count which will run concurrently from **30<sup>th</sup> August, 2017** when Appellant was sentenced.

**DELIVERED AND SIGNED IN KIAMBU THIS 25<sup>TH</sup> DAY OF OCTOBER 2019**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant** - Nancy

**Appellant** - Present in person

**For the State** - Mr. Kasyoka