



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 78 OF 2016

SAMUEL MWANGI WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in Criminal Case No. 888 of 2015 in the Senior Principal Magistrates' Court at Kigumo by D. Orimba, Senior Principal Magistrate, dated 15th June 2015]

JUDGMENT

1. The appellant pleaded *guilty* to *three* counts of *defilement* contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to *twenty years* imprisonment.
2. The particulars of the first count were that on 25th May 2015 Murang'a County, he intentionally caused his penis to penetrate the anus of J.C.N. [*particulars withheld*] a boy aged 8 years.
3. On the second count, he was charged that on 2nd June 2015, at the same place, he penetrated the vagina of E.N.W. [*particulars withheld*] a girl aged 11.
4. Regarding the third count, he was charged that on 5th June 2015, at the same place, he intentionally caused his penis to penetrate the vagina of G.W.N [*particulars withheld*] a boy aged 8 years.
5. The appellant has preferred an appeal. The petition was filed on 25th October 2016. There are *four* grounds urged in the appeal. They can be condensed into one: that the learned trial magistrate erred in accepting the plea of guilty because the appellant was mentally unfit. The petition states that the appeal was lodged by a paralegal on behalf of the appellant as provided in Article 50 (2) and (7) of the Constitution. The appellant thus contends that the prosecution did *not* prove the charge beyond reasonable doubt.
6. At the hearing of the appeal, the appellant relied wholly on his home-made submissions filed in court.
7. The appeal is contested by the State. Learned State Counsel, Ms. Otieno, relied on earlier submissions made to the court by her colleague, Mr. Njeru. In a synopsis, it was contended that the facts disclosed the offences; and, that the plea of guilt was *unequivocal*. Accordingly, there was no basis of an appeal against *conviction* by dint of section 348 of the Criminal Procedure Code. Furthermore, the sentence handed down was the minimum sentence. I was implored to dismiss the appeal.
8. I have considered the grounds of appeal, the records of the lower court, the facts and the rival submissions.
9. This is a first appeal to the High Court. I have re-evaluated the record and drawn my own conclusions. *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570.
10. This appeal was first heard by Waweru J. The appellant claimed that he had a mental ailment. The judge referred the appellant to a specialist. A medical report was filed on 9th May 2018. It is prepared by Dr. J. M. Mburu, a consultant psychiatrist. The report confirms that the appellant has "*impaired intellectual capacity, largely due to lack of a formal education. However, this does not compromise his mental functioning*".
11. The report further concludes that "*his higher mental functioning including judgment, orientation and memory is intact*". It is clear to me that the claim that the appellant was mentally unfit when he took plea is an afterthought. It was not disclosed to the trial court. It is not supported by medical evidence. It is simply a red herring.

12. The *facts* were fairly straightforward. On the material dates, the appellant waylaid the minors on their way from school. He dragged them into a coffee plantation or nearby bushes and defiled them. The complainants reported the assault to their teachers who informed their parents. The complainants *identified* the appellant to the police. The complainants were aged 8, 9 and 11 respectively. Treatment notes and P3 forms for all the complainants were produced as exhibits 1 to 6. They confirm *penetration*.

13. The charges were read out and explained to the appellant in *Kikuyu* language. He answered: "*it is true*". The facts above were then read out to the appellant in *Kikuyu*, a language he understood. He again answered: "*facts are correct*". The appellant was thus properly convicted on *all* the three counts. I find the plea was *unequivocal*. See *Lusiti v Republic* [1976-80] 1 KLR 585, *Desai v Republic* [1974] EA 416, *Adan v Republic* [1973] EA 445.

14. The *ages* of the complainants were disclosed in the charge sheets and the facts that were read to the appellant. He admitted it. Under section 8 (3) of the Sexual Offences Act, the *minimum* sentence for defiling a child under the age of 11 years is *life imprisonment*. That was the sentence handed down. I *decline* to disturb the sentence.

15. The upshot is that the conviction and sentence are *upheld*. The appeal is *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 24th day of May 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant (in person).

Ms. Gichuru for the Republic.

Mr. Kiberenge and Ms. Dorcas, Court Clerks.