



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.157 OF 2013**

*(An Appeal arising out of the conviction and sentence of Hon. L.D. Ogombe - RM delivered on 12<sup>th</sup> August 2013 in Kiambu CM. CR. Case No.3035 of 2012)*

**SAMUEL MBURU WANYOIKE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Samuel Mburu Wanyoike was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 28<sup>th</sup> October 2012 at about 5.00pm at [*particulars withheld*] Village within Kiambu County, the Appellant unlawfully and intentionally committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of D N I, a child aged seven (7) years. He was alternatively charged with the offence of **committing an indecent act** contrary to **Section 11(4)** of the same **Act**. The particulars of the offence were that on the same date and in the same place, the Appellant committed an indecent act on D N I by touching her private parts, namely vagina. When the Appellant was arraigned before the trial magistrate's court he pleaded not guilty to the charges. After full trial, the Appellant was convicted of the main charge of **defilement**. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his amended petition of appeal filed without leave of court (however this court will consider it), the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for failing to observe the requirements of **Sections 198 (1)** and **214 (1) (ii)** of the **Criminal Procedure Code** and **Article 50(2)(m)** of the **Constitution**. He was of the opinion that the prosecution had not proved its case to the required standard of proof beyond any reasonable doubt. For the above reasons, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

At the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to acquit him. Ms. Nyauncho for the State opposed the appeal. She made oral submission to the effect that the prosecution had established its case on the charge brought against the Appellant to the required standard of proof. She submitted that the complainant had been defiled because she was found to have had a bloody discharge from her vagina. She also had an infection. In the opinion of PW6, the complainant was partially penetrated. She submitted that the Appellant was positively identified by PW1 who found the Appellant inside the house with the complainant. The complainant's evidence was corroborated by that of PW3 and PW4. She submitted that the complainant's age was established through her birth certificate produced as **Prosecution's Exhibit No. 1**. She urged the court to dismiss the appeal as it lacks merit.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and evaluation before reaching its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to bear in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (**see**

**Njoroge –vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

The facts of the case according to the prosecution are as follows. The complainant D N I was at the material time aged seven (7) years. Her age was confirmed by her grandmother, PW1 E W T who produced her birth certificate. The birth certificate was produced as **Prosecution's Exhibit No. 1**. The birth certificate indicated that the complainant was born on 24<sup>th</sup> July 2005. On the material day, PW1 sent the complainant, PW3 D T and PW4 S W M to sell bananas by the road side. This was about 15 meters from their home. The complainant testified that the Appellant went to purchase bananas from them. He requested them to follow him to his house where he was to give them money for the bananas that he had purchased. When they arrived at the Appellant's house, the Appellant gave PW3 and PW4 twenty shillings (20/=). He asked them to go and look for change. The Appellant then carried the complainant into his house. The complainant testified that while inside the house, the Appellant removed her underpants. She screamed for help but the Appellant strangled her. The Appellant put her on a bed where he lay on top of her and sexually assaulted her. She felt pain.

The evidence of PW3 and PW4 was that when they went back to take the change to the Appellant, they could not open the gate. They had seen the Appellant taking the complainant inside his house. They went back to their home to inform PW1 that the complainant was at the Appellant's house. According to PW1, they thought that the complainant had been stolen. They led PW1 to the Appellant's house. When PW1 entered the Appellant's house, she found the Appellant with the complainant inside a one roomed house. The complainant was on the bed. She was not wearing her underpants. PW1 testified that she examined the complainant and saw that her neck was bleeding and had bruises. PW1 screamed drawing the attention of members of the public at the Appellant's house.

PW5 Bernard Njuguna Ithangi, the area Assistant Chief was called to the scene. He testified that he went to the scene and found that the Appellant had been apprehended by the members of the public. He called the police to the scene. A report was made to Karuri Police Station. The complainant was taken to Karuri Health Centre where she was examined by PW6 Richard Munene, a Clinical Officer. The complainant's outpatient card was produced as **Prosecution's Exhibit No.3**. PW6 noted that the complainant had bruises on her neck. Her outer genitalia was tender. Her hymen was intact. A vulva swab carried out on the complainant showed pus cells an indication of an infection. PW6 concluded that the complainant had been defiled. His report indicated that she had been partially penetrated. The P3 form was produced as **Prosecution's Exhibit No. 4**. He also filled a post rape care form for the complainant which was produced as **Prosecution's Exhibit No. 5**. PC Grace Opiyo was assigned to investigate the case. She interviewed the witnesses, recorded their statements and formed the opinion that a case of defilement had been made. She charged the Appellant with the offence. PW7 produced the complainant's underpants recovered from the scene as **Prosecution's Exhibit No. 2**. When the Appellant was put on his defence, the Appellant denied committing the offence.

Upon re-evaluation of the facts of the case and the submission made by the parties to this appeal, this court is of the firm view that the prosecution did indeed prove its case to the required standard of proof beyond any reasonable doubt on the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act**. To establish a case of defilement, the prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of **defilement**. The first element is penetration. Penetration is defined under **Section 2(1)(d)** of the **Sexual Offences Act** as **"the partial or complete insertion of the genital organs of one person into the genital organs of another person"**. In the present appeal, the complainant testified that the Appellant carried her into his house where he placed her on the bed and removed her underpants. He then sexually assaulted her. On being examined by PW6, a Clinical Officer, the complainant's outer genitalia was tender. A vulva swab carried out on the complainant showed pus cells an indication that there was an infection. PW6 established that the complainant had been partially penetrated.

The second element that the prosecution was required to establish is the identity of the perpetrator. PW3

and PW4 saw the Appellant carry the complainant to his house. The evidence of PW1 was that when she entered the Appellant's house, she found the Appellant with the complainant. The complainant told her that the Appellant had sexually assaulted her. The complainant's neck had bruises and was bleeding. It was clear to this court that the Appellant was positively identified as the perpetrator of the penetration to the required standard of proof beyond any reasonable doubt.

The third element that the prosecution is required to prove is the age of the complainant. Under **Section 2(1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years. In the present appeal, the age of the complainant was established by her birth certificate which was produced into evidence. It showed that the complainant was born on 24<sup>th</sup> July 2005. The complainant was about seven (7) years old the time of the sexual assault. From the foregoing, the prosecution proved its case against the Appellant on the charge of **defilement** contrary to **Section 8 (1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellant's appeal on conviction lacks merit and is hereby dismissed.

As regards sentence, **Section 8 (2)** of the **Sexual Offences Act** provides a sentence of life imprisonment for any person convicted of defiling a child of less than eleven (11) years. The complainant was seven (7) years old at the time the offence was committed. The trial court sentenced the Appellant to serve life imprisonment. That sentence is legal. The appeal against sentence is similarly dismissed. It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY 2016**

**L. KIMARU**

**JUDGE**