



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 445 of 2009**

**BENSON WANYONYI WANDERA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(Being an appeal from the original conviction and sentence in the**

**Chief Magistrate's Court at Kibera Cr. Case No. 1606 of 2008,**

**delivered by Hon. P. Kidulah on 7<sup>th</sup> October, 2009).**

**JUDGMENT**

**BACKGROUND**

Benson Wanyonyi Wadera, the Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the offence were that on 18<sup>th</sup> June, 2008 at [particulars withheld] in Riruta within Nairobi Area province committed an act of inserting his male genital organ (penis) into the female genital organ (vagina) of M.S., a child aged thirteen years, causing penetration.

In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of this charge were that on 18<sup>th</sup> June, 2008 at [particulars withheld] in Riruta within Nairobi area province, committed an indecent act by placing his male genital organ (penis) on the surface of the female genital organ (vagina) of M.S., a child aged 13 years.

The Appellant was found guilty in the main charge and sentenced to 20 years imprisonment. Being dissatisfied by that court's decision he has lodged the present appeal contesting both his conviction and sentence. He filed Amended Supplementary Grounds of Appeal which raised nine grounds of appeal which I have summarized as; that his right to a fair trial was violated, that the case was not proved beyond a reasonable doubt, that his defence was not considered and the sentence meted was harsh and excessive in the circumstances.

**SUBMISSIONS.**

The Appellant relied on written submissions while the Respondent, represented by learned State Counsel,

Mr. Ongige made oral submissions. The Appellant submitted that he was never awarded time to peruse or scrutinize the prosecution's evidence before the trial. He submitted that he was never furnished with the materials necessary to prepare his defence to his detriment. On prove of the age of the complainant, he submitted that no documentary evidence was adduced to prove the same. On identification, he submitted that the complainant testified that she did not see him. Again, she was allegedly defiled at night when conditions of identification were not conducive. As such, an identification parade should have been conducted so as to erase doubt that he was the culprit. His view was that his identification was by way of dock identification which was worthless and the trial court should not have relied on it. On the whole he submitted that his identification was based on circumstantial evidence which did not meet the threshold to warrant a conviction.

The Appellant's further submission was that penetration was never proved to the required standard. In that regard, he submitted that the medical evidence of the doctors was contradictory as to whether there was defilement or not.

He also submitted that his defence was not considered when the decision on his conviction was arrived at. He submitted that it was rejected without reasons being given.

Learned State Counsel, Mr. Ongige opposed the Appeal. He submitted that all the elements of the offence of defilement, namely penetration, identification and the age of the complainant were proved to the required standard. He submitted that penetration was proved by the evidence of PW5, Dr. Kamau as was shown in the P3 form produced in which he confirmed that there was a hymenal tear. He submitted that with regards to identification it was proper as it was done in moonlight. In any case, both the Appellant and the complainant were known to each other. The Appellant sent the complainant to the shop after which he waylaid her and committed the offence. He rejected the Appellant's submission that there was a grudge between him and the complainant's mother as the same was never shown to exist. Furthermore, the Appellant wrote a letter to the complainant's mother in which he admitted responsibility and asked for forgiveness which letter was adduced in court as further proof of his guilt. He submitted that the lack of corroboration of the complainant's evidence was not fatal as the same was not mandatory pursuant to Section 124 of the Evidence Act. In a departure from the submission that age was proved, Mr Ongige submitted that an age assessment of the complainant should have been ordered given the varied statements by both the complainant and her mother. The complainant testified that she was 13 years old whilst her mother testified that testified that she was 14 years old. He urged that the appeal be dismissed.

## **EVIDENCE.**

**PW1, M.S.**, after a voire dire examination gave sworn evidence. She testified that she was 13 years old. She recalled that on 15<sup>th</sup> June, 2008 at around 8:00 p.m. she was on her way to the toilet, which was next to the Appellant's house, when she heard him calling her. She did not respond and went ahead to the toilet. On her way back she found the Appellant standing at his door and he sent her to buy paraffin. The shop was about a ten minutes' walk away and as she was on her way somebody behind her held her hands and dragged her into a nearby bush. He covered her mouth as he dragged her into the bush. He informed her that if she screamed she would be killed. He knew the voice and recognized it as that of the Appellant. He also saw his face as he took her into the bush. He then proceeded to unclothe her and defile her. When the Appellant was done he informed her not use the normal route home but to pass by another route that approached the houses from behind.

When she got back she was afraid of informing her mother of where she had been. Her mother called the landlord, one Kariuki, to further interrogate her. She finally informed her mother what had transpired. Her mother then informed the landlord who called the police. Police officers arrived later that evening and arrested the Appellant. PW1 was taken to Nairobi Women's Hospital where she was examined and treated.

In cross examination she stated that she did not know the year she was born. She further stated that, apart from identifying the Appellant with his voice, there was moonlight by which she knew he is the person who had defiled him.

**PW2, M.M.**, the mother of PW1 corroborated the testimony of PW1. She confirmed that PW1 went to the toilet at 8.00 p.m. but had not returned by 9.00 p.m. Together with her children started looking for her to no avail. She thus informed the landlord of her disappearance. While they were waiting outside the gate they saw the Appellant come in from outside the gate towards the compound. After about 5 minutes PW1 entered the compound from the rear side. She looked afraid and did not immediately speak out. After sometime, PW1 disclosed what had happened.

PW2 also recalled that on 16<sup>th</sup> August 2008 she received a letter from the Appellant through a Pastor Anyokwa. It was addressed to her and her husband asking for forgiveness and admitting to committing the offence. She submitted the letter in evidence.

**PW3, Charles Kariuki**, the landlord to PW2 entirely corroborated the evidence of PW2. **PW4, No. 45476 PC David Kimani** of Riruta Police Station was the arresting officer. He recalled that on 19<sup>th</sup> June, 2008 he was on duty when at around 1.00 p.m. when the Appellant was brought accompanied by one girl and her parents and he re-arrested him.

**PW5, Dr. Z. Kamau**, of police surgery in Nairobi examine PW1 on 23<sup>rd</sup> June, 2008 and filled her P3 Form. She had no physical injuries and her external genitalia were normal. The vulva was also normal but there was a hymenal tear at the 5 o'clock level. There was no discharge and no exhibits were taken during the examination. He noted that the patient had been seen and treated at Nairobi Women's Hospital. He adduced the P3 form in evidence.

**PW6, No. 85748 PC Elias Mutwiri**, of Riruta police Station was the investigating officer. He summed the evidence of the prosecution and preferred the charges against the Appellant. He also recorded the statements of the witnesses. On evaluation of all the evidence he was convinced that the Appellant had committed an offence and he charged him.

**PW7, Dr. Ketra Muhombe**, then of Nairobi Women's Hospital examined PW1 on 19<sup>th</sup> June, 2008. She noted blood stains on her underwear. The genitalia had minor lacerations and bruises. There was also a fresh tear at the 6 o'clock position. She took a vaginal swab and found the presence of spermatozoa. There were also traces of blood in her urine specimen. She did not find any sexually transmitted infections and she gave her treatment to prevent HIV and other infections. She also referred her for counseling. She made a report dated 20<sup>th</sup> June, 2008 and she produced it as an exhibit. In cross examination, she testified that the complainant was aged 10 years having been born in 1998.

The Appellant gave an unsworn statement in defence. He stated that he was in the business of selling doughnuts. He stated that the complainant's mother was one of his customers and she used to collect doughnuts from him to sell which she would pay at the end of the month. On the day he was arrested he had supplied her and afterwards he went home. At about 1.00 a.m. he was awoken by the landlord who informed him he was required at the police station. He was detained for 5 days before he was arraigned. He stated that the complainant's mother was framing him since she had not paid him for the doughnuts for about a month and he had demanded payment on the fateful day.

### **DETERMINATION.**

Having summarized the evidence on record and the respective submissions, I have arrived at the issues for determination as; whether the Appellant's right to a fair hearing was violated, whether the case was proved beyond a reasonable doubt and whether the Appellant's defence was considered.

On whether the Appellant was accorded a fair trial, he submitted that he was never furnished with witness statements and other documents for the prosecution's case that were necessary to facilitate him prepare for his defence. He further submitted that he was not conversant with the language used in examination of the witnesses which contravened Section 198 of the Criminal Procedure Code. Upon perusal of the record it is clear to the court that the Appellant in his defence gave an unsworn statement in Swahili which implies that he was conversant with the language. It is also clear from the record that PW1, PW2, PW3 and 4

gave evidence in Kiswahili. The other three prosecution witnesses (PW5 & PW6) gave evidence in English but the Appellant cross examined each one of the witnesses. Further, it is clear from the proceedings that he never complained to the court on the language being used. It can then only be concluded that he understood the language in use at any given time as he fully participated in the proceedings. The same can be said of the witness statements. The Appellant did not ask the court to facilitate their production and service. The court has considered the fact that the Appellant cross examined on the evidence at hand. Respectively, I equally conclude that had the statements not been supplied, he would have raised the concern with trial court. I find the complaint at this time an afterthought and I dismiss it accordingly.

The next issue for consideration is whether the case was proved beyond a reasonable doubt. I delve into whether there was penetration which is a key element of the offence. Defilement is defined under Section 8(1) of the Sexual Offences Act as **“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”** On the other hand penetration is defined under Section 2 of the Act as **“... the partial or complete insertion of the genital organs of a person into the genital organs of another person”**. Therefore, all that the prosecution needed to establish was whether there was penetration into the genital organs of PW1. PW1 was candid that the Appellant put her on the ground after which he inserted his penis into her vagina. In her graphic narrative of what happened, she testified that she felt pain upon penetration. Dr. Muhombe of Nairobi Women’s Hospital corroborated her evidence on examining her on 19<sup>th</sup> June, 2008 which was a day after the incident. She testified that PW1 had not changed her clothes including her underwear. She noted minor lacerations and bruises on her genitalia. There was fresh tear on her hymen at the 6.00 o’clock position. A microscopic examination revealed spermatozoa and a trace of blood in her urine specimen. There was no evidence of sexually transmitted disease but was treated to prevent HIV and other infections. She was referred for counseling. Dr. Muhombe’s evidence tallied with that of PW4, Dr. Z. Kamau of police surgery. He examined PW1 on 23<sup>rd</sup> June, 2008 and filled her P3 Form. At the time PW1’s external genital were normal but there was a visible hymeneal tear at the 5.00 o’clock position. He produced her P3 Form as evidence. This evidence crystalized together leaves no doubt that PW1 was defiled.

The question that lies is whether it is the Appellant who defiled her. In her evidence, PW1 testified that on the fateful evening she was going to the toilet when the Appellant whom she knew called her and asked her to go and buy him paraffin. He gave her Kshs. 20 /=- to purchase the paraffin with. As she walked to the shop and in a bushy area, she saw somebody behind her who held her hands and pulled her to the bush. That is when her mouth was covered and as she tried to scream the person threatened her with death. In her evidence PW1 was categorical that the person who defiled her was one Benson. They lived in the same plot where the Appellant too lived with his family. She testified that during the defilement, there was moonlight and she could clearly see his face as he lay on her. Besides, on the part of this court, I have no doubt in my mind that the Appellant was properly identified because PW1 had sufficient time with him as he sent her to the shop to buy paraffin. The two were therefore not strangers to each other. The same was said of Appellant by PW2, the mother to PW1.

Moreover, the Appellant after sending PW1 to the shop left the compound and was to return moments before PW1 entered compound. And to cap it all, PW1 testified that the Appellant had commanded her to use the rear entry into the plot. Sure enough, as PW2 testified, PW1 accessed the compound through the rear gate whilst the Appellant entered through the front gate. That turn of events could not have been a mere coincident. The Appellant planned it so that he could not be seen with PW1. This leads me to conclude that indeed he was the culprit. Having sent PW1 to the shop ought to have waiting for her to deliver the paraffin but instead followed her in the darkness and orchestrated the heinous act. Furthermore, PW1 reported the incident on the same night to her mother after which it was escalated to the landlord and thereafter to the police. Throughout this period, PW1 was candid that her attacker was one Benson, the Appellant herein. I hold as much.

On whether the age of PW1 was established, the court notes that varied ages were given. The charge sheet stated that PW1 was 14 years old. Her mother PW2 testified that she was 14 years old. The P3 Form indicated her age as 13 years. But the twist was in the testimony of PW5, Dr. Muhombe who testified that PW1 was aged 10 years. She examined her on 19<sup>th</sup> June, 2008 and she stated that she was born in 1998 as

reflected in the medical report from Nairobi Women Hospital adduced as Pexb 3.

I emphasize that prove of age in a defilement case is paramount as penalties under the Sexual Offences Act are determined by the age of the victim. Apart from the reflected ages in the medical report and the P3 Form, no documentary evidence was adduced to establish the age of PW1. Be that as it may, it is trite that the age must not necessarily be proved by documentary evidence. It can be established by amongst other means, oral evidence, observation or age assessment.

Back to the evidence on record, although PW1 testified that she was 13 years old, in cross-examination, she stated that she did not know her actual date of birth. Her mother on the other hand stated that she was aged 14 years. The discrepancy therefore is more reflected in the evidence of PW5 who gave her age as 10 years. Under the Sexual Offences Act, if the age of PW1 were taken as 10 years, the Appellant would be sentenced under Section 8(2) of the Sexual Offences Act. The same carries life imprisonment. On the other hand, whether PW1 was either 13 or 14 years old the Appellant would be liable to the penalty prescribed under Sub-Section (3) of Section 8 of the Act. The penalty therein is an imprisonment for a term of not less than 20 years.

Having made the above observation, my take on this issue is that both PW1 and her mother could not have been so far mistaken of the age of PW1. Whether or not she was either 13 or 14 years old is an age that is not within the border line under Sub-Section (3). In that respect, it was not mandatory that an age assessment be done. Although Dr. Muhombe indicated her age as 10 years the same is sharply disproved by the persons who hold better knowledge on it. I will therefore conclude that her age was between 13 and 14 years and that the Appellant is entitled to the punishment prescribed under Section 8(3) of the Act.

I have also had the opportunity of looking at the judgment of the learned trial magistrate. The Appellant contended that his defence was not considered in it. Although the learned trial magistrate did not explicitly compare and contrast the defence with the prosecution's, she noted **“the unsworn statement of the accused that he was not around at the time and that PW2 framed him because of her failure to pay for his doughnuts has no merit and is dismissed. He never put the issue of doughnuts to PW1 when he cross-examined her nor did he deny having written the letter Exhibit 1.”** I am of a similar view that the Appellant's defence did not dislodge the strong prosecution case. The latter squarely placed the Appellant at the scene and I have no doubt in my mind that he defiled PW1.

In the end, I find that the prosecution discharged its burden in proving the case beyond a reasonable doubt. The learned trial magistrate properly arrived at the conviction and the sentence imposed. Consequently, the appeal has no merit and I dismiss it in its entirety.

Finally, I note that the Appellant took plea on 24<sup>th</sup> June, 2008 and was sentenced on 7<sup>th</sup> October, 2009. He was therefore in remand for one year three months and seventeen days. This period shall be taken into account to reduce the jail term. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DECEMBER, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Appellant in person.
2. M/s Sigei for the Respondent.