



IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO 186 OF 2013

(Appeal from conviction and sentence in Kangema PM

Criminal Case No 399 of 2011 - D. A. Orimba, SRM)

KENNEDY IRUNGU WANJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. Then Appellant **Kennedy Irungu Wanjiru** was charged with *defilement* contrary to **section 8(1) & (4)** of the *Sexual Offences Act, No 3 of 2006*. It was alleged that at unknown times on diverse dates between 13th and 14th (!) November 2011 in *Kiruri Location, Kangema District* within *Murang'a County*, he intentionally caused his penis to penetrate the vagina of one **M W W**, a girl aged 16 years. He was charged in the alternative with committing an indecent act with a child contrary to section 11(1) of the same Act. The particulars here were that at the same unknown times on the same dates in the same place he intentionally and unlawfully touched the vagina of the same complainant.

2. The Appellant pleaded guilty to the main count, but when facts were stated by the prosecutor he denied that they were true. A plea of not guilty was therefore entered. He also pleaded not guilty to the alternative charge. Trial subsequently commenced and the complainant testified (PW1). He did not cross-examine her and indicated to the court that he wished to change his plea. The main charge was then read and explained to him again. He replied that it was true.

3. The prosecutor then addressed the court thus –

“The court may consider the facts as per the evidence by the complainant. I wish to produce the P3 and the

clothes as Exhibits 1 & 2 respectively.”

The court then proceeded thus –

“Plea of guilty entered. Accused is convicted on plea of guilty”.

The Appellant was then, after mitigation, sentenced to serve fifteen (15) years imprisonment. He has appealed against both conviction and sentence.

4. The trial court fatally erred by not asking the Appellant whether the facts as contained in the complainant's testimony just given were true. It mattered not that he had not cross-examined the complainant; the trial court should not have presumed that he accepted that testimony as true. In criminal trials the court should not presume anything, particularly where the accused is undefended! It will be recalled that the Appellant had once before pleaded guilty but denied that the facts narrated by the prosecution were true. The trial court should have been extra careful when taking his guilty plea. He was facing a very serious charge, and he got a very heavy penalty. The plea was not unequivocal.

5. Learned Prosecution Counsel properly does not support the conviction. I will allow this appeal in its entirety. The conviction is quashed and the sentence imposed set aside. The Appellant was sentenced on 29/11/2011; he has thus served over three years and six months of his sentence. Again the learned Prosecution Counsel properly does not seek a retrial. The Appellant shall therefore be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF JUNE 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 12TH DAY OF JUNE 2015