REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 66 OF 2012

HarunWaweruWanjiru…….Appellant

Versus

Republic…….……Respondent

(Appeal against Judgement, sentence and conviction imposed in Criminal Case Number 36 of 2011, Republic versus HarunWaweruWanjiru at Nyeri, delivered by S. A.Okato, S.P.M. on 27.3.2012).

JUDGEMENT

Harun Waweru Wanjiru (hereinafter referred to as the appellant) seeks to quash the conviction and sentence passed against him by the Learned Senior Principal Magistrate, Nyeri in criminal case number **36 of 2012, Republic vs. Harun Waweru Wanjiru**delivered on 27.3.2012. In the said case the appellant was convicted of the offence of defilement contrary to Section **8 (1)** as read with Section **8 (2)** of the Sexual Offences Act.[1]

The particulars of the offence were that on the 1st day of October 2011 in Nyeri District of the Central Province, intentionally and unlawfully caused his penis to penetration the vagina of **M N M** a child aged 10 years.

The appellant faced an alternative count of indecent act with a child contrary to Section **11 (1)** of the Sexual Offences Act.[2] It was alleged that on 1stOctober 2011 in Nyeri District of Central Province intentionally touched the breasts, buttocks and vagina **M N M** a child aged 10 years with his penis.

This court fully understands its duty as enunciated in the case of **Okeno v. R**[3] which is to subject *"the evidence adduced in the lower court as a whole to a fresh and exhaustive examination*[4] *and to the render this court's own decision on the evidence."* This court being a first appellate court must itself weigh conflicting evidence and draw its own conclusions.[5] This court must make its own findings and draw its own conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, this court should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.[6]"Thus, this court must itself weigh conflicting evidence and draw its own conclusions

PW1 M N M the complainant was a minor then in class 5 at the time of giving evidence. The court was satisfied the child understood the nature of an oath and allowed her to give sworn evidence. Her evidence proceeded as follows:-

> *"……. On 1st October 2011 at around 8.00am I was going to buy bread…..i met Waweru……the accused in the dock. I met him at my grandmothers' compound. The accused is my grandmothers'*

shamba boy.……..He held my right hand and kissed me on my left cheek. I went and told my mother. My mother told me to go and tell my grandmother. At 1.00pm I went to fetch water at my grandmothers' tank. My grandmother was not around. The accused held my right hand and kissed me on my left cheek. He saw a certain woman and let me go.……i told my mother. I returned to my grandmothers' tank to fetch water and found the accused who asked me to go with him to the kitchen to show me something. I refused. The accused fell me down and covered my mouth. He started kissing me.……I fell facing upwards and the accused lay on me. He touched my breasts and touched my buttocks. I had my pants on. He did not remove it.……..i told him I was going to scream and so he removed himself and ran away.……..At 7.00pm same day my mother asked me to accompany my younger brother to my grandmothers' house. My brother refused to accompany me. I went alone found the accused outside the kitchen. ……the accused pushed me inside the kitchen. I fell down and was hurt on the head. I tried to scream but the accused had covered my mouth with his hand. ……...The accused unzipped his trouser and removed his pant. He removed his trouser and pants using one hand. I struggled with him ……..I fell facing upwards. I had worn a trouser and a pant which the accused removed.……The accused penetrated my vagina with his penis. I bit him on his hand.……He rose up and I took my clothing and put on.……the next day I told my grandmother.……she told my aunt Wangechi.……..i told my mother…I was taken to Nyeri Provincial Hospital…..to the police station.……"

That is all"

PW2 M K W, mother to **PW1** confirmed that she sent her to buy bread, and her daughter told her the accused had kissed her. Same day at around 12.00pm she sent her to fetch water from her grandmothers tank, that she came back running and told her the accused had scared her. Same day at 7.00pm she sent her to get milk. The complainant disclosed first to her grandmother that she had been defiled, and when they asked her she confirmed. She accompanied her to the Hospital and the police. She confirmed that the complainant was born on 17.07.2001 and produced a copy of the birth certificate.

PW3 Z W N testified that the complainant told that her appellant had defiled her that she asked him but he denied, that she informed **PW2**. He took both the appellant and the PW1 to the police; she also confirmed that **PW1** was examined at the hospital.

PW4 A K confirmed that he found the accused holding the breasts of the complainant, that she informed **PW2** about it.

PW5 Dr. Sarah Wangui, a medical officer at Nyeri Provincial General Hospital confirmed that PW1 was seen at the hospital, that she had bruises on the libiaa, hymen was broken and had hyperemic labia minora. (swollen), that she had an infection in the vagina. She produced the clinical card and P3 form. The conclusion was that the injury was caused by sexual assault.

PW6 Elizabeth Nyaga from Nyeri Police Station confirmed that he received the report at the station and charged the appellant.

At the close of the prosecution case, after evaluating the evidence, the trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence and complied with the provisions of Section **211** of the Criminal Procedure Code.[7] The accused elected to give unsworn evidence and called no witness.

He denied the offence and stated that the complainant told her mother inserted her fingers in her genitals and that on the same day he was arrested.

The learned magistrate in his judgement analysed the evidence of all the prosecution witnesses and the above defence and concluded that "*the accused person was guilty as charged.* There is no finding on the alternative count. After hearing the accused in mitigation the learned magistrate proceeded to sentence the appellant to **life imprisonment.**

Aggrieved by the said verdict, the appellant appealed to this court seeking to quash the conviction and sentence. The appellant filed written submissions and raised three grounds, which in my view can be reduced to two, namely;**(i)** there was no sufficient evidence to prove the case beyond reasonable doubt; **(ii)**that his defence was not considered.

Learned State Counsel **Miss. Jebet** urged the court to uphold the conviction and submitted that there was overwhelming evidence to support both the conviction and sentence.

I have carefully considered grounds of appeal and the submissions made by the appellant and the state counsel. I have also analysed and reviewed the evidence on record and the relevant law. Section **8(1) & (2)** of the Sexual Offences Act[8] provides that:-

> ***8(1)****A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> ***8(2)*** *A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

Section **8 (1)** cited above provides the key elements of the offence of defilement. These are **"Penetration,"** and **"Child".** The act defines **"penetration"** as partial or complete insertion of the genital organs of a person into the genital organs of another person while **"child"** has the meaning assigned thereto in the Children's Act. Before I exit the definitions it is extremely important that we bear in mind the category of persons defined in Section **2** of the act as **'vulnerable person'** which *means a child, a person with mental disabilities or an elderly person and 'vulnerable witness'* shall be construed accordingly. I find no difficulty in concluding that the minor in this case was a vulnerable person.

Section **8 (1)** defies the offence of defilement and therefore before section **8 (2)** comes into play, the prosecution must prove the offence of defilement was committed. As stated above, an important element of defilement is penetration. From **PW5** testified that the minor had bruises on the labia, hymen was broken and had hyperaemic labia minora (swollen), that she had an infection and that the injuries were caused by sexual assault. This evidence collaborated the evidence of PW1 reproduced above.

In my view, even without considering the presence or otherwise of medical evidence an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. My position in this regard is fortified by the holding of the court of appeal in **Martin NyongesaWanyonyivs Republic**[9] citing **Kassim Ali vs Republic**[10] where the court stated:-

> *"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"*

The complainant was aged 10 year at the time of the defilement. It is clear that the complaint is a child within the definition in the Children's Act and secondly she was below **11** years within the provisions of section **8 (2)** and that the child was a vulnerable person within the above cited definition. Commenting on the age of a victim in cases of this nature the court of appeal in **Kaingu Elias Kasomovs Republic**[11] had this to say:-

> *"Age of the victim of sexual assault under the Asexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".*

I am satisfied that the prosecution proved the offence of defilement under section **8 (1)** as read with section **8 (2)** and that the necessary ingredients of the offence as enumerated above where proved beyond doubt.

On the sentence, Section **8 (2)** of the Sexual Offences Act provides that a person guilty of an offence

under this section is liable upon conviction to imprisonment for life. Considering the evidence, the age of the minor at the time of the offence and the penalty prescribed by the law, I hold the view that the sentence imposed was within the law and I hereby uphold the conviction and sentence and dismiss the appeal.

The up-shot is that the appeal against both conviction and sentence fails.

Dated at **Nyeri** this **27th** day of **November,** 2015

John M. Mativo

Judge

---

[1] Act No 3 of 2006

[2] Ibid

[3] {1972) E.A, 32at page 36

[4] See Pandyavs Republic {1957}EA 336

[5] See Shantilal M. Ruwalavs Republic {1957} EA 570

[6] See Peter vs Sunday Post {1958}EA 424

[7] Cap 75, Laws of Kenya

[8] Supra

[9] Criminal Appeal no. 661 of 2010,(Eldoret), D. K. Maranga, D. Musinga& A. K. Murgor JJA

[10] Criminal Appeal No. 84 of 2005 (Mombasa)

[11]Criminal Appeal no. 504 of 2010 cited in Martin NyongesaWanyonyivs Republic, Criminmal Appeal no. 661 of 2010