



**Wambui v Republic (Criminal Appeal 302 of 2011)
[2014] KEHC 7494 (KLR) (Crim) (25 June 2014) (Judgment)**

Eliud Waweru Wambui v Republic [2014] eKLR

Neutral citation: [2014] KEHC 7494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL 302 OF 2011

LA ACHODE, J

JUNE 25, 2014

BETWEEN

ELIUD WAWERU WAMBUI APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence in criminal case
Number 5215 of 2009 in the Chief magistrate's Court at Thika)*

JUDGMENT

1. Eliud Waweru Wambui the appellant herein, was tried by the Chief Magistrate's Court Thika on a charge of defilement of a girl contrary to Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars contained in the charge sheet were that in the month of May 2009 at Makuyu Township in Muranga he intentionally and unlawfully defiled A. N. K. (identity concealed on account of her being a minor) by penetrating her genitals with his male organ. She was a girl aged under 17 and 5 months at the time. Section 11 (1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on diverse dates from January 2007 and 16th November 2009 he committed an indecent act by touching her genital area. He was subsequently convicted on the main offence of defilement, and sentenced to fifteen years imprisonment. The appellant being dissatisfied, filed an appeal against both conviction and sentence. The appeal was opposed through learned state counsel M/s. Njuguna. Section 382 of the Criminal Procedure Code since the appellant did not deny having committed the offence. I note that the manner in which the charge sheet was drafted did not meet the requirements of a charge sheet. It merely states that: On the month of May 2009 at Makuyu township in Murang'a County within the



Republic of Kenya committed an act that caused penetration to a child namely A N K a child aged 17 years and 5 months”.

2. *Ondeyo v Republic* 2007 Vol 1 KLR pg 457. *JMA v Republic* [2009] KLR pg 671 in the criminal appeal to fault the Superior Court which had quashed conviction on the main charge of defilement and found the appellant guilty on the alternative charge. The superior court relied on the case of *Achoki v Republic* [2000] 2 EA 283, to hold that the conviction of the appellant on the main charge of defilement was wrongful, because the charge was fatally defective since its particulars did not include the word “unlawful”. Rape was an offence which involved adults who are able to consent, unlike a situation where a child was involved, and the issue of consent or lack of it is wholly irrelevant. For a child of the age of the complainant there was no sexual act which could be regarded as lawful. This was a case in which the superior court should have invoked the provisions of section 382 of the Criminal Procedure Code to cure the irregularity which on the facts and circumstances of this matter was minor”.
3. Section 382 of the Criminal Procedure Code was meant to cure such irregularities where prejudice to the appellant was not discernable. Section 8 of the Sexual Offences Act are minors, they are not able to report the offences committed against them to the police themselves. It is therefore immaterial who lodged the complaint or that PW1 did not herself complain. It does not matter that the girl did not complain and that it is her parents who complained since she was under age. The complainant was 17½ years and a birth certificate was produced by PW5 to that effect. [particulars withheld] Secondary School and was born on 3rd October 1991. That on 21st October 2009, the complainant’s father was called to [particulars withheld] Secondary school where the principal informed him that the complainant was pregnant. On being questioned she revealed that the appellant was the one responsible for the pregnancy. The police were informed and they arrested the appellant and eventually charged him as read. PW1’s age since she was still in school. Unfortunately the law does not make exception against predators who have intentions of marrying their victims. As long as the victim is a minor the offence of defilement is committed because they lack capacity to consent.rd October 1991 and a birth certificate was produced in evidence to that effect. The complainant conceived in May 2009 according to her testimony and as is borne out by the birth of baby in February 2010. She was therefore still a minor and lacked the capacity to give her consent for sexual intercourse or indeed for marriage as the appellant claimed, when he started to engage her in sexual intercourse.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF JUNE 2014.

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L. A. ACHODE

JUDGE

