



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO.51 OF 2013
BETWEEN
WILLIAM WANJAU KARIUKI.....APPELLANT
AND
REPUBLIC.....RESPONDENT
(Being an appeal from the original conviction and sentence in
Mukurweini PM's Court in Criminal Case No.374 of 2012 delivered
on 28th March, 2013 – Hon. M.W. Murage, Ag. SRM)

RULING

The appellant was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act No.3 of 2006**, the particulars of which were that on 4th August 2012 in Nyeri County, intentionally caused his penis to penetrate the vagina of H.W.W. a child aged 5 years.

He faced an alternative charge of Indecent Act with a child contrary to **Section 11 (1)** of the **Sexual Offences act No.3 of 2006**, the particulars of which were that on 4th August 2012 in Nyeri County unlawfully and intentionally touched the vagina by hand of H.W.W. aged 5 years an Indecent Act which she would not have allowed.

He pleaded not guilty, was tried, convicted and sentenced for life in respect of first count. Being aggrieved by the said decision, he filed this appeal and raised the following grounds of appeal:-

- 1. The learned trial magistrate erred in law and fact in placing reliance on the evidence of the prosecution witnesses which was materially contradictory.*
- 2. The learned trial magistrate erred in law and in fact in failing to warn herself about the inconsistency in the evidence of the prosecution about the time, date, and the reporting of and the nature of the reporting of the alleged offence.*
- 3. The learned trial magistrate failed to warn herself about credibility of the prosecution witnesses and thereby arrived at a wrong decision.*
- 4. The learned trial magistrate erred in law and fact in admitting hearsay evidence.*

5. *The learned trial magistrate erred in failing to warn herself on the reliability of the medical evidence and police evidence and thereby arrived at an erroneous decision.*
6. *The charge as framed was not supported by the evidence on record.*
7. *The conviction was against the weight of the evidence as there was no evidence of defilement or indecent act as by law provided.*
8. *The trial magistrate erred in outrightly dismissing the defence of the accused while the same had merit.*
9. *The sentence was manifestly excessive.*
10. *The trial magistrate erred in law and fact by ignoring the evidence of the complainant and the law relating to defilement and thereby arrived into a wrong conclusion.*
11. *The learned trial magistrate erred in failing to appreciate that the prosecution failed to call crucial prosecution witnesses and instead called witnesses who only offered hearsay evidence.*
12. *The learned trial magistrate erred in substituting the law and evidence with her personal views and therefore arrived into a wrong decision.*

By an application dated 10th October 2013, the appellant moved court for an order that the same be admitted to bond or bail pending the hearing of the appeal. In support of the application, it was deponed that the appellant had been in jail for a period of one year six months and the appeal had not been heard. It was further deponed that the appeal has high chances of success.

Submissions

On behalf of the appellant, it was submitted that the offence of defilement was not proved and that the evidence given was materially contradicting. Mr. Chebii for the State opposed the application and submitted that the appeal had no chances of success as there was sufficient evidence tendered to sustain conviction. It was submitted that the evidence of PW1 was on recognition and that PW3 confirmed that there was penetration. It was further submitted that the appellant was convicted for life and therefore the appeal will be heard before he served substantial part of his sentence.

The conditions upon which an appellant may be granted bond pending appeal are as follows:-

- a. *Whether there is a high probability of the appeal succeeding.*
- b. *Whether there are special or exceptional circumstances.*

Does the appeal herein has high chance of success? The evidence of the complainant PW1 was that they were playing next to the appellant's gate when the appellant called her by name and stated that he wanted to send her to one Mama Mutahi to buy a cake when he took her to his bed. He put his hand to her mouth and put his five finger inside her anus having removed her clothes. She stated that as she was playing with Ngetha and Emma who informed her grandmother.

PW2 confirmed checking PW1's private parts and saw **“a crack”** therein. PW3 Anna Kiragu a clinical officer at Mukurweini District Hospital examined the minor and confirmed that her hymen was broken while PW4 confirmed that the appellant called PW1 and took her to his house.

Taking into account the evidence tendered herein above and without taking the duty of the judge who will hear the substantive appeal, the appeal may be arguable but might not have high chances of success. I have further noted that the appellant was sentenced for life and therefore the fact that he has been in custody since conviction is not as an exceptional condition which warrants the same being released on

bond as he shall not have served substantial part of his appeal by the time when the appeal is heard.

I would at this stage decline to grant the appellant bond pending appeal. The application dated 10th October 2013 is therefore dismissed. The appellant will stay in custody pending the hearing and determination of his appeal.

Signed and dated day of 2014

J. WAKIAGA

JUDGE

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November, 2014

J. NGAAH

JUDGE

In the presence of:-

----- for Appellant

----- for Respondent