REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 101 OF 2011

(Arising from original conviction and sentence by Hon. E. Cherono, PM in Webuye Cr. No.861 of 2010)

FRED WANJALA WEPUKHULU.....APPELLANT

Versus

REPUBLIC .....RESPONDENT

JUDGMENT

Introduction

[1] The Appellant, Fred Wanjala Wepukhulu, was charged with; the offence of defilement contrary to section 8 (1) of the Sexual Offences Act No.3 of 2006; an alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act No.3 of 2007 (2006); and another offence of attempted defilement contrary to section 9 (1) read with section 9 (2) of the Sexual Offences Act No.3 of 2007 (2006). A plea of not guilty was entered on behalf of the Appellant and the case proceeded to trial.

[2] The Appellant was tried and was eventually convicted on the main charge of defilement, and was sentenced to serve a term of 20 years imprisonment.

The Appeal

[3] Being dissatisfied with the conviction and sentence by the trial magistrate, Hon. E. Cherono, PM, the Appellant filed this appeal. The appeal carries the following two significant grounds:

1. ***That I was not conversant with the language that was used during the trial at the lower court.***
2. ***That I pray that your honourable court order a retrial so that I may engage an advocate.***

Judgment by trial court muddled up

[4] The judgment by the trial court was muddled up with foreign information particularly from pages 30 – 31 of the said judgment. The trial magistrate however, captured the evidence and facts properly. The muddle in the judgment of the trial magistrate does not, therefore, affect the facts and evidence as recorded. It will also not affect the decision of this court, for; an appellate court should re-evaluate the entire evidence as provided by the witnesses, and make its own conclusions and findings. That shall surely be done.

Re-evaluation of evidence

[5] I repeat, and I stated this earlier, that this court is enjoined in law to re-consider the evidence, re-

evaluate it and draw its own conclusions. I will, therefore, look in more detail at the evidence on record. See ***Okeno v Republic*** **[1972] E.A 32.**

[6] The Prosecution called 6 witnesses. PW3 was, however, recalled by the Prosecution to identify the exhibit marked P – Exhibit No.3. And the evidence of PW3 will be re-evaluated in its entirety.

[7] PW1 is the complainant herein. She was a child and testified after the trial court duly conducted a *Voire dire inquiry*. PW1 told the court that she is a class three pupil at ***[particulars withheld]*** Primary School. She knew the Appellant who had been employed by her father to look after cows owned by her parents. On the material day, PW1 had been sent to get a *jiko* from the "big house". The Appellant followed her to the 'big house'. Suddenly, the Appellant closed the door and "fell on her". She testified that the Appellant "did bad manners" by putting his penis into her vagina. He had removed her short trousers and placed her on the bed. The Appellant then on seeing the mother of PW1 jumped from the bed to the door. The mother of PW1 had forced the door open. According to PW1, her mother wanted to know from the Appellant, what he was doing with PW1. The Appellant denied that he had done anything to PW1. PW1 then put on her short trouser. Her mother then called PW3, the aunt of, and who took PW1 to Naitiri Health Centre. Her mother remained at home. She then identified the P3 Form and her Certificate of Birth-both were produced in court. PW1, in cross-examination, maintained that the Appellant "fell on her" and her mother found him on top of her. She also confirmed that the Appellant had removed her short trousers.

[8] PW2 was the mother of PW1. Her name is E.N.N (1). She told the trial court that her daughter was 8 years old then. She remembered vividly that on 4/6/2010 at 3.00 p.m., she was at home with her small baby and PW1. She confirmed that on the material day, she had sent PW1 to 'the big house' to bring vegetables and a jiko. She was cooking *ugali* at the time. After she had cooked the *ugali*, she realised 30 minutes had passed without PW1 coming back. She, therefore, decided to check on PW1 in 'the big house'. The main door to 'the big house' was open but on entering she found that the door to one of the rooms where her sister sleeps was shut. They also keep water in that room. She then pushed the door and found the Appellant on top of PW1. She told the trial court that before she had opened the door she heard the Appellant asking PW1 to wake up as her mother was coming- *"Adoti ruka ndio huyu mama ametupata"*. The Appellant jumped out and pulled back his trousers that had been lowered. The short trousers of PW1 had also been lowered down.

[8] When PW2 asked the Appellant to explain what he was doing with PW1, the Appellant started to ask for forgiveness and that he will not repeat it again. The Appellant confessed to PW2; that was his first time to do such a thing, and he did not know what devil sent him to the child. PW2 was alone and had a small child, she, therefore, decided to call her sister who came and took PW1 to Naitiri Health Centre. The father of PW1 took PW1 to Webuye Hospital the following day and also reported the incident to a nearby AP Camp. The Administration Police then arrested the Appellant. On cross-examination PW2 confirmed that he found the Appellant defiling her child on the bed.

[9] PW3, a female named E.N.N (2) testified that on 4/6/2010 at about 3.00 p.m., she had gone for Friday Service when her sister (PW2) called her quickly from the service. PW2 told her that the Appellant had defiled PW1. She went back with PW2 and she took PW1 to Naitiri Health Centre. PW3 identified the Appellant at the dock. On cross- examination; PW3 said that the Appellant had defiled PW1 who was found with some sperms when she was taken to hospital. She said the doctor confirmed this. She repeated this in re- examination.

[10] PW3 was recalled (erroneously indicated as DW3). She confirmed that PW1 is her niece. PW1 was, as at 28/10/2010 when PW3 was recalled, aged 8 years. She confirmed that she is the one who took PW1 to hospital on the material day. She identified the treatment book (P-exhibit 3) produced earlier as the one that was issued to PW1 during the first treatment when she took her to Hospital.

[11] PW4, Dr Edward Vilembwa testified on 28/10/2010. He said that on 7/6/2010 (not 7/9/2010) on the request of OCS Kiminini Police Station, examined PW1 aged 7 years then on allegations of defilement by a person known to PW1. When PW1 was brought for examination her clothes did not

have any blood stain. He observed that PW1 was well "concented" in time and place. He filled the P3 form (P- Exhibit 1). His findings were that:

a) The injuries are major lava with *hyminal* bruises;

b) There was offensive discharge;

c) The details of the specimens did not contain any spermatozoa;

d. There was, therefore, penetration.

[12] PW4 also produced treatment book for V.M (PW1) aged 7 years. He told the trial court that the contents of the treatment book were incorporated in the P3 form he produced.

[13] In cross-examination, PW4 confirmed he had examined PW1 before filling in the P3 form which detailed his findings.

[14] PW5 No.234894 PC Leonard Jimba attached to DOS Office, Naitiri told the trial court that on 4/6/2010 while on duty, Mr C.N, the father of PW1, in company of another teacher reported to him that he had received a call from his wife that the Appellant had raped her daughter, PW1. PW5 accompanied the teacher to his house where they found two daughters of the said Mr C.N. They also found PW2 at home. PW5 arrested the Appellant after he had been identified by Mr C.N. He took him to Kiminini Police Station.

SUBMISSIONS BY THE APPELLANT

[15] The appellant submitted orally in court. He, however, referred the court to his written submissions in the file. I note that those submissions are handwritten submissions and was drawn and filed by the Appellant. The submissions are, however, not dated or signed by the maker. They also do not bear any court rubber stamp to show when they were filed. Although those submissions are short of the aspects I have mentioned, the Prosecution did not raise any objection thereto, and I will therefore consider them for the sake of justice.

[16] According to the Appellant, he was arrested and charged without being checked by a medical doctor to confirm he had defiled a minor. There was no DNA test carried on him to establish he is the one who defiled the minor.

[17] In the undated and unsigned submissions, the Appellant submitted that the trial magistrate erred in law and fact by failing to appreciate that the Prosecution's case was not only insufficient but a fabrication, unreliable, inconsistent in material particulars and could not sustain a conviction. The medical notes from Webuye Hospital and those from Naitiri Health Centre were fabricated. The former was prepared before the child had been taken to the hospital whilst the latter was prepared after the child had been to the health centre.

[18] In support of the above ground of appeal, the Appellant urges that PW4 testified that he received the child at Webuye Hospital on 7/6/10 which means that the medical notes were prepared three days before the child had been taken to that hospital. He further submitted that the medical notes by Webuye Hospital were not signed as claimed except they bear a stamp of the hospital.

[19] The Appellant has argued in his submissions that there are material contradictions in the evidence of the witnesses herein in that; a) the initial report was for attempted defilement; b) later it was substituted for one of defilement; c) PW6's testimony that PW1 told her that she had been defiled by the Appellant while standing was an impossibility; and d) there is also absolutely nothing on record that shows the child was ever taken to any hospital.

[20] All the above lapses, according to the Appellant support his view that the child was never defiled;

the charges were tramped up to frame him.

[21] The appellant urges his second ground that the trial magistrate confused his case with another of the same nature where he used the facts and evidence in that other case to convict him. The complainant in that other case was E.N. This state of affairs prejudiced him, for had the trial magistrate noted that he had incorporated wrong evidence, he could have arrived at a different decision.

SUBMISSION BY THE PROSECUTION

[22] The Prosecution was represented Mr Kibelion. He opposed the appeal. He argued that the Appellant was charged with defilement contrary to section 8(1) of the Sexual Offences Act. The person defiled was a child aged 8 years who testified and gave a clear account of the commission of the offence of defilement by the Appellant. She identified the Appellant as the person who defiled her. She knew the Appellant as he was employed by the child's parents to look after their cattle. Further, it was day time, at about 3.00 p.m. when the offence was committed and so she saw the Appellant clearly and recognized him.

[23] According to the Prosecution, PW2, the mother of the child corroborated what the child told the court about the incident giving rise to the offence for which the Appellant was convicted. She told the trial court that she is the one who pushed the door open where the incident took place. She found the Appellant in the room, on top of the child. The Appellant was half naked as he had lowered his trouser. She also heard the Appellant say 'mama ametupata' i.e. your mother has caught us.

[24] Mr Kibelion submitted that the Certificate of Birth was produced which shows the child was aged 8 years old having been born on 11/11/2002. That evidence is not in doubt.

[25] Mr Kibelion submitted that the doctor found there was penetration evidenced by bruises on and discharge from the child's genital. And therefore, the evidence was cogent making the conviction safe. He, however, asked for enhancement of sentence to one of life imprisonment as provided by law. His argument is that the sentence under section 8(2) of the Sexual Offences Act is life imprisonment and is mandatory.

ANALYSIS OF THE APPEAL BY THE COURT

Preliminaries

[26] As I stated earlier in this judgment, I will re-evaluate the entire evidence and submissions of the parties in order to arrive at my decision as by law required. I will consider some preliminary arguments first for good order particularly those in the unsigned submissions by the Appellant. They will however be accorded appropriate weight of importance as required in law. I will then look at the applicable law, the grounds of appeal as stated in the Petition of Appeal against the evidence tendered, and of course, re-consider what the Prosecution submitted. Eventually, I will come to the final determination of the appeal.

Arguments in the unsigned submissions

[27] I should make an immediate rejoinder and courts finding on the submissions of the Appellant in the unsigned and undated written submissions. I will start with the substitution of charges that was done on 16.9.10. The substitution was done properly as per the law. After substitution of the charges, the Appellant was called upon to plead to the substituted charges in accordance with section 214(4) of the CPC, to which he pleaded not guilty. The taking and recording of the plea thereto conformed to the law. It is, therefore, not correct for the Appellant to allege that he was not involved in the substitution of charges that were done on 16.9.10. The question of prejudice does not, therefore, arise, and that argument fails flat. It is so held.

[28] The other arguments I need to dispose of from the outset are those relating to the medical notes produced in the trial court. I note that the medical notes made in Webuye Hospital were made on 5th

June, 2010, which is in line with the evidence by PW1, PW2, PW3, PW4, PW5 and PW6. Those medical notes made at Naitiri Health Centre are indicated to have been made on 5/6/10 but, from the body of the notes the doctor who prepared them indicates clearly that the minor was taken to the centre at 5.00 p.m. on 4/6/10 with a history of rape by a person known to her. Therefore, that argument does not possess any value addition to the appeal, and it fails. I accordingly so hold.

[29] I will now turn to the more substantive grounds of appeal.

Grounds of appeal

[30] The appeal carries the following two significant grounds:

1. ***That I was not conversant with the language that was used during the trial at the lower court.***
2. ***That I pray that your honourable court order a retrial so that I may engage an advocate.***

The question of Language

[31] This is the first ground of the Appeal. It is a matter I should determine from the outset. The trial court is under a constitutional duty to enquire from the accused the language he understands and wishes to be used in the proceedings. This is done by formally recording the enquiry and the reply of the accused. That is a constitutional requirement which must be adhered to. It is an integral part of fair hearing under Article 50 of the Constitution. See the case of **Degow Dagane Nunow v R Cr. A. A. 223/05 (ur).** Although the initial enquiry was not recorded in a subtle manner, the trial magistrate was careful to record from the beginning and throughout the trial that the language used was Kiswahili. The record is clear on that aspect. The Appellant did not raise any objection to the use of Kiswahili or inform the court that he does not understand Kiswahili language. I presume, therefore, that the trial court was convinced that the Appellant understood Kiswahili language and proceeded to conduct the proceedings in Kiswahili language. It is imperative to note that the Appellant conducted his cross-examination in Kiswahili, and from the record, it is clear the question(s) put to the witnesses by the Appellant agrees with the evidence given by the witness which shows he understood the language of Kiswahili. Moreover, the Appellant gave his evidence in Kiswahili which is quiet consistent and plausible. The magistrate recorded through-out the proceedings that the language used was Kiswahili.

[32] I am alive to the requirement of the Constitution that the language used in a criminal proceeding must be the one that the accused understands. In the present case, there is everything to show that the Appellant understood Kiswahili language. The above recapitulation of the record of the trial court is not only a confirmation of the language used but also that the Appellant understood the language. The allegation that the Appellant did not understand Kiswahili is just an afterthought by the Appellant. For those reasons, I am convinced that the Appellant understood Kiswahili- the language that was used in the proceedings. That ground of appeal, therefore, fails.

The law applicable on the charge preferred

[33] The offence of defilement is established under Sections 8(1), and the relevant penalty for the instant charge is the one prescribed in Section 8(2) of the Sexual offences Act No. 3 of 2006. The sections are reproduced below:-

> ***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 act of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

[34] Penetration is the key element for the offence of defilement under the Sexual Offences Act. Section 2 of the Sexual Offences Act is important in this decision. It defines penetration as:-

''....the partial or complete insertion of the genital organs of a person into the genital organs of another person''

IMPORTANT LEGAL ISSUES TO BE DECIDED ON THIS OFFENCE

[35 In accordance with the constituent elements of the offence of defilement, the court is obliged to determine the following three inextricable issues:-

1) Whether the complainant is a child;

2) Whether there was penetration of the genital organs of the complainant; and

3) Whether the penetration was by the appellant.

Was the complainant a child?

[38] The Certificate of Birth for the complainant was produced as an exhibit and it shows she was born on 11/11/2002. She was at the time about 7 years and 7 months old. Other witnesses including PW2, the mother of PW1 confirmed that PW1 was aged 7- 8 years at the time of the offence. That was sufficient and conclusive proof of age, and, therefore, she was a child to whom section 8(1) and (4) of the Sexual Offences Act applied. For further elucidation on proof of age in sexual offences, I recite here below the finding by J. M. Ngugi J in **MACHAKOS HC CR APPEAL NO 296 OF 2010 FAPPYTON MUTUKU NGUI V REPUBLIC:**

''…that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases''.

Was there penetration of the genital organs of the complainant?

[39] PW1 testified after the trial court duly conducted a *Voire dire inquiry* and was satisfied she possessed sufficient knowledge to understand the purpose of the evidence she was giving and the need to tell the truth. After going through the record, I do not find anything that would make the court not to believe her testimony. She was truthful. She knew the Appellant as the person who had been employed by her father to look after cows. On the material day, she had been sent to get a *jiko* from the "big house" when the Appellant followed her to the 'big house'. Suddenly, the Appellant closed the door and "fell on her". She testified that the Appellant "did bad manners" by putting his penis into her vagina. He had removed her short trousers and placed her on the bed. She was then taken to Naitiri Health Centre by PW3. She then identified the P3 form by the doctor. PW1, in cross-examination, maintained that the Appellant "fell on her" and her mother found him on top of her. She also confirmed that the Appellant had removed her short trousers.

[40] If the only evidence is that of the complainant, the court could still convict on it in sexual offences following the proviso to Section 124 of the Evidence Act that was enacted vide the Criminal Law (Amendment) Act 2003, Legal Notice No. 5 of 2003 that:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

[41] But, that proviso to section 124 of the Evidence Act does not preclude the court from considering evidence in corroboration of that of the complainant when it is offered. It only entitles the court to convict when the only evidence is that of the complainant as long as the court is satisfied the victim is telling the truth. The reasons thereof should, however, be recorded by the court. It is, therefore, profitable in a case for sexual offences to ascertain every corroborating-evidence, and where it is

in abundance, then the conviction should be sustained. As a matter of speaking, although there is no legal prohibition, courts should warn themselves of the dangers of convicting on the evidence of a single witness.

[42] The evidence of PW2, the mother of PW1 was consistent with that of PW1. PW2 testified that she was at home with PW1 whom she had sent on the material day to the big house to bring vegetables and a jiko. She realised 30 minutes had passed and PW1 had not returned. She, therefore, decided to check on her in the big house. She entered the big house and noticed that the door to one of the rooms where her sister sleeps was shut. She then pushed the door and found the Appellant on top of PW1. She had opened the door after she had heard the Appellant asking PW1 to wake up as her mother was coming- *"Adoti ruka ndio huyu mama ametupata"*. The Appellant jumped out and pulled back his trousers that had been lowered. The short trousers of PW1 had also been lowered down.

[43] Further, and equally important evidence on penetration was the one by PW4, Dr Edward Vilembwa. He said that on 7/6/2010 (not 7/9/2010) on the request of OCS Kiminini Police Station, examined PW1 who was then aged 7 years on allegations of defilement by a person known to PW1. When PW1 was brought for examination her clothes did not have any blood stain. He observed that PW1 was well "concented" in time and place. He then filled the P3 form (P- Exhibit 1) and made the following findings:

a) The injuries are major lava with *hyminal* bruises;

b) There was offensive discharge;

c) The details of the specimens did not contain any spermatozoa;

d) There was, therefore, penetration.

[44] PW4 also produced the treatment book for PW1. He told the trial court that the contents of the treatment book were incorporated in the P3 form that he produced.

[45] In cross-examination, PW4 confirmed he had examined PW1 before filling in the P3 form which detailed his findings.

[46] There was therefore sufficient evidence that there was penetration of the genital organs of the complainant.

Was the penetration by the Appellant?

[47] The monumental task in cases of defilement is in proving that *the penetration was by the appellant.* In the opening part on this section of the judgment, I pointed out that the three issues set out above share an inextricable bond such that the absence of one would not substantially decimate, but kill the entire case. In this case, I should ultimately determine whether the Appellant has been properly identified by recognition by PW 1 or by the other witnesses as the person who committed penetration of the genital organs of the complainant.

[48] The complainant, PW 1, consistently said the Appellant was the one who defiled her and had penetration of her genital organs. The evidence as recorded by the trial court was that, suddenly, the Appellant closed the door and "fell on her" and the Appellant "did bad manners" by putting his penis into her vagina. PW1 knew the Appellant well as he was the employee of the family. Indeed she told the trial court that the Appellant had been employed to look after the cattle. She was not in doubt that the Appellant is the one who defiled her. As I pointed out earlier, PW1 was truthful and I have no reason to distrust her evidence. She also understood the duty to tell the truth and the purpose of giving evidence in the trial.

[49] PW2, the mother of PW1 confirmed that when she entered the ''big house'', she heard the

Appellant asking PW1 to wake up as her mother was coming- *"Adoti ruka ndio huyu mama ametupata"*. That is when she pushed open the door to the room where both the Appellant and PW1 were. On opening the door, she found the Appellant on top of PW1. The Appellant jumped out and pulled back his trousers that had been lowered. The short trousers of PW1 had also been lowered down.That evidence of PW2 corroborates the evidence of PW1 on identification of the Appellant by recognition. She knew the Appellant well as he was their employee.

[50] In sum, there was sufficient evidence which proved beyond any reasonable doubt, that the Appellant committed the offence of defilement on a child of the age that is less than eleven years. The complainant was aged 7 years and 7 months. In spite of the muddle in the judgment of the trial court, the trial court nonetheless arrived at the correct decision of guilty against the Appellant. I should emphasize that the muddle in the judgment of the trial magistrate did not affect the evidence as recorded. Given the decision I have arrived at, I do not think the muddle in the judgment by the trial magistrate could be said to have caused any prejudice to the Appellant. There is no foreign material or evidence in the facts of the case consisting in the evidence as captured by the trial magistrate. That is the evidence that the Appellate court has re-evaluated and on which it has come to its decision. That requirement of the law is the safeguard design of the law for situations such as this.

The question of re-trial

[51] On that decision I have reached, it is not necessary to determine whether or not there should be a re-trial.

Decision

[52] The Appellant, Fred Wanjala Wepukhulu, was charged with; the offence of defilement contrary to section 8 (1) of the Sexual Offences Act No.3 of 2006; an alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act No.3 of 2007 (2006); and another offence of attempted defilement contrary to section 9 (1) read with section 9 (2) of the Sexual Offences Act No.3 of 2007 (2006).

[53] After the case was heard, the Appellant was eventually convicted on the main charge of defilement contrary to section 8 (1) of the Sexual Offences Act No.3 of 2006, and was sentenced to serve a jail term of 20 years imprisonment.

[54] The penalty for the offence of defilement in section 8 (1) of the Sexual Offences Act is provided in section 8(2) of the said Act that:

> ***8(2):- A person who commits an act of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

[55] The Prosecution sought for enhancement of the sentence to imprisonment for life. The court has that power in law. It is, however, a discretionary power which must be exercised judiciously and judicially; upon defined legal principles in sentencing as a judicial act. I am aware of the case of **Peter Ngotho Kariuki v Republic [2010] eKLR** which reinforced the constitutional principle that the discretion of the court in sentencing cannot be taken away or limited by statute especially by providing for a mandatory sentence. Such provisions leave no room for discretion and should be taken to have provided for a maximum sentence. I will treat section 8 (2) of the Sexual Offences Act in the same light. For those reasons, the appeal is dismissed. I uphold the conviction and sentence as was imposed by the trial magistrate. Accordingly, the Appellant will suffer imprisonment for 20 years in jail.

Dated, signed and delivered in open court at Bungoma this 22nd day of July, 2013

F. GIKONYO

JUDGE

In the presence of:

Mr. Kamau for State

Appellant in person present

COURT: Judgment read in open court.

F. GIKONYO

JUDGE