



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 113 & 114 of 2006**

**WILSON KAMWARO WANG'ERE.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**HIGH COURT CRIMINAL APPEAL NO.114 OF 2006**

**SAMUEL NGEKENYA KABUI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From original Conviction and Sentence of the Principal Magistrate's Court at Murang'a in Criminal Case No.1655 of 2004 by T.W. MURIGI – SRM)***

**J U D G M E N T**

Wilson Kamwaro Wang'ere and Samuel Ngekenya Kabui, the 1<sup>st</sup> and 2<sup>nd</sup> appellants hereinafter, appealed to this court from the judgment of the Principal Magistrate's Court at Murang'a (T.W. Murigi, SRM Presiding). The appellants were tried on one count of Defilement of a girl under the age of 16 years contrary to *section 145 (1)* of the Penal Code. They also faced the alternative charge of indecent assault on a female contrary to *section 144 (1)* of the Penal code. The particulars of the charge of defilement with which we are mainly concerned in this appeal were that Wilson Kamwaro Wangere, and Samuel Ngekenya Kabui on the 22<sup>nd</sup> day of October, 2004 at Murang'a District of the Central Province, jointly with another not before court unlawfully had carnal knowledge of B W G a girl under the age of 16 years. Having undergone a full trial the appellant were found guilty as charged in the main count. The learned Magistrate correctly made no findings with regard to the alternative count. On convicting the appellants, the learned Magistrate sentenced each one of them to the maximum sentence permitted for the offence, which is life imprisonment.

The appellants being aggrieved by the conviction and sentence each separately lodged their appeals to this court through Messrs Gacheru J. & Co. Advocates. The appellants raised the same grounds of appeal in their respective petitions of appeal. However the interesting ground and which may very well determine

the fate of this appeal is ground three in the petitions of appeal. It is couched in these terms:

“.....The learned Magistrate erred in law in failing to hold that the charge was defective as the appellant is said to have committed the act jointly which is physically impossible.....”

When the appeal came up for hearing, Mr. Orinda, learned Principal state counsel readily conceded to the appeal on the ground that the main count as framed was incurably defective and this court cannot sustain the conviction based thereon. In his own words the learned state counsel submitted:

“.....I concede to the appeal on the basis that the appellants could not have jointly defiled the victim.....”

I have no hesitation whatsoever in agreeing with the position taken by the learned Principal state counsel. The appellants were charged with jointly defiling the complainant. It is impossible and impracticable for two or more people to jointly commit the offence of defilement. It is not possible for two or more people to rape and defile a victim at the same time and or simultaneously. The appellants would not have unlawfully inserted their male genital organs in the victim's genital organ at the same, simultaneously and or contemporaneously. It is impossible. **Mr. Gacheru J.** learned counsel for the appellant's took a similar view of the matter.

In the case of Paul Mwangi Murunga V Republic, (2008)eKLR, the court of appeal commenting on the issue delivered itself thus:

“...this court has repeatedly said that two or three men or whatever may be their number cannot jointly at the same time rape one woman. Each one of the men commits the act of rape individually and is followed by the next man. We are unable to appreciate how two or three men can at the same time “*jointly*” enter or try to enter her genital organ. The act is committed by each one of them alone and if there be two, three or four of them each must be charged on a separate count of rape.....”

I wouldn't agree more with this proposition of the law save to substitute the word “*rape*” with “*defilement*” so as to suit the circumstances of this case.

The appellants were convicted with jointly defiling the complainant which act as I have attempted to demonstrate above is well nigh, impossible. Accordingly the appellants were convicted on both a defective and duplex charge. It was duplex as the acts of defilement were combined in one charge. Much as the charge was defective and duplex, there was also a misjoinder of accused persons for the very reason that they could not have done what they were accused of jointly.

This ground of appeal alone is sufficient to dispose off this appeal. That being my view of the matter, I allow this appeal, quash the convictions recorded against the appellants under *section 145(1)* of the Penal Code, set aside the life sentences imposed on them and order that each appellant be released from prison forthwith unless they are held for some other lawful cause.

***Dated and delivered at Nyeri this 10<sup>th</sup> day of June, 2008.***

**M.S.A. MAKHANDIA**

**JUDGE**