

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 547 of 2003

**(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in
Criminal Case No. 1392 of 2003 – H. WASILWA [SRM])**

PETER WEKESA MWAMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Peter Wekesa Mwambi was charged with defilement of a girl under the age of sixteen years contrary to **Section 145(1) of the Penal Code**. The particulars of the charge were that on the 22nd of June 2003 at [*particulars withheld*], Nakuru District, the appellant unlawfully had carnal knowledge of MW a girl under the age of sixteen years. He was alternatively charged with indecent assault of a female contrary to **Section 144(1) of the Penal Code**. The particulars of the charge were that on the same day and at the same place, the appellant unlawfully and indecently assaulted MW, a girl under the age of nine years. The appellant pleaded not guilty to the two charges and after a full trial he was found guilty of the main charge of defilement. He was sentenced to serve life imprisonment with hard labour. From his petition of appeal, it is apparent that he was not challenging his conviction but rather his sentence.

However, during the hearing of the appeal, the appellant changed his story and made oral submissions challenging his conviction. He submitted that he had not committed the offence and that the complainant had told untruths to secure his conviction. He told the court that his defence had not been considered by the trial magistrate when she evaluated the evidence and reached a decision convicting him. He further submitted that there was a grudge between himself and the complainant's family which was caused by the fact that the appellant was at the time living with a Ugandan woman. He submitted that the charge was brought against him so as to frame him and achieve the result of separating him from his lover. He urged the court to re-evaluate the evidence and reach a decision allowing his appeal.

Mr Koech, Learned State Counsel supported the conviction and the sentence meted out on the appellant. He submitted that the charge of defilement against the appellant was proved to the required standard. He submitted that the appellant was caught red handed by the complainant's mother after he had defiled the complainant. She raised alarm after which the appellant was arrested. The complainant was taken to hospital and was admitted for a period of one and a half weeks. The doctor who examined the complainant confirmed that indeed the complainant, who was by then aged nine years, had repeatedly been defiled. Mr Koech urged the court to disallow the appeal as there was overwhelming evidence to support the charge of defilement. Furthermore, he submitted that since the appellant was the step-father of the complainant, the sentence of life imprisonment was merited in the circumstances. He submitted that there was no evidence that the appellant had been framed for the charge for which he was convicted. He urged this court to disallow the appeal.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the subordinate court so as to reach its own independent conclusion whether or not to uphold the conviction of the appellant. In doing so, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified (*See Njoroge –vs- Republic [1987] KLR 19*). In this appeal, the issue for determination by this court is whether the prosecution proved the charge of defilement against the appellant to the required standard of proof beyond reasonable doubt. The second issue for determination is whether the defence raised by the appellant is such that it exonerates him from the charge

of defilement facing him.

To prove its case against the appellant the prosecution called four witnesses. PW1 MW (*the complainant*) testified that the appellant repeatedly defiled her for a long period of time and on each occasion threatened that he would kill her if she told her mother what had transpired. On the material day, she recalled that her mother PW2 CS had gone to church, the appellant got hold of her removed her clothes and again defiled her. Her mother came back and found the appellant in the act. She testified that PW2 screamed and alerted the members of public who came to the house. They took her to hospital where she was admitted for about one and a half weeks. She testified that she was bleeding from her private parts when she was taken to hospital and felt pain when she passed urine. She further testified that she was examined by a doctor who filled a P3 form.

PW2 recalled that on the 22nd of June 2003 at about 5.00 p.m. as she entered the house, she found the appellant wearing his trousers while the complainant was naked and wearing only a T-shirt. The complainant was putting on her pants. When PW2 asked the appellant what he was doing, the appellant kept quiet. PW2 screamed and alerted the neighbours who came to her house and interrogated the complainant. The complainant told them that the appellant had been defiling her since January 2002. PW2 went and made a report to the police. She also took the complainant to the hospital where she was admitted and treated. She was later discharged. When PW2 asked the complainant why she had not informed her of what the appellant had done to her, the complainant told her that the appellant had threatened to kill her if she ever disclosed what he was doing to her. PW2 testified that the appellant was the step-father of the complainant.

PW3 Dr. Kogutu Vitalis examined the complainant on the 2nd of July 2003. He established that the hymen had been broken. He confirmed that the complainant had been repeatedly defiled. He produced the P3 form which he had duly filled as prosecution exhibit No. 1. He also examined the complainant on the 23rd of June 2003 and established that the underwear that the appellant was wearing had sperms which the appellant claimed were as a result of the sex he had had with the complainant's mother on the 18th of June 2003. The P3 form was produced as prosecution exhibit No. 2. PW4 Police Constable Lawrence Ariamutu received the complaint which was made by PW2. He investigated the case and later re-arrested the appellant when he surrendered himself to the police. He testified that his investigation established that there was sufficient evidence to charge the appellant for the offence of defilement.

When the appellant was put on his defence he denied that he had defiled the complainant. He testified that he had disagreed with the complainant's mother hence the charge of defilement that was brought against him to frame him up. The appellant reiterated his innocence when he made his submissions on appeal.

As stated earlier in this judgment, the appellant did not challenge his conviction when he filed his petition of appeal. It is apparent that the only complaint that he then had was against sentence. However when the appeal came up for hearing before this court, the appellant changed his mind and instead challenged his conviction. I have re-evaluated the evidence and the submissions made by the appellant and by Mr Koech on behalf of the State. The evidence adduced by the prosecution established that the appellant was found *in flagrante delicto* by the mother of the complainant who found him in the house putting on his trousers after he had defiled the complainant. The complainant was not wearing any pants. She was wearing a T-shirt only.

On inquiry, the complainant's mother established that the complainant had been repeatedly defiled by the appellant for a long period of time prior to the date that the complainant's mother found him in the act. The appellant secured the silence of the complainant by threatening her with death if she ever disclosed what went on between them. Being a father figure to the complainant, the complainant obviously believed that the appellant could have harmed her if she ever told her mother what the appellant was doing to her. PW3 who examined the complainant confirmed that the complainant had been repeatedly defiled.

Although the appellant denies that he had defiled the complainant, the issue for determination by this

court is whether the evidence adduced by the prosecution proves beyond reasonable doubt that it is the appellant and no one else who could have defiled the complainant. The fact that the complainant was defiled is not in dispute. This was proved by the evidence of the doctor who testified in this case. The identity of the defiler was established by the evidence of the complainant herself and that of her mother who found the appellant in a compromising position with the complainant. The evidence adduced by the prosecution proves beyond reasonable doubt that it is only the appellant who could have had access to the complainant and who could have secured her silence after defiling her.

In the circumstances of this case, I find that the prosecution proved its case against the appellant on the charge of defilement to the required standard of proof beyond reasonable doubt. I find no merit with the defence of the appellant that the mother of the complainant framed him. It is inconceivable that the complainant's mother could have had her daughter defiled by someone else and then frame it on the appellant. The defence by the appellant is obviously a sham and it was rightly rejected by the trial magistrate. I similarly find no merit on the appeal by the appellant against conviction and consequently proceed to dismiss it.

On sentence, upon re-evaluation of the evidence adduced, it is my view that the sentence merited the offence. The appellant abused the trust placed upon him by the society who expect him to bring up his daughter to be a responsible citizen in the society and not treat her as a sexual object to satisfy his perverted sexual urges. The fact that the appellant repeatedly defiled the complainant is more the reason why the life imprisonment with hard labour imposed was appropriate in the circumstances. In the premises therefore, the appeal against sentence is similarly dismissed. The appellant shall serve the sentence imposed by the trial magistrate. The said conviction and sentence is hereby confirmed.

DATED at NAKURU this 10th day of May 2006.

L. KIMARU

JUDGE