REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA AT KITALE.
APPELLATE SIDE.
CRIMINAL APPEAL NO. 172 OF 2002.

JOHN WANYONYI WAMALWA ::::::::::::::::::::::: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(Being an appeal against the judgment of the SPM's court in Criminal case No. 4064/2001 by D.K. Gichuki – SRM delivered on 30th July, 2002 in Kitale)

J U D G M E N T.

The appellant herein was charged, tried and finally convicted of the offence of defilement. He was sentenced to serve 6 years imprisonment with hard labour with 6 strokes of the cane.

He has now appealed against the conviction and the sentence mainly on the grounds that he was not positively identified.

Briefly, on 18/8/2001, at about 3.00p.m., while on her way to church, the minor, then aged 6 years old, was lured into a maize plantation by a man, who then defiled her and thereafter took her to the roadside and advised her to go home.

Upon arrival at her home at about 3.30p.m. she found her mother who noticed that the child who was then crying could not walk properly, and when she enquired, the child informed her that somebody whom she didn't know that defiled her. The child merely referred to the man as 'baba mwingine'.

I have evaluated the evidence which was adduced to support the charge. I have also evaluated the defence case, and have taken into account the judgment, which was delivered in the case.

It is on record that the minor identified the appellant at a village parade in which over 30 men participated. That in my humble opinion cannot qualify as a parade which is recognizable in law. A parade can only be carried out by the police and even then within certain specified regulations. It would appear that the police let PW1 carry out the investigations and conduct the parade. That cannot be the basis upon which a conviction can be founded.

Be that as it may, I find that the evidence for the prosecution was full of contradictions which weighed heavily against the prosecution case, in that though PW1 testified that she had been with PW5 when PW2 narrated her ordeal, that didn't from part of PW5's, evidence which was that he heard of the matter for the first time a day after it happened while he was on his way to church.

The upshot of all this is that I find that the prosecution failed to prove its case against the appellant beyond reasonable doubt and I do in the circumstances allow the appeal, quash the conviction and set aside the sentence.

The appellant should be released forthwith unless otherwise held in lawful custody.

Dated and delivered at Kitale day of 2004.

JEANNE GACHECHE.

JUDGE.

Delivered in the presence of:

Ms. Oundo for the State.

Appellant in person.