



REPUBLIC OF KENYA



KENYA LAW
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**Wangio v Republic (Criminal Appeal E067 of 2023)
[2024] KEHC 19 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 19 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E067 OF 2023
KW KIARIE, J
JANUARY 12, 2024**

BETWEEN

BRIAN MWASHIGADI WANGIO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO.119 of 2020 of the Senior Principal Magistrate's Court at Shanzu by Hon. D.O. Odhiambo–Principal Magistrate)

JUDGMENT

1. B.M. W., the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 Of 2006.
2. The particulars of the offence are that on the 14th day of September 2020 at [particulars withheld] in Nyali sub-county, within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of G.J.N., a child aged 11 years.
3. The appellant was sentenced to thirty years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:
 - a. That the learned magistrate misdirected himself by disregarding the defence of alibi casually claiming that the same did not shake the prosecution's case even though the accused's work colleagues confirmed his presence at his place of work at all times in question and with no ability to have travelled such distance to the scene of the crime within the times in question.
 - b. That the learned magistrate misdirected himself by shifting the burden of proof by disregarding the evidence of the appellant of a pre-existing grudge over hanging line and clothes line which he treated as a mere afterthought.



- c. That the learned magistrate misdirected himself by disregarding the testimonies of the defence witnesses presented by the appellant during his defence.
 - d. That the learned magistrate erred in fact and law by disregarding the fact that the minor's evidence did not stand the test of cross-examination by the appellant and that the minor was a sickly and underdeveloped child whose ability to provide testimony ought to have been taken with some level of caution and non-conclusively.
 - e. That the learned magistrate erred in law and fact by expecting the appellant, a layman to know the rules using the defence of alibi as he wasn't represented by an advocate at the time.
 - f. That the learned magistrate erred in law and fact by failing to appreciate that the evidence of the prosecution was not watertight and was full of doubts which should have been ruled in favour of the appellant. The threshold of beyond reasonable doubt was far from being met.
 - g. That the learned magistrate erred in law and fact by arriving at the decision which culminated in the conviction and sentence of the appellant, an innocent young man vibrant with life and denying him his future while in fact, the benefit of the doubt favoured him.
4. The state did not file grounds of opposition or submissions.
 5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.
 6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
 - a. Whether there was penetration;
 - b. Evidence must show that the accused is the perpetrator; and
 - c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if they were proven.

7. There is no doubt that the complainant herein was defiled on the 14th day of September 2020. Dr. Fatma Mohamed (PW4) produced a P3 Form that Dr. Nafisa had completed on examining the complainant on the 17th day of September 2020. The complainant had a swollen hymen and had abrasions.
8. Except for the evidence of the complainant, no other witness placed the appellant at the scene and where they did, they attributed the information to the complainant.
9. In his defence the appellant pleaded an alibi and contended that at his place of work the entire day. He called witnesses who supported his claim and also produced some documents. When an accused person



raises an alibi defence, the onus is on the prosecution to prove the defence false. In the case of *Victor Mwendwa Mulinge vs. R [2014]* eKLR the Court of Appeal while addressing the alibi defence stated:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja vs. R [1983]* KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

10. When I checked the attendance sheet which was produced by the defence, I noted that the appellant attended duty from 14th to 19th of September. The appellant was cross-examined on the same. If the prosecution did not believe the authenticity of this document and the witnesses who testified to support the contention of the appellant, they had an option of applying to reopen their case. The conviction is quashed and the sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT MOMBASA THIS 12TH DAY OF JANUARY, 2024.

KIARIE WAWERU KIARIE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

