



**Wanjala v Republic (Criminal Appeal E085 of 2022)
[2024] KEHC 33 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 33 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E085 OF 2022
KW KIARIE, J
JANUARY 11, 2024**

BETWEEN

OSCAR WEKESA WANJALA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO.59 of 2020 of the Chief Magistrate's Court at Mombasa by Hon. D. Odhiambo–Senior Resident Magistrate)

JUDGMENT

1. O. W. W., the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 Of 2006.
2. The particulars of the offence are that on the 10th February 2020, at [particulars withheld], Bamburi location, Kisauni sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of R.A., a child aged 16 years.
3. The appellant was sentenced to fifteen years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He was represented by the firm of Amuma Dulu & Company Advocates. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact in failing to hold that the prosecution had not established its case beyond reasonable doubt.
 - b. That the learned trial magistrate erred in law and fact in purporting to shift the burden of proof from the prosecution to the appellant.
 - c. That the learned trial magistrate erred in law and fact when he disregarded the documentary evidence of the appellant yet their authenticity or admissibility was not questioned.



- d. That the learned trial magistrate erred in law and fact by raising issues of professional negligence with no basis with the same clearly showing bias.
 - e. That the learned trial magistrate erred in law and fact by failing to recognize that the evidence by the appellant was unchallenged and unrebutted by the prosecution.
 - f. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the police failed and/or neglected to investigate the circumstances surrounding this case.
 - g. That the learned trial magistrate erred in law and fact in completely ignoring the defence case has submissions and authorities cited in support of his case, and in effect shifting the burden of proof in blatant disregard of the presumption of being innocent.
 - h. That the learned trial magistrate erred in law and fact in relying on inconsistent and massively contradictory evidence to convict the appellant.
 - i. That the learned trial magistrate erred in law and fact by failing to appreciate that all the foregoing is quite essential encompassment of reasonable doubt.
4. The appeal was opposed by the state through M/s. Vallerie Ongeti learned counsel. She contended that the prosecution proved all the ingredients of the offence to the required standards.
 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 offence 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 Ngugi vs. Republic* [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. M. 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 are proven.

1. At the time when the trial prosecution process started, the complainant was expectant and there were medical documents that supported this contention. This, therefore, proved penetration of the complainant's genitalia by a male.
2. A copy of the birth certificate of R.A. was produced as an exhibit. It indicates that she was born on the 14th day of September 2003. At the time of the offence, she was sixteen years and five months old. Section 8 (4) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.



The prosecution therefore proved the age of the complainant.

9. On the 13th day of September 2021, Mr. K. the complainant's advocate applied for a DNA test to be conducted for there was an allegation that the complainant's mother had reported another person at Kiambeni police station to be responsible for the complainant's pregnancy. The court issued the order but the complainant failed to avail herself.
10. The appellant raised this issue in his defence and produced a letter purportedly authored by the complainant's mother. In the said letter, she claims her daughter had run away with the real father of the child. Though the authenticity of this letter cannot be ascertained, the failure by the complainant to avail herself for a DNA test raises reasonable doubts that ought to be resolved in favour of the appellant.
11. The upshot of the foregoing analysis of the evidence is that the conviction was unsafe. The same is quashed and the sentence is set aside. The accused is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT MOMBASA THIS 11TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

