



**Wambua v Republic (Criminal Appeal 157 of 2023)
[2024] KEHC 1502 (KLR) (20 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 157 OF 2023
DR KAVEDZA, J
FEBRUARY 20, 2024**

BETWEEN

NICHOLAS MULEI WAMBUA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. E. Boke (S.P.M) on 7th May 2020 at Kibera Chief Magistrate's Court
Sexual Offences Case no. 42 of 2019 Republic vs Nicholas Mulei Wambu)*

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8 (1) and (3) of the *Sexual Offences Act*. He was sentenced to serve twenty (20) years imprisonment.
2. Being aggrieved, he filed the present appeal, challenging his conviction and sentence. The grounds of appeal are: He challenged the totality of the prosecution's evidence, against which he was convicted. He complained that essential prosecution witnesses were not called to testify. That his defence was not taken into consideration. He argued that the charge sheet was defective. In addition, that the trial court failed to conduct a *voir dire* examination before admitting the complainant's evidence. Finally, his sentence was harsh and excessive.
3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court to come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify. With the above, I now proceed to determine the substance of the appeal.



4. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. To succeed in a prosecution for defilement, the prosecution must prove that the accused committed an act that caused penetration with a child. "Penetration" under Section 2 of the Act means "the partial or complete insertion of the genital organs of a person into the genital organs of another person." The other ingredients are proof of the age of the victim and the positive identification of the assailant. The appellant and the respondent filed written submissions which have been duly considered.
5. The prosecution case was as follows: PW 1 PNM, the complainant testified that her birthdate was 12 years old. She informed the court that she knew the appellant who was their neighbour. During the school holiday, the appellant's wife called her to assist her in washing her utensils. She was hesitant because her mother had warned against such activity. The appellant's wife promised that she would lock her inside the house where her mother could not see her and left. He also told her to only open the house for her or her husband.
6. While she carried on with the household tasks, the appellant showed up with a sack of vegetables. Extracting a knife from the kitchen utensils, he menacingly warned her not to disclose what was about to occur. Despite her attempts to resist, he overwhelmed her, forcefully throwing her onto a bed in the adjacent room. He then removed her trousers, and underwear and defiled her. She was in pain and cried during the ordeal. He threatened her not to tell anyone what had happened.
7. She returned home, showered, and refrained from informing her mother. Several days later, she encountered the appellant, who struck her with the blunt side of a '*panga*' and seized her by the throat. He interrogated her to establish whether she had disclosed the incident to her mother, while threatening to harm both of them. Notwithstanding the threats, that night, she finally disclosed her traumatic experience to her mother. Subsequently, she received medical attention, and the incident was reported to the police.
8. The complainant's testimony did not require corroboration in accordance with the provision of Section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. The trial magistrate noted that the complainant had no grudge against the appellant. In addition, her demeanour during the trial was well documented, and the trial court found that there was no reason why she would lie. The trial court was therefore satisfied that the victim was telling the truth.
9. In her testimony, PW 1 gave a clear and graphic testimony of her encounter at the hands of the appellant. She knew the appellant, who was their neighbour, and was clear what had happened to her. She told the court that the ordeal greatly traumatized her. The court noted that she was intelligent and had no reason to lie. I therefore hold that the appellant is the one who committed the act of penetration.
10. With respect to additional corroborating evidence, PW2, the complainant's mother, recounted the events of 24th April 2019 when the complainant told her of her encounter with the appellant. She took her to hospital and later reported the incident at Lang'ata Police Station. She also told the court that the complainant was born on 7th October 2008. She affirmed that the appellant was their neighbour and lived with his wife.
11. Alice Gori (Pw 3) a medical examiner at Amref told the court that the complainant was brought to the hospital on 29th April 2019, after a case of alleged sexual assault. On examination, her outer genitalia were normal and her hymen was broken with whitish discharge. She produced the Post-Rape Care (PRC) Form. It was her opinion that this was consistent with the evidence of penetration. I hold that the opinion of the medical expert is consistent with the evidence of penetration and corroborates PW 1's testimony that the appellant sexually assaulted her.



12. The investigating officer, PC Sofia Kitasao summarised the prosecution's evidence. She produced the complainant's birth certificate and a verification of the birth certificate from the civil registrar.
13. On the age of the complainant, the trial court considered the complainant's birth certificate, which indicated that she was born on 7th October 2008 and was 10 years and 6 months at the time the offence was committed. There is therefore no doubt that PW 1 was a child within the meaning of the law.
14. The appellant complained that the failure to conduct a voir dire examination on the complainant was fatal. It is firmly settled that in cases where voir dire examination is not administered or not administered properly the entire trial would be vitiated. The question depends on the circumstances of each case. (See. *James Mwangi Muriithi v R* Nyeri Criminal Appeal No. 10 of 2014) Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the admissibility of the evidence of a child of tender years. This provision underpins the practice in relation to children's testimonies, the format may be varied in testing the intelligence of the child depending on the suitability of the child in question. (See *Johnson Muiruri v R* [1983] KLR 447. What is clear is that whatever format, the court adopts, it must be on record,
15. From the record of the trial court, the court noted the complainant was very intelligent and sounded like an adult. The purpose of a voir dire was therefore achieved, which is to determine whether the complainant would understand the meaning of an oath, testifying under oath and the consequences thereof.
16. The appellant also complained that the charge sheet was defective. However, no submissions were made on the ground of appeal. That notwithstanding, have gone through the charge sheet and it discloses, the name of the accused, when the offence was committed, where it was committed, who committed the offence and importantly indicates the name of the victim. The charge therefore contains the statement of offence and the full particulars.
17. The Appellant further argued that his defence was not considered. In his testimony, he denied the charges terming them a fabrication. When weighed against the prosecution evidence, particularly the testimony of PW 1, it amounted to a mere denial of the offence and was rightly dismissed.
18. From the totality of the evidence, the prosecution proved all the elements of the offence of defilement beyond reasonable doubt. I therefore affirm the conviction of the trial court.
19. With regard to the sentence imposed, the appellant was charged under section 8 (3) of the *Sexual Offences Act*. Consequently the court imposed a sentence of 20 years imprisonment.
20. Sentences are intended, *inter alia*, to punish an offender for his wrongdoing; they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt in my mind that the sentence imposed by the trial court was lawful, due to fact the appellant threatened to cause harm to the complainant and her mother a week after the commission of the offence.
21. The upshot of the above analysis is that the appeal is found to be lacking in merit and is dismissed.
Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY 2024

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D. KAVEDZA

JUDGE



In the presence of:

Ms. Ntabo for the State

Appellant present on the platform

Nelson Court Assistant

