



REPUBLIC OF KENYA



**Wanjala v Republic (Criminal Appeal E016 of 2023)  
[2024] KEHC 6895 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6895 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E016 OF 2023**

**AC MRIMA, J**

**JUNE 11, 2024**

**APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF HON. C. M. KESSE (PRINCIPAL MAGISTRATE) IN KITALE CHIEF MAGISTRATE'S COURT CRIMINAL CASE (S.O.) NO. E042 OF 2022 DELIVERED ON 16TH FEBRUARY, 2023**

**BETWEEN**

**ISAAC NYONGESA WANJALA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of the conviction and sentence of Hon. C. M. Kesse (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. E042 of 2022 delivered on 16th February, 2023)*

**JUDGMENT**

**Introduction:**

1. The Appellant herein, Isaac Nyongesa Wanjala, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on 31<sup>st</sup> January 2022 at [Particulars withheld], the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of NNW, a child aged 14 years old.
2. The Appellant was alternatively charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in same place, the Appellant intentionally caused the contact between his penis and the vagina of NNW, a child aged 14 years old.
3. When the Appellant was arraigned before the trial Court to answer to the charges, he pleaded not guilty to both counts.



4. After a full trial, the Appellant was convicted on the main charge of defilement.
5. He was sentenced to serve 15 years imprisonment.

#### **The Appeal:**

6. Dissatisfied with the findings of the trial Court, the Appellant filed the present appeal. He filed Grounds of Appeal and a Further Amended Grounds of Appeal as well as written submissions.
7. The Appellant argued that penetration was not proved, that Article 49(f) rights under the Constitution were infringed and that he was properly identified as the perpetrator of the offence.
8. During the hearing of the appeal, parties relied on their written submissions.
9. He urged this Court to allow the appeal and that he be set at liberty.
10. The appeal was opposed by the prosecution. Learned Counsel for the State submitted that all the ingredients to a charge of defilement had been established to the required standard.
11. The State also filed written submissions.
12. The State prayed that the conviction be upheld and the sentence be affirmed.

#### **Analysis:**

13. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono v. Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.
14. Having carefully perused the record, this Court is now called upon to determine whether the offences of defilement or Committing indecent act with a child were committed, and if so, whether by the Appellants.
15. For the prosecution to establish the charge of defilement, it must establish the following crucial ingredients: -
  - a. Age of the Complainant;
  - b. Penetration and;
  - c. Identification of the perpetrator.
16. Five witnesses testified in this case. They were the complainant one NNW who testified as PW1, the mother of PW1 who testified as PW2, a Clinical Officer from Endebes Sub-County Hospital who testified as PW3, the Medical personnel who produced the PW1's Age Assessment Report testified as PW4 and the Investigating Officer was PW5.
17. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.
18. The Appellant gave an unsworn defence.
19. In its judgment, the trial Court found the Appellant culpable and convicted him of the offence of defilement. The question which must now be answered is whether the prosecution discharged its



burden of proof to the required standard? A look at the ingredients of the offence of defilement in light of the evidence and the law now follows.

### **Age of the Complainant:**

20. There was no contestation on the age of PW1. In this case the State relied on an Age Assessment Report which was produced by PW4 . The age was settled at 14 years.
21. This Court, therefore, finds and hold that the Complainant was a child within the meaning ascribed to the term under Section 2 the *Children's Act*.

### **Penetration:**

22. The evidence of penetration was by two witnesses; PW1 and PW3. It was PW3 who examined PW1 and observed that her hymen was torn and old looking. He confirmed that PW1 was first attended at the facility on 2<sup>nd</sup> February 2022 and that he filled in the P3 Form on 8<sup>th</sup> February 2022. That a laboratory high vaginal analysis revealed infection and that PW1 was dispensed with appropriate drugs. From his assessment, PW3 confirmed that PW1's vagina had been penetrated by a male sexual organ; the penis.
23. PW1 also testified that she had sexual intercourse with a man who went into her room in the night at around 3am. She described how the intruder's penis was inserted into her vagina.
24. The combined evidence of PW1 and PW3 leaves no doubt that indeed a penis was inserted into PW1's vagina. That is proof of penetration.

### **Identity of the perpetrator:**

25. Had the Appellant been positively identified as the perpetrator? The evidence on the identity of the assailant was led by PW1 and PW2.
26. There is no doubt that the two witnesses knew the Appellant well. Although the incident took place at night, there was evidence on how PW2 used a spotlight to see in the house.
27. PW2 testified that when PW1, who was sleeping in another room with her younger siblings, raised alarm that there was someone in their room, she put on her torch and walked towards the room. That, she met the Appellant at the door of the room where the children were as he walked out. The Appellant was naked. That, PW2 confronted him and the Appellant just returned into the room and dressed up.
28. PW1 also confirmed seeing the Appellant by the use of the torch light.
29. The Appellant tendered his unsworn defence. This Court has, on numerous occasions, rendered the position that unsworn testimony has extremely low probative value, if any. The reason is that the other party is not accorded an opportunity to test that evidence on cross-examination and as provided for in the *Evidence Act*.
30. Be that as it may, the defence was a plea that the Court considers the period the Appellant had been in custody.
31. The totality of the evidence, therefore, placed the Appellant at the scene as the perpetrator. He was positively identified as such. The prosecution's evidence was, therefore, not inconclusive, contradictory, scanty or falsified as alleged by the Appellant.



**The other issue:**

32. The Appellant also raised the issue of his alleged extended stay in custody on arrest. He contended that he was arrested on 8<sup>th</sup> February 2022 and that he was arraigned before Court on 10<sup>th</sup> February 2022.
33. From the record, the issue was not raised at the trial. As such, the issue was not considered by the Court of first instance to be properly before this Court for consideration. The contention, therefore, fails.
34. The upshot of the above is that the prosecution discharged their burden to the required standard of proof and the trial Court, rightly so, found the Appellant guilty and convicted him.
35. Consequently, this Court finds that the appeal against the conviction lacks merit and is hereby dismissed.

**Sentence:**

36. The Appellant was sentenced to 15 years imprisonment. The trial Court considered the mitigations and exercised its discretion in accordance with the current law as set by the Supreme Court of Kenya.
37. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
38. In this matter, the Appellant did not establish the infringement of any of the above parameters by the sentencing Court. The sentence remains lawful and it ought not to be disturbed. However, since the trial Court indicate that the sentence had taken into account the Appellant had been in remand during the trial, such allowance ought to be given.
39. Therefore, save that the sentence shall start running from the date of plea, the sentence itself is hereby affirmed.

**Disposition:**

40. Drawing from the above discussion, it is apparent that the appeal is wholly unsuccessful.
41. In the end, the following orders do hereby issue: -
  - a. The appeal on conviction is dismissed.
  - b. The appeal on sentence only succeeds to the extent that the term of 15 years imprisonment shall run as from 10<sup>th</sup> February, 2022.
  - c. The file is marked as closed.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 11<sup>TH</sup> DAY OF JUNE, 2024.**

**A. C. MRIMA**

**JUDGE**



Judgment delivered in open Court and in the presence of: -

No appearance for Isaac Nyongesa Wanjala, the Appellant in person.

No appearance for Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

