



REPUBLIC OF KENYA



**Wambara v Republic (Criminal Appeal E026 of 2021)
[2024] KEHC 6432 (KLR) (3 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E026 OF 2021**

SM GITHINJI, J

JUNE 3, 2024

BETWEEN

JOHNSON KARIUKI WAMBARA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of PM's Court at Lamu Law Courts in
Criminal Case No.23 of 2020 before Hon M.Maina Wachira dated 24/6/2021)*

JUDGMENT

1. Johnson Kariuki Wambara was charged in the lower court with a main count of defilement, contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of this offence are that on the 8th day of September, 2020 at around 14.00Hours in [Particulars withheld] village, area of Hindi Division in Lamu West Sub County within Lamu County, the appellant intentionally caused his penis to penetrate the vagina of P.N, a child aged 14 years.
3. In the alternative the appellant was charged with an offence of committing an indecent act with a child, contrary to section 11 (1) of the [Sexual Offences Act](#) No.3 of 2006.
4. The particulars hereof being that on the 8th day of September, 2020 at around 14:00hrs in [Particulars withheld] Village, area of Hindi Division in Lamu West Sub-County the appellant intentionally touched the vagina of P.N, a girl aged 14 years with his penis.
5. The prosecution case is that the victim herein who gave evidence as Pw-1 was born on 20th October, 2005. Her birth certificate No.6XXXX6 was produced as an exhibit. At the time of the alleged offence, that is on 8th September, 2020, she was aged 14 years old. She was living at Hindi [Particulars withheld] with her grandparents. Her father was deceased and the mother was working in Dubai. The appellant herein was a neighbour and a regular visitor at their home. They knew him as Kariuki.



6. On the alleged date of the offence, the victim was left at home with her sister who was feeling unwell. The victim was to look after the goats. At about 2:00Pm the victim decided to go for goats from where they were grazing. She used a path and before she got to the neighbouring farm she was held from behind and her mouth was muffled with one hand. She noted the one who had held her was their neighbour namely Kariuki. As he talked he smelt of alcohol and appeared drunk. He pulled her to a nearby bush. The victim was in a skirt and T-shirt. He pulled off the skirt and fell her down. He opened his trousers while squatting and had sex with her. The victim eventually pushed him off. She stated that she will report him to the grandmother. The assailant (appellant) told her that he had seen a witch that morning and if she reports she will die. The victim was scared and when she went home did not tell her sister. However, the sister indicated that she appeared scared. The victim did not as well inform her grandmother.
7. On Wednesday her grandfather went to Nairobi. On Thursday, the 10th day of September, 2020 in the evening they heard a knock at the gate. Using a torch, they went outside to find out who was visiting. They noted it was the appellant herein who was in company of his mother. Even then the appellant was smelling of alcohol. They all sat outside the house. The victim, her sister and grandmother (Pw-2) were all present. The appellant's mother said the appellant had something to say. The appellant said he was there to seek forgiveness for the act of sex he had with the victim on 8/9/2020. The victim was asked about it and she asked her sister and the appellant to move aside for her to explain to grandmother and Kariuki's mother. When they moved away she explained what happened. Pw-2 told the appellant and his mother that they should deliberate on the issue the following day. After they left, Pw-2 reported to Nyumba Kumi elder, the Pw-3 in this case. Pw-3 told them to get to him the following morning. They did as advised and were taken to Hindi Police Station where the incident was reported. On 10/9/2020 the appellant and his mother went back to the complainant's home. With help of Pw-5 the appellant was arrested. He was taken to Hindi Police Station.
8. Pw-7 investigated the case. He issued a P3 form to the victim. It was filled on 11/9/2020 at King Fahd Hospital. The victim complained of painful urination and white discharge. Upon examination it was noted that the hymen was absent. Other tests revealed that she was not pregnant and was HIV negative. Post Rape Care Form was also filled. The appellant was then charged with the offences carried in the charge sheet.
9. The appellant in his defence stated he was hired by Pw-2 to burn charcoal for her. He worked but was not paid. When she sold the charcoal she promised to pay him 500/=. However, using a motor cycle she took him to a witch doctor at Kiongoni where she said she wanted him carry for her items that will be given by the witchdoctor. She left her wedding ring with the witchdoctor and she paid him 7,000/= and was left with a debt of 8,000/= to pay. She was given items, some to place on the bed, other to the drinking water of her husband and some to bury near the door to her house. After paying 8,000/= she was to collect back the ring for her husband to wear. She told him never to disclose the secret. However, he called her husband to reveal the secret. The appellant also stopped working for her. She promised to pay him his dues. However, when she went to the firm she found him with another person. She got angry and vowed to fix him. The following evening, she visited his home. She said she wanted to see him and his mother. They went to her home at night. The appellant and Christine (Pw-6) were told to stay aside to let the others deliberate. They deliberated and the appellant was told the issue will be dealt with. He was not told what the issue was about. In the morning he went to the home of Pw-2 and was arrested even before he was served with tea.
9. The trial court evaluated the evidence and found that the offence in the main count was proved beyond reasonable doubt. The appellant was convicted of it and sentenced to serve 15 years' imprisonment.



10. Dissatisfied with the said conviction and sentence he appealed to this court on the grounds that: -
 1. The trial was illegal and a nullity as it was arbitrary and a violation of *the constitution* of Kenya.
 2. The case was poorly investigated and appellant wrongly convicted on unreliable evidence.
 3. The offence against him was not proved by the prosecution beyond reasonable doubt.
 4. Mandatory sentence upheld by the trial magistrate violates section 216 and 329 of the Criminal Procedure Code.
11. The appeal was opposed by the Respondent and was canvassed by way of written submissions. Both sides filed their respective written submissions.
12. As the first appellate court, I have re-evaluated the charges, evidence adduced by both sides, judgment of the court and sentence meted, grounds of appeal and the filed submissions.
13. What this court need determine is whether the three ingredients for the offence of defilement were established by the prosecution beyond reasonable doubt. These ingredients are: -
 1. Age of the complainant(victim) who must be a child, below 18 years.
 2. Penetration, which is the partial or complete insertion of the genital organs of a person into the genital organs of another person.
 3. Identification or recognition of the suspect as the perpetrator.
14. On the first issue a birth certificate in the name of the victim, No.6XXXXXX6 was produced as an exhibit and shows that the victim was born on 20th October, 2005. The offence was allegedly committed on 8th day of September, 2020. At the time the complainant (victim) was therefore 14 years old as would have hit 15 years on 20th October, 2020. A birth certificate is one of the best way to establish when a person was born, and therefore the age of the person in respect to whom it is issued. I therefore find this issue well settled.
15. For penetration, the victim narrated very well that they uncovered the genital organs and had sex. The filled P-3 form and PRC form shows that her hymen was absent. Her evidence that she was penetrated is therefore corroborated by the available medical evidence. The foregoing two ingredients of the offence were not disputed by the defence and are firmly established.
16. The disputed issue is that it is the appellant who defiled the victim. The victim herself had no cause to fix the appellant. After the incident she did not report immediately as the appellant told her he had seen a witch and if she disclosed she will die. However, as fate would have it, it's the appellant who requested his mother to accompany him at night to the house of the victim's grandmother so as to seek forgiveness and not be reported to the police. The evidence is well corroborated by that of the victim, her grandmother and sister.
17. This shows that Pw-2 had no grudge with the appellant who is their neighbour and a regular visitor to her home. She had no cause to fix him. He was well known to the victim and the incident happened at broad day light. The evidence is of recognition and reveals no possibility of her having made a mistake of him. His involvement is corroborated by the fact that he later went to seek forgiveness for the act. The lower court was correct in finding that he was the real culprit.
18. On sentence, the appellant was sentenced to serve 15 years' imprisonment. He was charged under section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. Section 8 (3) indicates that where the victim is aged between 12 and 15 years, the convict is liable to imprisonment for a term of not less



than 20 years. The trial court used then the Supreme Court decision in the case of Francis Karioko Muruatetu, to sentence the appellant to 15 years' imprisonment. However, clarification was done later in the said case stating the decision was only effective for murder offences and not any other offence. The appellant was therefore lucky to get a sentence less by 5 years of the recommended sentence under the Act. I will let him ride on the said luck by not interfering with the said sentence to his disadvantage.

19. The bottom line is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF JUNE, 2024

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S.M.GITHINJI

JUDGE

In the Presence of:

Appellant

Mr Mulamula for the State

