



**Wamaitha v Republic (Criminal Appeal E057 of 2022)  
[2023] KEHC 21964 (KLR) (1 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 21964 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL APPEAL E057 OF 2022  
HI ONG'UDI, J  
SEPTEMBER 1, 2023**

**BETWEEN**

**DAVID KAMUTO WAMAITHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment delivered by Hon. D.N Sure SRM on  
8th November 2022 in Engineer SPM's Court criminal case No. E066 of 2022)*

**JUDGMENT**

1. David Kamuto Wamaitha hereinafter referred to as the appellant was charged with the offence of defilement of a girl contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No 3 of 2006. The particulars being that the appellant on the 15<sup>th</sup> day of April 2022 in Kinangop within Nyandarua County unlawfully and intentionally caused his penis to penetrate the vagina of RWM a child of 15 years.

Alternatively he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars being that the appellant on April 15, 2022 in Kinangop within Nyandarua County unlawfully and intentionally caused his penis to come into contact with the vagina of RWM a child of 15 years.

2. He denied the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses. The appellant gave an unsworn statement of defence. Thereafter the learned trial magistrate found him guilty on the principal count convicted him and sentenced him to fifteen (15) years imprisonment. Being dissatisfied with the judgment he filed this appeal on November 22, 2022 on the following grounds

i. That, the appellant pleaded not guilty in the instant case



- ii. That, the learned trial magistrate erred in law and facts when he convicted the appellant in a prosecution case where age was not proved.
- iii. That, the learned trial magistrate erred in law and fact when he convicted the appellant in the prosecution case where penetration case was not proved.
- iv. That, the learned trial magistrate erred in law and fact by applying wrong standards of proof in criminal case which was a standard of probability instead of reasonable doubt.
- v. That, the learned trial magistrate erred in law and fact by convicting the appellant but did not consider the appellant's defence of alibi.

He further filed amended grounds on June 19, 2023 as follows:-

- i. That, the imposed sentence is excessively harsh and unjust considering that, the appellant was first offender who needed a lesser sentence.
  - ii. That, the imposed sentence is excessive and does not go well with the provisions of the policy sentencing directives 2015 under paragraph 4:1.
  - iii. That the appellant is remorseful and regrets his actions. He is repentant.
  - iv. That the appellant worked tirelessly to support his family and self and potential if given another chance.
  - v. That, the court considers his mitigation grounds and award a lesser sentence or substitute the remaining sentence with a non-custodial sentence or the court be pleased to order that the appellant serves in the Community Service Order.
  - vi. That the court considers the provisions of section 333(2) of the *Criminal Procedure Code* to be factored in his sentence
3. For the prosecution PW1 the victim testified that on April 15, 2022 at 7pm she was visited by two boys and a girl who were her school mates in primary school. Thereafter she and the girl (Eliza) left for Karangatha shopping centre but they parted ways thereafter. On the way she met the appellant and another but she did not talk to them. The appellant returned and caught up with her. He held her hands and took her to his house which had no electricity and left having locked the door from outside.
  4. When he returned he started touching her breasts and vagina. He then removed her skirt, skintight and panty and started inserting his male genital into hers. She lost consciousness and woke up the next morning only to find herself alone with the house locked from outside. She saw TW a former classmate outside and called her. The appellant came and opened the door. She remembers him threatening her. She went to T's place but never told her what had happened. Later T took her to Karangatha stadium and she met her mother to whom she explained where she had been. Her mother took her to hospital. She identified a birth certificate showing she was born on June 19, 2007. She denied having been offered a place to sleep by the appellant.
  5. PW2 who is PW1's mother confirmed that the girl went missing on April 15, 2022. She reported the matter at the police station at 7.30pm. The next day she went back to the station as PW1 had not returned. She later learnt from other children that PW1 was at the appellant's sister's place. She took her to hospital.



6. PW3 Dr. Patrick Wakahiu examined PW1 on April 20, 2022 for purposes of filing the P3 form. He relied on treatment notes from St Kennedy Medical Centre and his own examination. His finding was that PW1's hymen which was broken had old and fresh wounds. He produced the PRC filled form (Exb 1), Treatment notes (Pexb 3) & P3 form (Pexb 4). Pexb 1&3 confirms that the doctor who just attended to PW1 confirmed there was genital penetration of the victim.
7. PW4 No 10XXXX PC Gladys Nehemia of Karangatha police station and the investigating officer confirmed the report by PW1 and PW2 to her. The appellant was arrested on July 1, 2022.
8. In his defence the appellant stated on April 15, 2022 at 10.30pm he left his mother's home for his home when he met a girl along the road. On inquiring what the issue was she told him she had been chased away. He requested a female neighbour to offer her shelter but she refused.
9. Together with another man they escorted, the girl to her mother's homestead but the girl ran away before the door was opened. Later he opened the door to his house and left. The girl followed him crying. He decided to give her shelter and sat on a chair as she slept on the bed. He left for work the next day leaving the door open. When he returned he found her outside playing with the friends. He told her to go home. Three days later he was arrested over this girl.
10. The appeal was canvassed by way of written submissions. The appellant submitted that he was only challenging the sentence. He urged the court to consider his mitigation and the provisions of section 333(2) of the *Criminal Procedure Code*. He relied on the case of *Thomas Mwambu Wenyi V Republic* (2017) eKLR and the *Judiciary Sentencing Policy Guidelines* in support
11. He submits on how remorseful he is and condemns the action he did and regrets his deeds. On the other hand he urged the court to consider placing him on Community Service.
12. The respondent's submissions were filed by prosecution counsel Judy Rukunga and are dated April 26, 2022. She submits that all the three (3) ingredients viz age, identification and the perpetrator, and penetration for defilement were proved in this case. She further argues that the sentence is lawful as the court considered the mitigation, of the appellant.

### **Analysis and Determination**

13. I have carefully considered the evidence on record, amended grounds of appeal, both submissions, cited authorities and the law. The issues that arise for determination are:
  - i. Whether the prosecution case was proved to the required standards
  - ii. If the answer to (i) is positive, whether the sentence should be interfered with.
14. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. It has to bear in mind that it did not hear or see the witnesses. I refer to the cases of *Okeno v Republic* (1972) EA 32, *Mutboko & another V Republic* (2008) KLR 297 and *Kiilu and another V Republic* (2005) 1 KLR 174
15. The appellant herein was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. I am alive to the fact that the appellant in his amended grounds of appeal filed on June 19, 2023 abandoned his appeal against conviction. That notwithstanding this court must be satisfied that the conviction is sound.
16. I have in the earlier paragraphs of this judgment set out the evidence of the prosecution witnesses (PW1-PW4). In a case of defilement there are 3 ingredients which must be proved by the prosecution for a conviction to stand. They are;



- i. Age of the victim
  - ii. Penetration of the victim's genital organ
  - iii. Identification of the perpetrator
17. PW2 who is the mother of the victim availed the child's birth certificate (Pexb 6). It shows she was born on June 19, 2007, though PW1 and PW2 in their evidence had talked of the year 2006. The offence was committed on April 25, 2022. By then the victim was just about 15 years. I therefore find that the age of the victim was proved as per the charge.
  18. PW1 gave a detailed account of what was done to her on the night in issue. She could not recall how many times she was defiled. The medical evidence adduced by the Doctor (PW3) and the documents produced Pexb 1, 3, & 4 confirmed the victim's claims. I therefore find "Penetration" to have been proved.
  19. PW1 knew the perpetrator by name. She even knew his house and when she met the mother the next day after the ordeal, she gave out his name. The long arm of the law went for him. The perpetrator was identified as the appellant herein. In his submissions filed on June 19, 2023 he has owned up to his wrong doing.
  20. From all the above I am satisfied that the conviction is sound and I uphold it.
  21. The next issue is on the sentence. Section 8(3) of the *Sexual Offences Act* provides:  

8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
  22. This is a penalty that is set out by statute. The appellant was given a lesser sentence than what the statute provides. From the charge sheet, he was arrested on July 1, 2022 and presented to court on July 4, 2022. Judgment was delivered on November 8, 2022 when he was sentenced. He had requested this court to consider his period in remand custody, which is 4 months. Since the trial court already reduced his minimum statutory sentence by five (5) years, I find no reason to make me interfere with it, and so decline to consider his 4 months in custody.
  23. The upshot is that the appeal lacks merit and is dismissed. The conviction and sentence are upheld.
  24. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1<sup>ST</sup> DAY OF SEPTEMBER 2023 IN OPEN COURT AT NAIVASHA.**

**HEDWIG ONG'UDI**

**JUDGE**

**In the presence of:**

The appellant present, virtually

Mr. Atika for the respondent

Ms Ogutu- Court assistant

