



REPUBLIC OF KENYA



**Wambugu v Republic (Criminal Appeal E005 of 2024)
[2024] KEHC 12655 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E005 OF 2024
DR KAVEDZA, J
OCTOBER 22, 2024**

BETWEEN

STANLEY WAMBUGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 18th January 2024 by Hon. A. Mwangi C.M at Kibera Chief Magistrate's Court Sexual Offences Case No. 108 of 2018)

JUDGMENT

1. The appellant Stanley Wambugu was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve thirty (30) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted; the appellant complained that voir dire examination was not adequately conducted; he challenged the sentence imposed as being excessive and urged the court to quash his conviction and set aside the sentence.
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, and itself 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.
4. To succeed in a prosecution for defilement, it must be proven 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."



5. Further, section 8(1) and (2) of the [Sexual Offences Act](#), No. 3 of 2006 provides thus:
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
6. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.
7. The complainant gave an unsworn testimony after voir dire examination. She recounted the events of 23rd December 2018, around 7 p.m., when she went to a kiosk near her mother's shop. There, she found the appellant, who sold shoes nearby. He asked her to watch over his business while he went to the toilet.
8. She noted that he used different routes on his way back and, upon returning, said he wanted to close the kiosk. He shut the doors while she was still inside, and shortly after, a blackout occurred. He then undressed her and made her lie on a mattress. He then inserted his penis into her vagina.
9. After a few minutes, the complainant heard her mother calling her name and responded. The appellant opened the door when her mother inquired about him, but he denied any wrongdoing. Her mother called Dr. Elizabeth, who examined the complainant and confirmed sexual intercourse, advising that she go to the hospital. They reported the incident at Muthangari Police Station, leading to the appellant's arrest. During cross-examination, the complainant stated that the blackout occurred only in the appellant's shop and revealed a previous incident of sexual intercourse with him in August 2018, which she had not reported.
10. As discussed in the Kenya Judiciary Criminal Procedure Bench Book 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:
 - “94. No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).
 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, [Evidence Act](#)). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac [Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009](#); Julius Kiunga M'birithia v R [High Court at Meru Criminal Appeal No. 111 of 2011](#)).
 96. The evidence of a child, sworn or unsworn, received under section 19 of the [Oaths and Statutory Declarations Act](#) is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”



11. The complainant's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that the complainant was consistent and steadfast in his. In addition, their evidence which was subjected to cross-examination remained consistent throughout.
12. Regarding additional corroboratory evidence, PW2, EB, the complainant's mother provided a sworn statement about events on 23rd December 2018 at around 7:45 p.m. While selling items in her shop, the appellant asked for the toilet keys, which she gave him. Concerned about her daughter, she went to check and found that none of the nearby traders had seen them. After calling her daughter's name, she heard a response from inside a mattress shop.
13. Upon inquiry, her daughter said she was looking for a key with the appellant and that they had a torch. When PW2 ordered them to open the door, the appellant denied wrongdoing. However, he later admitted to having had sexual intercourse with the complainant and asked for forgiveness. PW2 suggested they go to the hospital. During cross-examination, she confirmed her daughter was not crying and noted that the appellant's relatives had tried to settle the matter out of court.
14. PW3, John Njuguna from Nairobi Women's Hospital, testified that the complainant was examined on 23rd December 2018 by Dr. Faith Nganga, who was unavailable to testify. He was familiar with her signature and handwriting. The complainant reported being sexually assaulted by a neighbour known to her. Upon examination, there were no physical injuries; her outer genitalia appeared normal, but there was reddening of the vagina, a broken hymen with old tags, and a healed tear. Laboratory tests were normal, and the diagnosis indicated blunt injury trauma to the genitalia. The PRC and P3 forms were submitted as evidence.
15. During cross-examination, PW3 noted that the reddening could also result from infections and clarified that reddening is considered an acute bruise.
16. PW4, Pamela Karimi of Isinya Police Station, testified about her investigation into the case. After PW2 reported PW1's assault, she obtained court permission to detain the appellant until 31st December 2018. Samples were collected from both parties. The offence occurred in the appellant's mother's shop, adjacent to the complainant's shop. PW4 found no evidence of any grudge between the families or indications that the appellant was framed.
17. On the age of the complainant, the trial court considered the birth certificate that was produced and indicated that the complainant was born on 25th July 2007. This was sufficient evidence as proof of age. She was therefore 11 years old at the time of the incident and a child within the law.
18. In his defence, the appellant stated that on 23rd December 2018, he gave keys to the complainant and later, the complainant's mother PW2 asked to borrow Ksh. 200, which he could not provide. Shortly after, PW2 and her husband accused him of defiling their daughter and assaulted him. The complainant intervened, stating he was innocent. The next day, PW2 and her husband visited him, demanding Ksh. 70,000 to drop the case. He however maintained his innocence and insisted on taking the matter to court, claiming the accusations stemmed from his refusal to lend PW2 the money.
19. DW2 Jackline Makau, the appellant's wife corroborated the appellant's account. She stated that after the appellant was taken to Muthangari Police Station, she closed the shop and went home to check on her child, only visiting her husband the next day. She maintained that the complainant's father attacked the appellant with fists and blows, and they did not report the incident because her husband was taken away immediately afterward.



20. DW3, Johnson Mali Nyambure, testified that he sold mattresses and pillows in Kawangware and had allowed the appellant to sell shoes in a small portion of his shop. He recalled that there was a power blackout between 6:30 and 6:40 pm, and he left the appellant and his wife to finish closing the shop.
21. The trial court, after considering the appellant's defense, dismissed it for failing to cast any doubt in the prosecution's case. I make a similar finding that the prosecution did not prove their case beyond reasonable doubt.
22. In his appeal, the appellant challenged the voir dire examination conducted on the minor as not being sufficient. He argued that although the court indicated that a voir dire was conducted, there is no record, of how it was conducted and the questions asked. He urged this court not to consider the evidence on the minor.
23. From the evidence on record, a voir dire examination was conducted on the minor complainant. The trial court wrote down the questions put forth to the witnesses and answers given in the first person in the words spoken by the witness in a dialogue form. The court then proceeded to make a decision that they should give unsworn testimony. The trial court adopted the procedure in the case of Sula versus Uganda [2001] 2EA 556 the Supreme Court of Uganda and the Court of Appeal case of Patrick Kathurima versus Republic Nyeri CRA 137 of 2014. The ground of appeal therefore fails.
24. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged. The conviction is therefore affirmed.
25. On sentence, the appellant was sentenced to serve thirty (30) years imprisonment. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, and that he was the first offender. The court sentenced the appellant to a sentence below the minimum requirement of life imprisonment as provided under the law.
26. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 Republic vs Joshua Gichuki Mwangi. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Ms. Omurokho for the Respondent

Achode Court Assistant

