



**Wambua v Republic (Criminal Appeal E020 of 2023)
[2024] KEHC 15434 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E020 OF 2023
AK NDUNG’U, J
DECEMBER 6, 2024**

BETWEEN

ISAAC MWIMI WAMBUA APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki CM
Sexual Offences Case No E096 of 2021– Ben Mararo, PM)*

JUDGMENT

1. Isaac Mwimi Wambu (the appellant) was convicted after trial of defilement contrary to section 8(1) as read with section 8 (4) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on the night of 08/12/2021 and 09/12/2021 in Kieni East Subcounty within Nyeri County, intentionally caused his penis to penetrate the vagina of FNM a child aged 16 years. On 15/02/2022, he was sentenced to fifteen (15) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, he appealed to this court *vide* an amended ground of appeal accompanying his submissions. The conviction and the sentence are being challenged on the following grounds;
 - i. The learned magistrate erred convicting him while relying on inconsistent and uncorroborated evidence.
 - ii. That the learned magistrate erred convicting him on hearsay evidence.
 - iii. The learned magistrate erred by failing to appreciate that penetration was not proved by both medical, oral and circumstantial evidence.
 - iv. The learned magistrate erred by quashing his defence without cogent reasons.



- v. The learned magistrate applied wrong principles while sentencing him to mandatory minimum sentence while ignoring his mitigation.
3. The appeal was canvassed by way of written submissions.
4. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.HJH.
5. A recap of the evidence at the trial court is as follows. PW1, the complainant, testified that 08/12/2021 at 10:00 pm, she went to a friend's place, the Appellant's place, it was house number 9 in a plot. She found him there and she spent there. She testified that they had unprotected sex. At 7:00 am, he escorted her home and, on their way, they met madam Lydia who inquired where they were coming from. With another police man, they asked her where she had slept and she said she had slept at the Appellant's. The Appellant had already left. They took her to her mother and they told her to ask her where she had slept and she said she had slept at the Appellant's and they had sex. The Appellant was called and they were taken to police station. They were taken to the cells.
6. She testified on cross examination that the Appellant contacted her through her mother's phone at 7:00pm and asked her to go. Her mother did not know anything.
7. PW2, the complainant's mother testified that on 09/2/2021 at 7:00pm, she retired to sleep with her children. At 10:00am, she was contacted by Lydia and corporal Anthony who were with the complainant. They asked her where PW1 had slept and she said at home. The complainant was asked where she slept and she took them to Appellant's home but there was no one there. That she knew the Appellant as he was a colleague at work. The Appellant was contacted and they were taken to police station. That the complainant was asked what they did but she did not respond. She was thereafter taken to hospital. She testified that she had known the Appellant since May, 2021 and the Appellant and the complainant knew each other.
8. She testified on cross examination that the Appellant contacted the complainant and told her to go. That Lydia saw him at 4:00 am at the door and he disappeared.
9. PW3 was the clinician. He produced the P3 form which he filled as Pexhibit 2 and PRC form filled by another doctor as Pexhibit 3. He testified that he was familiar with the handwriting and signature as they had worked together for 4 years. He testified that the history was that the complainant had consensual sex with the Appellant on several occasions that night. That her hymen was old broken, there were no bruises to external genitalia, nothing in the urine, nothing found on vaginal swab, nothing found in her blood.
10. PW4 PC Lydia Wangui testified that she was on patrol and she was returning home and found the complainant, her neighbour's daughter. He asked the Appellant what he was doing but he fled behind the house. The complainant was standing outside and she informed her that she was from the Appellant's house where she had spent the night and she was being escorted home. She informed Corporal Kariuki and they escorted her to her mother's house who did not know that the complainant had slept out. The Appellant was called by corporal and he sought forgiveness. She testified on cross examination that she did not arrest the Appellant as he fled behind the houses. That he saw him but she did not recognise him even though there were security lights.
11. PW5 was the investigating officer. She testified that PW4 intercepted the Appellant and the complainant at 4:00 am walking along the road side. They interrogated them but the Appellant fled. The Appellant had an affair with the complainant. The complainant's mother was informed and they



- were arrested and placed in custody. The complainant confirmed that they had a long friendship and they were having a sexual relationship. The Appellant was interrogated but denied any relationship. She testified on cross examination the appellant was found escorting the minor home but he fled.
12. In his unsworn testimony, the Appellant denied committing the offence. He testified that on 08/12/2021, he was at his house in Kusoi and on 09/12/2021 he went to work and at 7:00am. Two people went to his workplace who said they had been sent by PW4. He was taken to Naromoru police station where he was informed that he was a friend with a young girl. That he was forced to record a statement and they refused to write what he knew. He testified that they had an issue with Lydia since he had refused to work for her. That the last witness wanted his uncle to sell his land but he refused. He stated that he was framed.
 13. That was the totality of the evidence before the trial court. In conformity with the duty of this court to re-evaluate the evidence afresh and to reach my own conclusions, I have in that regard read and considered the evidence as recorded in the trial court. I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have taken into account the submissions on record.
 14. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.
 15. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.
 16. Proof of age is important in a sexual offense. In *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
 17. In the present appeal, the complainant’s age was not disputed. PW2, the complainant’s mother produced the complainant’s birth certificate as Pexhibit1 which shows that the complainant was born on 26/06/2005. The offence was committed on the night of 8th and 9th December 2021 and therefore the complainant was 16 years at the material time.
 18. As regards to proof of penetration, the Appellant submitted that PW1 testified that she went on her own accord and the court noted that the sex was consensual. That apart from the oral evidence of PW1 which was disjointed and inconsistent, medical corroboration was a requisite and the medical evidence was clear that there was no recent penetration. That it would have been expected that after engaging in unprotected sex as PW1 alleged, then presence of spermatozoa and epithelial cells would have been observed but nothing was observed. The medical evidence failed to support recent penetration though it was barely 24 hours from the time of the alleged defilement. That the old broken hymen could not be linked to a recent sexual encounter.
 19. He further submitted that it was imperative for the trial court to invoke section 124 of the *Evidence Act* and comment on the complainant’s demeanour and failure to comment on whether the complainant was truthful or not leaves the matter of integrity, honesty and truthfulness of the complainant to conjecture. That there was no indication that the complainant was a person of integrity. Her evidence



in chief lacked consistency and she was even stood down on her first appearance in court. That her testimony was contradicting which proves that the case was trumped up.

20. That there was no corroboration of her evidence from other witnesses in that PW2 testified that at 7.00pm she was at her home with her children and they went to sleep whereas PW1 had said that her mother was absent when she sneaked out. That at 10.00am on the same date, she was called by madam Lydia whilst PW1 said that she met madam Lydia on 09/02/2021 at 7.00am. That PW2 said madam Lydia called her at 10.00am on 09/02/2021. There was therefore variance on time. That PW2 on cross examination testified that Lydia saw the Appellant at 4.00am which was another variance on time of the alleged encounter with Lydia.
21. The Respondent's counsel on the other hand submitted that on the allegation that no spermatozoa was seen yet the sex was unprotected, section 2 of the *Sexual Offences Act* encompasses partial penetration and if there can be partial penetration, it follows that there can be penetration without spermatozoa or injuries. Reliance was placed on the case of Mark *Oluvi Mose v R* (2013) eKLR where the court held that penetration need not be deep inside the girl's organ. The fact that the hymen was broken but old does not mean that he did not have sex with the complainant on the fateful day and does not exclude him from being the offender. Further, it would not assist the culprit to simply say that there were no injuries. That PW1 testified that they had sex and they did not use protection which court have accepted as euphemism to describe defilement as was held in *Muganga Chilejo Saba v Republic* (2017) eKLR.
22. Further, the court in *Wachira v Republic* (Criminal Appeal E024 of 2023 (2024) KEHC 5972 (KLR) (24 May 2024), appreciated the impact of developmental stages in children and how the same might affect their ability and willingness to describe sexual organs and acts. That there was both direct and circumstantial evidence that there was penetration based on PW1's evidence which was corroborated by PW3's evidence of a broken hymen.
23. In the instant case, the medical evidence did not corroborate the complainant's evidence. Nothing unusual was seen to conclude that there was defilement as the complainant was examined on the same day. It is however trite law that the fact of rape or defilement is not proved by DNA test but by evidence as it was held in the case of *Kassim Ali v Republic* Cr. App. No. 84 of 2005 (Mombasa) where the court stated:

“... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.
24. Considering the complainant's evidence, she testified as follows;

‘I went to his house. It is in a plot...I found him there. It is house 9. It is one room. I spent there on that day. We had sex. We did not use protection...they took me to my mother's home and they told me to tell her where I slept. I said I slept at Is place and had sex...we were taken to Nanyuki police station. I was called by A. We were taken to Naromoru. We were taken to the cells.
25. The complainant's testimony in this regard was not specific as to the act of penetration and her evidence of having sex does not necessarily prove that penetration took place in the absence of further evidence and details as to what actually happened. The complainant's explanation as to what transpired between her and the Appellant was vague. She failed to describe the act complained of in a clear manner and while am alive to the impact of developmental stages in children and how the same might affect their ability and willingness to describe sexual organs and acts, evidence must be clear enough to establish



the act of penetration. Noting the heavy burden placed on the prosecution in prove of criminal cases, the complainant ought to have described the actual act of penetration.

26. I am fortified in this conclusion by the decision in the case of *Julius Kioko Kivuva v Republic* [2015] eKLR where the court held as follows;

“The complainant (PW1) testified as follows in this regard:

“The accused removed my pant and my skirt. I also had a black biker which he also removed. He did not use a condom. We had sex twice that night. We slept upto 9.00 a.m the following day”

PW1’s testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim’s testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness’s testimony, and is particularly powerful when the ability to prove a charge rests with the victim’s testimony and credibility as it does in this appeal.”

27. Kemei J also weighed in on the matter in *P M M v Republic* [2017] eKLR stated that;

“As noted in the case of Julius Kioko Kivuva =vs= Republic (Machakos HCCRA NO. 60 OF 2014) that evidence of sensory details such as what a victim heard, saw, felt and even smelled is relevant to prove the element of penetration. I share the same findings of the learned justice Nyamweya in the above stated case. It was necessary for the Complainant to provide the vivid details of the sequence of how the rape ordeal took place. Even though the doctor noticed the presence of whitish discharge and semen as well as a rugged vagina it was only the Complainant to present sufficient details as to whether penetration did occur. Hence I find the evidence clearly established the alternative charge of committing an indecent act with an adult contrary to section 11A of the Sexual Offences Act...”

28. Also, in *Furaha Ngumbau Kagenge v Republic*, Criminal Appeal No. 141 Of 2016, Mombasa (Cr); the court observed that;

“.....it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by Section 2 of the Sexual Offences Act, which is required to be proved beyond reasonable doubt.....”

29. It is also noted that the complainant was first stood down on her first appearance on account that she was not clear. Further evidence from the complainant and PW5 reveals that she was also placed in custody and this brings the question whether her statement to the police was voluntary or not. The court of appeal in *Kimani Ndung’u v Republic* (1979) I KLR stated that;

“The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”



30. From the foregoing reasons, it is my view that penetration was not proved to the required standard and being an essential ingredient in proving the offence of defilement, the prosecution fell far short of proving their case. Doubts linger as to what transpired at the material time. The benefit of doubt as per the law goes to the appellant.
31. With the result that the appeal herein is wholly successful and is allowed. The conviction and sentence imposed by the trial court are set aside and substituted thereof with an order acquitting the appellant. He is set at liberty forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF DECEMBER 2024

A.K. NDUNG’U

JUDGE

