



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL APPEAL NO 32 OF 2017**

**JUDE WAITHAKA WAKANYI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From original Conviction and Sentence in Nanyuki CM Criminal Case No 71 of 2013 – W J Gichimu, PM)***

**J U D G M E N T**

1. The Appellant herein, **JUDE WAITHAKA WAKANYI**, was convicted after trial of **defilement** contrary to **section 8(1) & (3)** of the **Sexual Offences Act, 2006**. On 03/03/2017 he was sentenced to twenty (20) years imprisonment. He has appealed against both conviction and sentence.

2. The conviction is challenged upon the following main grounds –

(i) That penetration was not proved beyond reasonable doubt.

(ii) That in any event the evidence tendered by the prosecution was insufficient to properly found a conviction.

(iii) That the Appellant’s alibi defence was improperly rejected after the trial court wrongly shifted the burden to him to prove the alibi.

3. Learned prosecution counsel for the Respondent does not support the conviction for the following reasons -

(i) That the trial court wrongly shifted the burden of proof to the Appellant in respect of his alibi defence.

(ii) That the complainant herself destroyed some of the evidence by bathing and washing the clothes which she was wearing when she was defiled, as a consequence of which medical evidence proved inadequate and not of much assistance.

4. I have read through the record of the trial court in order to evaluate the evidence placed before that court and arrived at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact. I have also considered the able submissions of the learned counsels appearing, including the cases cited.

5. The Appellant raised the defence of alibi when cross-examining PW4 (the investigating officer). He testified about the alibi under oath and was cross-examined. He stated that at the time when the alleged defilement took place he was away elsewhere attending an interview conducted by IEBC, and that he did not get to Nanyuki Town, where the complainant was defiled, until between 6.30 and 7.30 p.m. In evaluating that alibi defence, the trial court stated that the defilement took place within that time-frame. As a matter of fact, the complainant’s own testimony was to the effect that she was defiled some time shortly after 6:00 p.m.

6. The trial court also shifted the burden of proof to the Appellant. It stated as follows after evaluating the prosecution case –

***“Indeed when the accused person was asked by his counsel why the witness testified against him, he said he did not know. The accused had a duty not only to allege that he was framed, but to tell the court why he thought he was framed. No such evidence has been tendered before the court.”***

7. This was a grave error of law on the part of the trial court. The Appellant had no duty at all to tender any evidence to prove his innocence. In criminal trials the burden of proof never shifts to the accused, not unless some statute specifically shifts that burden in respect to a

particular offence. It is always the duty of the prosecution to prove the charge against an accused to the required standard, that standard being proof beyond reasonable doubt. Even where an accused has proffered an alibi defence, such as in that present case, he is not under any obligation in law to prove the alibi. It is the duty of the prosecution to disprove it; all the accused need do is to raise the defence, that is all.

8. Regarding the prosecution case, it is to be noted that the complainant herself, a girl of 14 years, bathed and washed the clothes she was wearing immediately after the defilement, thus destroying some of the evidence. The result was that the medical evidence was sparse and did not properly establish penetration. It is also to be noted that both the Appellant and the complainant were medically examined more or less at the same time. The complainant was found to have a fungal infection in her private parts that the Appellant did not have.

9. Finally, it is to be noted that the Appellant was tried by three different magistrates. The magistrate who took the Appellant's defence and wrote the judgment was the third one. Under **section 200(4)** of the *Criminal Procedure Code*, where an accused person has been convicted upon evidence not wholly recorded by the convicting magistrate, the *High Court* may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

10. In the present case the convicting magistrate never heard nor saw a single prosecution witness. The prosecution witnesses were seen and heard by two other different magistrates. I am of the opinion that the Appellant was materially prejudiced by this state of affairs.

11. In conclusion I hold that the conviction of the Appellant is not safe. Learned prosecution counsel for the Respondent has properly not supported the conviction.

12. In the result I will allow this appeal in its entirety. The conviction is hereby quashed and the sentence set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 12<sup>TH</sup> DAY OF MAY 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 13<sup>TH</sup> DAY OF MAY 2021**