REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 12 OF 2018

FRED WANJALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.95 of 2017of the

Chief Magistrate's Court at Busia by Hon. Maureen Odhiambo–Resident Magistrate)

JUDGMENT

1. Fred Wanjala, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 0f 2006.

2. The particulars were that on the 30th day of September 2017 in Busia County, intentionally and unlawfully caused his penis to penetrate the vagina of FL, a girl aged six years.

3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised three grounds of appeal as follows:

a) That the learned trial magistrate erred in law and in fact by not explaining to him the charge in a language that he understood.

b) That the learned trial magistrate erred in law and in fact breaching his constitutional rights.

c) That the learned trial magistrate erred in law and in fact by convicting him on the basis of insufficient evidence.

5. The appeal was opposed by the state through Mr. Mayaba, learned counsel who contended that the prosecution proved its case to the required standards.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. Article 50 of the Constitution of Kenya provides for fair hearing. At sub Article 2 it provides:

Every accused person has the right to a fair trial, which includes the right—

(b) to be informed of the charge, with sufficient detail to answer it;

8. The charge and the particulars ought to be read in a language that the accused understands. This forms the basis of fair trial. An accused must understand the charge for him to respond adequately. This is what the Court of Appeal in the celebrated case of **Adan vs. Republic [1973] EA 445** held. It stated as follows;

(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) the accused's own words should be recorded and if they are an admission, a plea guilty should be recorded;

9. The appellant herein pleaded not guilty and the matter proceeded to hearing. Though the record does not indicate in which language the complainant testified, the appellant cross-examined her at length. All the other witnesses testified in Kiswahili and the appellant equally cross-examined them. It is therefore abundantly clear from the manner of cross-examination, that he understood Kiswahili language. This ground of appeal cannot therefore stand.

10. The appellant contended that the severity of the charge was not drawn to him and was not advised to engage an advocate. In the case of **David Njoroge Macharia vs. Republic [2011] eKLR** the Court of Appeal in addressing the right of an accused to be represented said:

> **Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.**
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> **We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.**
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> **It is clear that this is not one of the cases where the appellant would have been entitled to an advocate at the expense of the state.**

Though the appellant has not argued he was entitled to be provided with an advocate at the expense of the state, the court had no duty to advise him on how to conduct his defence. The role of the court being that one of an arbiter is not compatible with that of an adviser. Even in cases where "***substantial injustice would otherwise result",*** the court's role is only to inform an accused person that he may need the services of an advocate. In the instant case therefore, I find that the right of the appellant was not breached.

11. The appellant contended that the prosecution failed to call the hotel owner from where he was arrested. According to him, this was a material witness. In the case of **Bukenya vs. Uganda [1972] EA 549,** (Lutta Ag. Vice President) held:

> **The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
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> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.**

EA (PW2), the child's mother testified that she found the appellant hiding in a hotel from where he was arrested. This evidence would have been material had the manner of his arrest been an issue. Failure to call the hotel owner, therefore did not prejudice the appellant in any way.

12. Section 8(1) of the Sexual Offences Act defines defilement in the following terms:

> **A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

An offence of defilement therefore, is established against an accused person when the prosecution has proved the following ingredients:

a) Whether there was penetration;

b) Evidence must show that the accused is the perpetrator; and

c) The age of the victim must be below eighteen years.

In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** Joel Ngugi J. said:

> **Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.**

13. The first issue we must address is whether there was penetration into the genitalia of the complainant. The appellant has contended and rightly so that given the age of the complainant, she could not have withstood an adult's penetration. I have perused the evidence on record and it would appear that the clinical officer concluded that there was penetration due to the absence of the hymen. The other observation he made of finding whitish discharge on the girl's thighs coupled with the complainant's evidence, ruled against penetration.

14. The evidence of the girl's mother and that of Scovia Anyango (PW4) was that the two saw some whitish discharge on the girl's thighs.

15. In her evidence, EA (PW2), said that when she returned, she found her daughter at the door of the appellant. The only thing she noted was that her daughter was holding her skirt. She never testified of making any observations of distress on her daughter. Had there been penetration, the child could have been in great pain and there was no way she was going to hide it.

16. Though the prosecutor in court did not elicit from the child, the evidence of how she felt when the *"tabia mbaya"*was done to her, I would have expected her to mention it. The silence of the girl on the issue of pain, talked volumes. I am therefore persuaded to find that the prosecution did not prove penetration.

17. What does the absence of hymen denote? The absence of hymen per se is not prove of penetration. In the case of **P. K.W vs. Republic [2012] eKLR** Maraga & Rawal JJA observed as follows at paragraphs 15 &16:

> **15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse"**
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> **16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs. Manuel Vincent Quintanila [1999] AB QB 769.**

The clinical officer's evidence did not indicate whether the perforation of the hymen was recent. The absence of the hymen therefore, does not support the contention that there was penetration into the child's genitalia.

18. The age of the complainant was proved by the production of a copy of her birth certificate.

19. The appellant was well known to the child and the issue of his recognition was not in doubt.

20. Without prove of penetration, the offence under section 8 (2) was not proved. However, there was sufficient evidence in support of the offence of attempted defilement contrary to section 9 (2) of the Sexual offences Act. It states:

> **A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.**

21. From the foregoing analysis of the evidence, I find that the prosecution proved the offence of attempted defilement. I therefore quash the conviction and set aside the sentence. I substitute the conviction with that of attempted defilement contrary to section 9(2) of the Sexual Offences Act. I sentence him to serve ten (10) years imprisonment to run from when the trial court sentenced him. To that extent, does his appeal succeed.

DELIVERED AND SIGNED AT BUSIA THIS 9TH DAY OF JULY, 2020

KIARIE WAWERU KIARIE

JUDGE