



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.42 OF 2017**

**(From CM's Court at Bungoma Criminal 259 of 2016 by: Hon. E.N. Mwenda (SRM))**

**JOHN JUMA WANJALA.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**John Juma Wanjala** was convicted of the offence of defilement of a child contrary Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charge are that on 22/1/2014 at Nalondo Sub-Location, Sirare Location, Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of L.W. a child aged 9 years.

In the alternative, the appellant faced a charge of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act.

Upon conviction on the main charge, the appellant was sentenced to life imprisonment.

The appellant is aggrieved by both conviction and sentence. He filed this appeal citing six grounds which are contained in his petition of appeal dated 10/4/2017.

The grounds can be summarized as follows:

- (1) That the evidence of PW1 & 2 was not believable;***
- (2) That the court was involved in the prosecution of the case instead of leaving it to the prosecutor;***
- (3) That the appellants defence was not considered;***
- (4) That the evidence adduced was insufficient to found a conviction;***
- (5) That the court failed to appreciate that the charge was a fabrication;***
- (6) That the sentence is too harsh and excessive.***

The appellant therefore prays that the conviction be quashed and sentence set aside.

This being a first appeal, it behoves this court to re-examine all the evidence that was tendered before the trial court, evaluate it and arrive at its own determinations. It must be remembered however that this court did not see or hear the witnesses to assess their demeanor, a chance which the trial court had. ***See Okeno v Republic (1972) EA 32.***

The prosecution called a total of 6 witnesses in his defence. The appellant called five other witnesses for the defence.

**PW1 L.W.L.** testified on oath after the court conducted a *voire dire* examination and established that she understood the meaning of the oath. PW1 testified that on 22/1/2014, she was at her aunt E's home and left to go back to her grandmother's home where she lived and arrived there at 9.30 p.m.; that on the way home, she met the appellant whom she knew as a grandfather. He carried her to his single roomed

house, in which there were two beds, a table and chairs; that he removed her pant, lay on her and threatened her with death if she screamed; that he inserted his thing in hers and she felt pain and she cried loudly. After he finished, he escorted her to the grandparent's home where he found both grandparents but PW1 did not report what had happened because of fear. She started having pains in her lower abdomen and when passing urine and was given medicine by her grandmother (PW2) who later took her to Bungoma Bokoli Hospital. PW1 told the grandfather about the incident after 3 days. PW1 said it was dark when the appellant carried her to his house but there was a little moonlight.

**PW2 R W**, PW1's grandmother who lives with PW1 recalled 22/1/2014; that she sent PW1 to her aunt Evaline and PW1 returned at 9.00 p.m. in company of the appellant who is PW2's brother in law; that the appellant told her that he had escorted PW1, whom he had found on the way; PW2 enquired why she had come home late but she was quiet and went to sleep but at 2.00 a.m. she started to cry saying she had stomachache; PW2 gave PW1 tablets; that PW1 continued to complain of pain next day and PW2 bought more drugs. When she did not improve, on 25/1/2014, she took off PW1's clothes to bathe her and found her lower abdomen and private parts to be swollen and on enquiring what happened is when PW1 revealed that John, the appellant had defiled her and threatened to kill her if she told anybody what had taken place; PW2 informed her husband and PW1's father (PW3) who took her to Bungoma Hospital and reported the matter to the police. PW2 denied the existence of a grudge between her and the appellant.

**PW3** is the father of the complainant, PW1. PW3 told the court that PW1 lives with his mother, PW2 and on 22/1/2014 he received a call and was informed by PW2 that PW1 was sick; that on 23/1/2014, he went to enquire from PW1 what the problem was and PW1 said she had chest and back pains. On 26/1/2014, PW1 was feeling worse and he was informed that the PW1 she was defiled by John, his uncle and PW3 reported to police. He took the child for treatment. He denied having any grudge with the appellant.

**PW4 Dr. Mansur Ramzan** of Bungoma Hospital produced in court the P3 form filled by Dr. Shinu; that the doctor found the labia majora and minora to be normal, hymen perforated with a foul smelling vaginal discharge but no spermatozoa were present save for yeast cells and epithelial cells. The complainant's age was assessed as 9 years; that the child was also treated for pelvic inflammatory infection due to the defilement. PW4 said the perforation may have been due to the infection or penetration.

**PW5 Kevin Martin Masinde**, a Kenya Registered Nurse produced an Out-Patient Card for the complainant, PW1, whom he examined on 26/3/2014; that PW1 had abdominal pains and was discharging pus from her private parts and was treated for pelvic inflammatory infection and that there was trauma to her genitalia.

**PW6 Cpl Zablon Boke**, the investigating officer in this case received a report from the complainant and her uncle who reported a case of defilement on 26/7/2014. He went to arrest the appellant on 4/2/2014 and issued the complainant with a P3 form.

When called upon to defend himself, the appellant told the court that on 22/1/2014, he left home at 7.00 a.m. for Kitale to visit Kasembe Watila and Josephat Namasaka; that they went to the home of Collins Wangila Nalianya to discuss recording of music about him. He stayed there till 5.00 p.m. and on the way home he was told that his wife was sick and he went to Wanjala's place where his sick wife was and he spent the night there. Next day, he took the wife to Kitale Hospital. He denied meeting the complainant on 22<sup>nd</sup> or 23<sup>rd</sup>/1/2014; that he met the complainant's father on 24/1/2014 while taking Busaa. He bought him some but he demanded for more and the appellant gave him Kshs.50/=. PW3 was dissatisfied and started abusing him that he was not sired by the grandfather and that he would use all means to get part of his land. He was surprised to be arrested on 4/2/2014; that the child (PW1) must have been couched to fix him.

**DW2 Carolynne Juma**, wife to the appellant said that the appellant left for Kitale on 22/1/2014 at 7.00 a.m.; that he did not come back till 23/1/2014 and that he had gone to take his brother to hospital at Lugulu and that she was not with him.

**DW3 Collins Wanjala Sichangi** stated that he lived at Kitale from 2013 June to December, 2014; that on 22/1/2014, the appellant went to his home in Kitale with Kasemba Watila but left at 5.00 p.m. and he did not know where he went.

**DW4 Joseph Simiyu Wanjala**, an older brother of the appellant recalled that he was sick on 22/1/2014 and called his brother (DW1) to take him to hospital at about 3.00 p.m.; that the appellant said he was away in Kitale but would come later and he did come at 7.00 and took him to hospital next day; that he left home at 10.30 p.m. and hence could not have been at Sirare.

**DW5 Moses Wekesa**, a resident of Sirare told the court that on 24/1/2014, D W W(PW3) asked him to escort him to take Busaa; that the appellant arrived at the Busaa Den at 5.00 p.m., bought Busaa and left at 6.15 p.m.; that David asked the appellant for money and was given Kshs.50/= but complained that it was little. An exchange ensued between them but DW5 had not heard about PW1 being defiled.

**DW6 Luka Watibiri** a Clinical Officer at Lugulu Hospital told the court that on 23/1/2014, Josephat Simiyu was treated at Lugulu Hospital and that he went there accompanied by John Wanjala, the appellant.

**Mr. Kundu**, counsel for the appellant relied on the grounds of appeal filed by the appellant. He submitted that the complainant never disclosed to anybody about the alleged defilement till after 4 days on 26/1/2014. He asked whether it means that PW2 never bathed PW1 for 4 days; that PW2's evidence contradicts PW4's evidence to the extent that the labia majora was not injured; counsel wondered why PW3 never went to find out what was ailing PW1 till after 4 days.

On medical evidence, counsel submitted that the hymen could have been perforated by the infection or penetration.

Counsel also submitted that the incident occurred at about 9.30 p.m. and the prosecution did not reveal how the appellant was identified; counsel wondered why the appellant was not arrested till 4/2/2014 yet he had been identified on 22/1/2014 and PW6 did not explain why they took long to arrest the appellant. Mr. Kundu further submitted that the appellant gave an alibi defence that he was not at home on 22/1/2014 and it was corroborated by his wife DW2, DW4, 5 and 6; that DW5 corroborated the appellant's defence that the appellant was framed because he had failed to bail out DW2 from a court case.

Ms. Njeru learned counsel for the State opposed the appeal arguing that there is no doubt that the appellant is related to PW1, PW1 being a grandchild to the appellant's brother and lived a few metres apart; that the appellant escorted the complainant to PW2's house and PW2 spoke to him and recognized his voice; that PW1 was threatened with death and after the ordeal, in fear, she kept quiet till she fell sick that she disclosed; that the medical evidence confirmed that PW1 was defiled; that the time when PW1 got home is not an issue because nobody checked the watch; as to the delay in arrest; Ms. Njeru submitted that the report was made on 26/1/2014 and arrest was on 4/2/2014; that the police had to investigate first then look for the appellant; that the complainant placed the appellant at the scene and was a truthful witness and had no dispute with the appellant.

Counsel further submitted that the defence was a mere denial and the alibi had no merit as DW2 to 6 contradicted the appellant's alibi and it did not dislodge the prosecution case.

I have considered the grounds of appeal, the submissions by both counsel and the evidence tendered in the trial court. It is the duty of the prosecution to prove the offence of defilement beyond reasonable doubt. To prove the said offence, the following ingredients must exist:

- (1) ***The victim must be a child;***
- (2) ***Proof of penetration;***
- (3) ***Proof of the identity of the perpetrator.***

The trial court had the opportunity to see the complainant and conducted a *voire dire* examination. The court was satisfied that she understood the meaning of the oath and she gave sworn evidence. She told the court that she is 9 years old and an age assessment report was produced which confirmed that she was indeed 9 years old and therefore a child.

#### ***Whether there was proof of penetration:***

Section 2 of the Sexual Offences Act defines penetration as:

***the partial or complete insertion of the genital organs of a person into the genital organs of another person”.***

PW1 testified that the appellant removed her pants and lay on her and inserted his thing into her. PW2 said that when she examined PW1 on 26/1/2014, she found that her private parts were swollen and the lower abdomen. PW5, the nurse who examined PW1 on 26/1/2014 found that she was discharging pus from her private parts, there was trauma to her genitalia and had pelvic inflammatory infection. She was of the view that the complainant had been defiled.

PW1 was further examined by doctor Shauni on 30/1/2014 who found the hymen to have been perforated but no injury to the labia majora. He was of the view that the perforation may have been due to penetration or the pelvic infection. From these initial findings coupled with those of Shauni there is no doubt that the medical evidence corroborated PW1 and 2's evidence that there was penetration and hence PW1 was defiled.

#### ***The last question is who was the perpetrator?***

PW1 told the court that she knew the appellant as her 'guka' (grandfather) and indeed the appellant is a brother to PW1's grandfather. PW1 further told the court that after she was defiled, the appellant escorted her upto the door of PW2's house and called PW2 to open the door and that he left after the door was opened.

PW2 corroborated PW1's evidence when she stated ***“the accused person is my brother in law. He knocked on the door and I opened. I saw the accused person and the child standing outside the house. It was dark but there was some moonlight. I was able to identify the accused. He told me he had escorted the child he had found on the way from auntie's place. He left immediately.”***

PW2's evidence corroborated PW1's evidence that the appellant escorted PW1 upto her door and left after PW2 opened the door. Although it was dark they had a conversation and I have no doubt that PW1 and 2 ably recognized the appellant. Besides, PW1 told the court that the appellant took her to his house. She knew him well before. The appellant was properly identified by PW1 and 2.

The appellant denied the offence and raised an alibi defence that he left for Kitale on the morning of 22/1/2014 and did not return to the home on the said day.

When an accused person raises an alibi defence, he does not assume any burden to prove his alibi defence. That position was stated in ***Kiarie v Republic (1984) KLR*** as follows:

***“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's findings on the alibi because the finding was not supported by any reasons.”***

The alibi was not raised during the prosecution case but the court had a duty to consider it anyway and the trial court did consider it.

The offence is alleged to have occurred on the evening of 22/1/2014. DW2, the appellant's wife said that the appellant left for Kitale on 22/1/2014 and did not come back till 23/1/2014 contending that he took the brother to Hospital at Lugulu. DW2 could not tell where the appellant was on the evening of 22/1/2014. DW3 Collins Wafula, a resident of Kitale did confirm that indeed the appellant went to his home in Kitale on 22/1/2014 at 10.00 a.m. but left at 5.00 p.m. DW3 could not tell where the appellant went to thereafter.

DW4 the appellant's brother told the court that on 22/1/2014 he called the appellant to go and take him to hospital and that from Kitale, DW1 arrived at his home at 7.00 p.m. and took him to hospital the next day. PW1 had testified on 9/6/2015 before Hon. Maisiba and stated as follows:

***“On 22/1/2014, I left home early in the morning at 7.00 a.m. and proceeded to Kitale to visit Kasembe Watila and Josephat Namasaka. We went to the home of a politician Collins Wangila Nalianya to discuss about recording some music about him. I stayed there from 10.00 a.m. to 5.00 p.m. On the way home, I was told my wife was sick. I was told this by Josphat Saranji Wanjala. I went to where my wife was. She was sick at Wanjala's place. We spent the night there. The following day I took her to Kitale Hospital. On 22/1/2014, I was not at home.....”***

On 14/11/2014, DW1's counsel applied to recall DW1 after all the other defence witnesses had testified. In his second statement, DW1 totally contradicted the contents of his earlier statement cited above and stated that on 22/1/2014 when he left Kitale, he went to take his brother, DW4 to hospital. I agree with the trial magistrate's finding that DW1 sought to make a second statement in order to cure what DW2 had said. DW2 denied that she was sick on 22/1/2014 or that DW1 ever took her to hospital on 23/1/2014.

DW6 a Clinical Officer at Lugulu told the court that DW4 attended the Hospital on 23/1/2014 and that DW4 was accompanied by DW1. DW6 admitted that he does not keep records of people who accompany patients to hospital. He did not explain how he was able to tell that DW1 accompanied DW4 to hospital on 23/1/2014. In the end, I found the alibi defence was contradictory and was just made up to try and help out the appellant. The alibi did not dislodge the prosecution evidence which placed the appellant at the scene of crime.

I find the defence to be a sham and dismiss it.

PW1 alleged that he was framed over a land dispute. PW1 was a child aged 9 years. Her testimony was not shaken even during the cross examination. DW2 & 3 also denied there having been any land dispute between them and the appellant.

DW1 alleged that he had disagreed with PW3 at a Busaa drinking den and PW5 claimed to have been present. However, from PW5's testimony, if there was any dispute, it seems to have been no serious dispute. In any event, if there had been a dispute between PW3 and DW1, I doubt that DW1 would have bought alcohol for PW3.

Of contradictions in the prosecution evidence, PW3 claimed to have been called by a neighbor on 22/1/2014, but from PW2's testimony, she did not know of PW1's illness till about 2.00a.m. in the night. It follows that the father could not have been told about the defilement at 3.40 p.m. In fact, by 3.40 p.m. on 22/1/2014 the incident had not occurred. I believe there was just a mix up on the dates. PW2 found out what was ailing PW1 on 26/1/2014 and she took up the matter the same day. A report was made to the police station on the same day and she was treated by PW5 on the same day. I find no serious contradiction in the said evidence.

As to the delay in charging and arresting the appellant, the incident occurred on 22/1/2014, PW1 did not reveal the occurrence till 26/1/2014. PW1 told the court that she feared to say anything because she had been threatened by the appellant with death if she revealed. PW1 was a child of 9 years old and it was not abnormal for a child to believe the threats and fail to report such incident. PW6 told the court that he had been told that the appellant had fled home and when he learned that he had been seen, he went to arrest him. Further to that, the P3 was not filled till 30/1/2014 and the arrest followed 4 days later.

There was no inordinate delay and the delay, if at all, does not weaken the prosecution case in any way.

In the end, I find that the prosecution did prove its case against the appellant to the required standard and the conviction is well founded.

The lower court duly considered the appellants mitigation. Under Section 8(2) of the Sexual Offences Act, upon conviction for defilement of a child under 11 years, the only sentence provided in law is life imprisonment. The sentence is lawful and this court has no discretion to vary it.

The appeal lacks merit and is hereby dismissed in its entirety.

**Signed and Dated at NYAHURURU this 9<sup>th</sup> day of April, 2019.**

.....

**R.P.V. Wendoh**

**JUDGE**

**Delivered by S. Riechi (J) at BUNGOMA this 20<sup>th</sup> day of May, 2019.**

**PRESENT:**

Ms. Nyakibia - Prosecution Counsel

Wilkister - Court Assistant

Appellant - present