



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 12 OF 2019

JOHN MUNYAO WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Thika Chief Magistrates Court Criminal Case No. 395/2016 (S.O) by Hon. C.A Otieno - Omondi (PM) on 15/6/2017)

J U D G M E N T

1. **John Munyao Wambua**, the Appellant, was charged with **Defilement** Contrary to **Section 8(1) (3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **11th** day of **January 2016** at [particulars withheld] in **Thika Township** within **Kiambu County**, intentionally caused his penis to penetrate the vagina of **ENW** child aged **12 years**.
2. In the alternative he was charged with the offence of **committing an indecent act with a child** contrary to **section 11 (1)** of the **Sexual offences Act No. 3 of 2006**. Particulars of the offence were that on the **11th** day of **January 2016** at [particulars withheld] in **Thika Township** within **Kiambu County**, intentionally touched the vagina of **ENW** a child **aged 12 years** with his penis.
3. Having been taken through full trial he was convicted on the main count and sentenced to **twenty (20) years imprisonment**.
4. Aggrieved, he now appeals on grounds that the case was not proved beyond reasonable doubt, evidence adduced by the prosecution was contradictory and inconsistent and the minimum mandatory sentence as provided for was declared unconstitutional by the Supreme Court in the Case of **Francis Karioko Muruatetu & Another**.
5. Facts of the case are that on the **11th** day of **January 2016**, **PW1, EN**, the complainant herein was at home with her siblings after their mother stepped out, when the Appellant their neighbour went and requested to send her to the shop. She asked him for a torch that she used to light the way to the toilet. When she returned the torch the Appellant requested her to wipe some water that had spilled in the house as she washed utensils and she obliged. In the process the Appellant seized the opportunity, grabbed her, put her on the bed and undressed her. He violated her sexually. While inside the house her mother went and knocked on the door but the Appellant covered her mouth, stifled her and threatened to kill her if she made any sound. He told **PW2, MW**, her mother, that he had sent her to the shop. She sent her siblings to go and look for her. In the meantime he told her to leave the house and go towards the shop. As a result she ran out but when she got to the third house after theirs her mother called her. She went to her and disclosed what had transpired. She was taken to hospital for examination and treatment. The Appellant was arrested and charged.
6. Upon being put on his defence the Appellant stated that he was arrested following allegations that he was a chang'aa seller. Reaching the police station, it was alleged that he had defiled a child, allegations that he denied.
7. The Appellant canvassed the appeal by way of written submissions. He urged that the three (3) elements of the offence of defilement were not established. Evidence adduced was contradictory and that the court should exercise its discretion in sentencing him.
8. The Respondent through learned State Counsel, **Ms Ndombi** opposed the appeal. She urged that all the elements of defilement were proved to the required standard. Regarding the alleged contradictions, she urged that they did not exonerate the Appellant from the offence.
9. This being a first appellate court, I am duty bound to reconsider evidence tendered at trial afresh and come up with an independent conclusion bearing in mind that I neither saw nor heard the witnesses who testified (**See Okeno Vs. Republic 1972 EA 32**).
10. To prove the charge the prosecution was required to prove existence of ingredients of the act of defilement namely:

(i) The age of the victim

(ii) **The act of penetration into the complainant's genitalia**

(iii) **Positive identification of the perpetrator of the act.**

11. PW2 the mother of the complainant stated that she was born on the **25th November 2003**. A notification of birth was issued on the **15.12.2003** indicating the date of birth as **25.11.2003**. A child health card adduced in evidence has the same date. This was proof beyond doubt that the victim (complainant) was born on the 25.11.2003. Therefore at the time of the incident she was **twelve (12) years old**.

(See Mwalango Chichoro Mwajembe Vs. Republic Criminal Appeal No. 24 of 2015 (UR))

12. Penetration is defined by **Section 2 of the Sexual Offences Act** as:

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

13. The complainant testified that the Appellant inserted his male genital organs into her genital organs and she felt pain. She was taken to hospital on the material night. Her genitalia was wet, the vagina had laceration, the hymen was broken and there was shredding of the vaginal wall. The injuries found are consistent with penetration of the victim's genital organs.

The complainant identified the Appellant as her assailant. The complainant was a child of tender years. **(See Kipkering Koskei Vs. Republic (1949) (6 EACA 135))**

Section 124 of the Evidence Act Provides thus:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

14. The trial court opined that the identification of the assailant was by recognition. The complainant's evidence was not challenged materially. In a well-reasoned judgment, the trial court believed the complainant as having been truthful. Therefore contrary to the allegations of the Appellant, all the ingredients of the offence of defilement were proved beyond reasonable doubt.

15. In the Supreme Court case of **Francis Karioko Muruatetu & another vs. Republic (2017) eKLR** the death sentence was declared unconstitutional but each case must be considered according to its own circumstances. In the instant case I do consider the statutory provisions, circumstances in which the offence was committed and the age of the child. In the premises I find the sentence meted out by the trial court to be in accordance with the law.

16. In the result, I find the appeal lacking merit. Accordingly, it is dismissed in its entirety.

17. It is so ordered.

Dated, Signed and Delivered in Kiambu this 12th day of September 2019

L.N. MUTENDE

JUDGE