



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL APPEAL CASE NO.11 OF 2017**

**JAMES NDUATI WANJIRU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an Appeal from Original Conviction and Sentence in **Murang'a Chief's Magistrates Court Criminal Case No.26 of 2013** by **Hon. J. J. Masiga (RM)** on 5<sup>th</sup> June, 2014)

**JUDGEMENT**

1. James Nduati Wanjiru, the Appellant, was charged with defilement contrary to section 8(1) as read with 8(4) of the sexual offences Act No.3 of 2003. Particulars being that on diverse dates between 27/9/13 and 2/10/2013 at around 5:00 pm within Murang'a County Intentionally and unlawfully caused his penis to penetrate the vagina of TW a child aged 8 years.
2. In the alternative, the Appellant 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 being that on diverse dates between 27/9/13 and 2/10/2013 within Murang'a County, intentionally touched the vagina of TW a child aged 8 years with his penis.
3. Having been taken through full trial, he was convicted on the main count and sentenced to life imprisonment.
4. Aggrieved, he appeals on grounds that: charges were defective; elements of the offence were not proved; extraneous matters were taken into consideration; and the sentence was excessive.
5. Facts of the case were that, on the 2<sup>nd</sup> October, 2013, PW 2, JN, the mother of the complainant was at home. She had a shower and on coming out of the bathroom she saw the Appellant pulling the complainant towards him. She took the complainant and beat her up, thereafter she told her that the Appellant was molesting her. They lodged a complaint with the police and took the complainant to hospital. Investigations were carried out that culminated into the arrest of the Appellant who was subsequently charged.
6. Upon being put on his defence, the Appellant denied the charges. It was his evidence that his mother and the complainant's mother are friends and have a business at the market. That a week before he was charged he met the complainant with her mother, and when the complainant greeted him her mother looked at him badly.
7. The appeal was canvassed by way of oral submissions. Mr. Mwaniki, Learned Counsel for the Appellant submitted that the particulars did not support the charge; the age of the child was not proved; witnesses who testified did not mention the date created by the police.
8. The Respondent (State) conceded the appeal. Learned Counsel Ms. Keya urged that evidence adduced was insufficient to prove the charge; evidence of PW1 and PW 2 were insufficient to prove the charge; but regarding the alleged defect in the charge, it was curable.
9. This being a first appellate Court, I am duty bound to re-evaluate and reconsider evidence adduced at trial and come to my own conclusion bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified. (**See Okeno –V- Republic, 1972 EA 32**).
10. The critical ingredients that establish the offence of defilement are;
  - a) Age
  - b) proof of penetration

c) positive identification of the assailant (See **Fappyyon Mutuku Ngui –vs- Republic (2012) eKLR**).

11. In the case of **Hilary Nyongesa –V- Republic, Crim.App. No.123 of 2009, Eldoret**, it was stated that;

**“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”**

12. This is a case where the complainant PW 1 stated that she did not know her age. PW 2, her mother stated that she was eight years old but didn't tell the Court her basis. Age of a complainant can be determined professionally or by cogent evidence especially so by evidence of a parent. But this was a case where the mother casually stated that the complainant was 8 years old but did not endeavour to render what prompted her to say so.

13. Penetration is defined by Section 2 of the Sexual Offences Act as;

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

14. PW 4, David Mwaura, a clinical officer examined the complainant on 7.10.2013, her genitalia had no laceration, no bruises but her hymen was perforated. This was a suggestion of the hymen having been riddled which may have been proof of penetration.

15. The question to be answered therefore is, whether the Appellant was the culprit?

16. If indeed the complainant was a child of tender years, section 124 of the Evidence Act that the learned trial magistrate relied on was applicable. The proviso states thus;

**“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.”**

17. In her testimony the complainant stated that the accused did acts that caused penetration into her vagina four times on dates that she could not remember. That she told her mother that the Appellant had been doing bad manners to her that is when they reported to the police. PW 2 however, stated that she acted because she saw the Appellant pulling the complainant. If indeed the sexual activity had been going on for long as alleged by the complainant, it was unlikely that the hymen could just be perforated, it should have been stretched.

18. Although the trial Court believed the complainant, it had no reasonable basis. Evidence adduced did not prove the charge.

19. In the result, the conviction was not safe. Therefore, I quash the conviction and set aside the sentence imposed. The Appellant shall be set at liberty unless otherwise lawfully held.

**DATED, SIGNED, AND DELIVERED THIS 4<sup>TH</sup> DAY SEPTEMBER, 2019.**

**HON. L.N. MUTENDE**

**JUDGE**