REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 124 OF 2017

BETWEEN

STEPHEN KAMAU WACHIRA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kithimani Principal Magistrate's Court

SOA Case No. 3 of 2017, Hon. E. W. Wambugu, RM)

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN KAMAU WACHIRA.....ACCUSED

JUDGEMENT

1. The appellant herein, **Stephen Kamau Wachira**, was charged in Kithimani Principal Magistrate's Court SOA Case No. 3 of 2017 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of this charge were that on the 5th day of January, 2017 at about 5.00pm in Kiathineni Sublocation, Masinga Subcounty within Machakos County, the appellant intentionally caused his penis to penetrate the vagina of **FN**, a girl aged 12 years. In the alternative, he was charged with the offence of an Indecent Act in that on the said date and the same place at the same time, he touched the vagina of **FN**, a child aged 12 years.

2. After hearing, the Learned Trial Magistrate found the appellant guilty of the offence of defilement, convicted him accordingly and sentenced him to 30 years' imprisonment.

3. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

> **1. That the Learned Trial Magistrate's finding that the prosecution had proved the charge is not supported by the evidence on record hence his conviction was manifestly unsafe and based on misapprehension of the evidence.**
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> **2. That the Learned Trial Magistrate erred in law and in fact by failing to observe that the presence of bruises/injuries on the neck and buttocks of the victim was not evidence of defilement and did not link with the provisions of section 2 of the Sexual Offences Act, No. 3 of 2006.**
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> **3. That the Learned Trial Magistrate erred in law and in fact by failing to consider the evidence of his defence in the light of the provisions of section 169(1) of the CPC.**
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> **4. That his conviction was based against the weight of the medical evidence.**

4. At the hearing of the case the prosecution called seven witnesses.

5. PW1, the complainant, testified that she was a student in class 6 and knew the appellant having met the appellant when the appellant defiled her. It was her evidence that on 5th July, 2017 at 5.00 pm she left school in the company of three other children and along the way one of them branched off on the road leading to her home leaving the two of them. The appellant who was following them then grabbed her from behind and struggled with her and her bag fell while she was screaming. In the process the appellant assaulted her with the stick he was carrying and she sustained neck injuries and in the process her school shirt got torn under her armpit and the dress at the waist. The appellant threatened to kill her if she screamed and she stopped screaming. In the meantime, her colleague picked her bag which had dropped and ran away towards home. The appellant then took her off the road into a farm which had maize, beans, oranges and mangoes, pinned her down and removed her inner clothes while he unzipped his trousers and removed his penis which he inserted in her vagina, lay on top of her and repeated the act several times like 10 times. According to her, some discharge like sperms poured from the appellant's penis. In the course of the ordeal, the appellant removed her sweater which he used to cover both her mouth and eyes.

6. According to the complainant, the appellant did not remove his clothes but simply unzipped his trouser. He had a trouser, a black shirt and purple inner wear which the complainant saw when he was unzipping his trouser before the appellant covered her eyes. When the appellant heard a vehicle stop, he took the complainant's inner wear, put it in her school dress pocket told the complainant to leave after him and ran away. After that the complainant picked up her sweater and the slasher she had carried to school and also ran away as the appellant threated to return when she threatened that she would report him.

7. At home, the complainant found her father, **MN**, PW4, whom she reported the incident to. PW4 then left to look for the assailant while the complainant proceeded to inform her mother who was in the *shamba*. Her mother, **AK**, PW6, called **Mwangangi**, PW2, and instructed him to arrest anyone putting on black clothes. After the appellant was arrested, she went and identified him since he was still wearing the black trouser that he was putting on at the time of the incident and which he had in court during the hearing. According to the complainant, the appellant also had white shoes. According to the complainant she identified the appellant by his face, the clothes he had on and the white shoe he had on his feet. It was her evidence that the appellant only had one shoe and he had shaved his head.

8. After the appellant was arrested, they proceeded to Kiatinene but finding no police officer there, they proceeded to Nduthini where they found a police officer who told them to return the following day on which day they recorded their statements after which she went to Matuu Hospital where she was treated. Though the appellant was also taken to the Hospital, he refused to be injected. She was also furnished with a P3 form which she identified as well as the laboratory report.

9. PW2, **Stephen Mwangangi**, was on the same day at 5pm seated outside a kiosk besides the road with one **Kiseka**, PW3, when PW3 received a phone from the complainant's mother, PW6, to look out for someone dressed in black T-Shirt, black trouser and blue jacket as the man had defiled her daughter. According to him, they had seen the appellant pass. When they got to the road they saw the appellant 150 metres away running. They boarded a motorcycle together with one **Kavue Munyao** and pursued him. When the appellant saw them, he ran into the forest but they chased him while shouting. Upon reaching a place where there were hard-core stones, the appellant picked stones and threw them at them and upon being ordered to stop, he dropped the stones and took off. The three of them pursued the appellant, got hold of him and he told them that he was running away since a child had seen him in the *shamba* and raised alarm. According to PW2, the appellant was holding one shoe in his hand. On the way back, they met a group of people including the complaint and her parents with the complainant's father holding the other shoe and the complainant confirmed that the appellant was her assailant and that he had a knife after which the complainant fell down and lost consciousness. The appellant was then taken to the police station.

10. PW3, **Kireka Wambua**, a *bodaboda* operator, was on that day at 6.00pm at Kangundo Farm Junction waiting for customers when he was called by PW4 who asked him to look out for a tall black person wearing a black trouser and T-shirt. He informed PW4 that the said person had passed him heading towards Kiatineni. He then called PW2 to accompany him on his motorcycle and they went after the appellant. His evidence was similar to that of PW2 save that he added that when the other shoe was shown to the appellant, the appellant admitted it was his which he had left at the scene.

11. PW4, **RMN**, the complainant's father was on 5th January, 2017 at home while his wife, PW6 was in the farm when the complainant went crying and screaming and informed him that she had been defiled by someone she could identify on the road. He then told the complainant to go and inform her mother while he proceeded to the road where he was footprints and a shoe. Based on the description given to him by the complainant, and the direction gathered from the footprints, he called PW3 and asked him whether he had seen a man matching the description given by the complainant and PW3 confirmed having seen the person. PW4 then told him to arrest the person. At the junction, they met and the complainant identified the appellant who was wearing the black trouser that he had in court. He also had sport shoes which PW4 identified in court. The appellant was then taken to Ndithini Police Post and since it was 7pm at night, they were told to return the following morning without bathing the complainant. The next day the complainant was examined at Matuu Hospital and a p3 form issued after they recorded their statements.

12. The same day at about 5pm, the complainant found PW6, **FN**, her mother in the farm and informed her of what had happened to her. According to PW6, the complainant informed her that she could identify her assailant who had a black t-shirt and black trousers. The complainant ten took her to the scene where they found the assailant's white shoe. PW6 then called a *bodaboda* operator, PW3, described to him the assailant and told him to arrest the man if he saw him and PW3 informed her that he had seen a person fitting the description given passing while holding a shoe and he arrested the appellant after which he was identified by the complainant. According to PW6, the shoe they had recovered matched the one that the appellant had and he identified it in court. After taking the appellant to Ndithini Police Station the next day she took the complainant to Matuu Hospital where she was examined. It was her evidence that's he saw whitish discharge on the complainant's vagina and the complainant informed her the discharge was from the appellant. According to PW6, the complainant informed her that when the complainant tried to scream, the appellant removed a knife, placed it on her throat and threatened to kill her.

13. It was her evidence that the complainant was 11 years old having been born in 2004 and was issued with a notification of birth and later got birth certificate both of which she produced.

14. PW5, **Meshack Musyoka**, a clinical officer at Matuu level 4 Hospital filled the P3 Form for the complainant on 6th January, 2017. According to him, the complainant's clothes had tears on the front but had no blood stains. She alleged to have been defiled by a person known to her on 5th January, 2017. She had bruises on her neck and on the left side of her buttocks which injuries were approximately one day old. In his opinion the probable weapon was a blunt one and he classified the injuries as harm. According to his examination, the labia had neither bruises nor mucus and her membrane was intact though she had whitish discharge on her vagina. On the other hand, the appellant had no injuries on his penis or his anus. He testified that a high vaginal swab showed epithelial cells a sign of an infection and there were puss cells a further sign of infection. Yeast cells were also seen showing that she had fungal infection though no spermatozoa were seen. According to him, based on the torn clothes, bruises/injuries on the neck and buttocks, there was evidence of defilement. However, the test carried out on the appellant showed he had no infection and no spermatozoa was noted.

15. PW7, **PC Eliud Bushienei**, the investigations officer, testified that on 6th January, 2017, he was assigned the case in which the complainant alleged that she was defiled by the appellant. The complainant described her assailant as a black, tall man of medium age and who wore a black trouser, black T-Shirt and black inner wear and had one white shoe. He recorded her statement and upon looking at the appellant who was in the cells he confirmed that the description given fitted him. He then issued both the appellant and the complainant with P3 Forms. According to him the complainant had bruises on the neck and her clothes were torn pointing to the fact that she was defiled. According to him the appellant was taken to the station with one shoe which matched the one that was recovered.

16. Upon being placed on his defence, the appellant opted to make an unsworn statement in which he stated that he was arrested on 5th January, 2017 when he was from work and the charge against him was fabricated since they confused him with another person by comparing clothes.

17. In her judgement, the Learned Trial Magistrate found that the complainant was born on 12th May, 2004 and the offence was committed on 5th January, 2017 thereby placing her age at 12 years at the time of the commission of the offence. According to the learned trial magistrate the evidence of the complainant was corroborated by the clinical officer as well as that of the mother. It was therefore found that the evidence proved partial penetration. Based on the evidence adduced by the prosecution witnesses, the court found that the appellant. She proceeded to convict the appellant and sentenced him to 30 years in prison.

Determination

18. I have considered the submissions made by the appellant and on behalf of the Respondent by **Ms Mogoi**, the learned prosecution counsel in this appeal. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

19. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

20. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
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> **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

21. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

22. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. 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. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

23. In this case there is no question at regarding the age of the complainant. From the documentary evidence adduced it was clear that the complainant was 12 years old at the time the offence was committed.

24. Regarding 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.***

25. Therefore, for the offence of defilement to be proved evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient that the said organs came into contact. However partial insertion suffices for the purposes of penetration as the said insertion need not be complete.

26. In this case, apart from the evidence of the complainant, that the appellant inserted his penis into her vagina, there was no other evidence to corroborate this allegation. According to the medical evidence, the complainant had bruises on her neck and on the left side of her buttocks which injuries were approximately one day old. The labia had neither bruises nor mucus and her membrane was intact though she had whitish discharge on her vagina. On the other hand, the appellant had no injuries on his penis or his anus. While the evidence revealed some signs of infection on the part of the complainant, the results of the examination of the appellant showed no infection and no spermatozoa were seen either on the complainant or the appellant. In fact, the only basis for forming the opinion that the complainant was defiled was the torn clothes and the bruises/injuries on the neck and buttocks.

27. In this case the evidence was that the genitals of the complainant came into contact with those of the appellant. What was not clear was whether the appellant did in fact insert his male genital organ into the complainant's female genital organ since the evidence did not show that the hymen was broken and there were no injuries on the external genitalia of the complainant.

28. Accordingly, without proof beyond reasonable doubt that there was penetration, I agree with **Ms Mogoi** that the conviction of defilement cannot be sustained.

29. In this case however, the appellant faced the alternative charge of indecent act. Section 2 of the ***Sexual Offences Act*** provides *inter alia* as follows:

> ***"indecent act" means an unlawful intentional act which causes-***
>
> ***(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***
>
> ***(b) exposure or display of any pornographic material to any person against his or her will;***

30. Section 11(1) of the ***Sexual Offences Act*** provides that:

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

31. Therefore, for the purposes of that alternative charge, it does not matter whether in doing so, the appellant used his male genital organ or any part of his body.

32. Having considered the evidence presented before the trial court it is my view that the appellant was improperly convicted on the offence of defilement. From the evidence adduced it is my view that the evidence disclosed the commission of the offence of indecent act. Though that was not the offence with which the appellant was charged, it is my view that indecent act is a cognate offence to the offence of defilement. Section 179 of the ***Criminal Procedure Code*** provides that:

> ***(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
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> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

33. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** expressed itself as hereunder:

> **"The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged…As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences**

that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171* and *WACHIRA S/O NJENGA V. REGINA (1954) EA 398*). *Spry, J*. explained the essence of the first consideration as follows in *ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294,* while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

"*Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence."*

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial." [Underlining mine].

34. The Court proceeded:

"The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *REPUBLIC V. CHEYA & ANOTHER [1973] EA 500).* In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied."

35. Section 11(1) of the ***Sexual Offences Act*** provides that:

Any person who commits an indecent act with a child is guilty an offence and is liable upon conviction to imprisonment for a term of not less than ten years.

36. Regarding the identity of the appellant whereas the appellant was unknown to the complainant before the day of the incident, one of the shoes was recovered from the scene while the other shoe was found with him. He did not explain the circumstances under which his other shoe found itself at the scene. According to the complainant she saw the appellant with one shoe and the appellant ran away when he heard a vehicle stop nearby. In those circumstances and considering the comprehensive description of the appellant by the complainant and that fact that he was arrested soon after the offence while on light, I am satisfied that the appellant was properly identified as the complainant's assailant.

37. In this case, the appellant took advantage of the tender age of the complainant for his own selfish gratification.

38. In the premises I allow the appeal in so far as the conviction and sentence imposed on the appellant in respect of the offence of defilement is concerned, substitute therefor a conviction of the offence of indecent act and sentence the appellant to serve 10 years' imprisonment to run from the date of is incarceration on 5th January, 2017.

39. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 3rd day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey