



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO. 21(A) OF 2016**

**DAVID THUO WANGECHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an appeal from the original conviction and sentence in Criminal Case No. 1422 of 2015 in the Senior Principal Magistrates' Court at Kigumo by A. Ogonda, Resident Magistrate, dated 13<sup>th</sup> April 2016]***

**JUDGMENT**

1. The appellant was adjudged guilty of *defilement* contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to *life imprisonment*.
2. The particulars were that on 13<sup>th</sup> August 2015 within Murang'a County, he intentionally caused his penis to penetrate the vagina of I.W.M [*particulars withheld*] a girl aged *five and a half years*.
3. The appellant has preferred an appeal. The *original* petition was filed on 21<sup>st</sup> April 2016. On 6<sup>th</sup> June 2018, I granted *leave* to the appellant to *amend* the grounds of appeal. The new grounds are contained in the home-made pleading filed on even date.
4. There are *two* grounds of appeal. First, that there was no positive identification. Secondly, that the learned trial magistrate erred by relying on "contradicting and doubtful" evidence. In a synopsis, the appellant contends that the prosecution did *not* prove the charge beyond reasonable doubt.
5. At the hearing of this appeal on 6<sup>th</sup> June 2018, the appellant relied *entirely* on his handwritten submissions filed in court on even date.
6. The appeal is contested by the State. Learned State Counsel, *Mr. Mutinda*, submitted that on the totality of all the evidence, the ingredients of the offence were proved beyond reasonable doubt. He contended that there was no contradiction between the four witnesses. Regarding the sentence, he submitted that the penalty given was the minimum sentence under section 8 (2) of the Act. I was beseeched to dismiss the appeal.
7. I have considered the *amended* grounds of appeal, the written submissions, the records and the evidence in the lower court.
8. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Felix Kanda v Republic Eldoret*, High Court Criminal Appeal 177 of 2011 [2013] eKLR.
9. PW1 testified through an *intermediary*, her mother. After a brief *voire dire* examination, the learned trial magistrate observed that the toddler was "*painfully shy...other than stating her name, the child has withdrawn completely and refused to talk to the court....It is therefore not possible to take the evidence of the child*"
10. I am satisfied that the court complied *fully* with the procedure of taking the evidence of the minor. Under the Children Act, it was open to the trial court to find the child was *vulnerable*; and, to appoint an *intermediary*.
11. The minor was a class one pupil at G. [*particulars withheld*] Primary School. The appellant was employed as a farmhand by a neighbour. On the material date, at about 6:30 p.m., the complainant arrived home. Her mother noted that she had difficulties sitting. Upon enquiring, the complainant pointed to her private parts. When she undressed her, she discovered that her vagina was bleeding; and, there was some discharge. She at first took the child to Kangare Health Centre and later to Kigumo Hospital. The matter was reported to Kigumo Police.

12. Initially, the complainant told her mother that she had been defiled by someone known as *Brandon*. The following day, her mother asked her to take her to the home of the assailant. The complainant led her to the home of her classmate *M*. But *M* (PW2) said that the accused had lured the complainant to *Mama J's* (the accused's employer's home) to give the complainant avocados. The appellant was arrested by members of the public. He conceded that he promised to give children avocados but denied defiling the complainant.

13. PW2's material evidence was as follows: He is aged 13 years and the complainant's schoolmate. On the material day at about 6:30 p.m., he was pushing two boys on a wheelbarrow. Outside *Mama J's* house, he saw the complainant and another girl, *S*, in the compound. He saw the complainant enter into the house with the appellant. He said she stayed there for about an hour. He said there was no one else in the house. He testified that it was "*a long time; we were playing outside with the other boys.*"

14. PW3 was James Karuga. He was a clinical officer at Kigumo Hospital. He prepared the P3 form at the hospital (exhibit 1). He produced the treatment notes from Kangare Health Centre (exhibit 2) and the Post Rape Care Form (exhibit 3). He testified that the complainant's hymen was broken and there was a whitish discharge. The *labia majora* and vulva had bruises or lacerations. The examination was conducted on 14<sup>th</sup> August 2015. The P3 form was signed on 17<sup>th</sup> August 2015.

15. The treatment notes and P3 form indicate that the administered drugs included antibiotics and Post Exposure Prophylaxis.

16. The last witness was Corporal Chamumona. I do not find his evidence helpful. He was not the investigating officer. He relied largely on a statement by his colleague, *Maxwell Mwenda*, recorded on 16<sup>th</sup> August 2015 at Kigumo.

17. When the appellant was placed on his defence, he gave an *unsworn* statement. He denied the charge. He said that on 13<sup>th</sup> August 2015 he was instructed by his employer to go to a neighbour's compound to dig a grave. It was early in the morning. He said he did not return to his house until 7:30 p.m.

18. Later in the night, he was summoned to *Brandon's* house. He found PW1 there. The following day, the village elder questioned him about the incident. He was accused of having committed the offence. He said he was suffering from gonorrhoea; a fact he claimed was confirmed by the hospital. He said that some whitish discharge on his pants was as a result of the medication.

19. A number of issues arise from that evidence. I will deal first with the age of the complainant. The age of the complainants is *material* in offences of this nature. See *John Wagner v Republic* [2010] eKLR, *Macharia Kangi v Republic* Nyeri, Court of Appeal, Criminal Appeal 346 of 2006 (unreported), *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported), *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.

20. I am satisfied from the evidence of PW1; and, exhibits 1, 2 and 3 that the minor was *five years and a half*. In any case, she fell within the bracket of a child *below* eleven years. I am fortified in that conclusion from the recent decision of the Court of Appeal in *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Criminal Appeal 661 of 2010 [2015] eKLR.

21. Was *penetration* proved? *Penetration* is defined in section 2 of the Sexual Offences Act as follows-

“*penetration*’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

22. From the evidence of the clinical officer and the mother of the complainant, I entertain *no* doubt whatsoever that the complainant was defiled. She was *bleeding*; her hymen was *broken*; and, there was a whitish discharge. The *labia majora* and vulva had bruises or lacerations.

23. The next key question is whether the appellant perpetrated this heinous crime. The issue is intertwined with *identification* of the appellant. The complainant's evidence was not reliable on this aspect. She at first accused a boy called *Brandon*. She then led her mother to the home of another boy called *M*. *M*, who testified as PW2, *implicated* the appellant.

24. I thus find that the complainant did not conclusively identify the appellant. But there is strong *circumstantial* evidence of PW2. His evidence should however be treated with *caution* as he was a *suspect*. He said that he saw the complainant and another girl, *S*, in the appellant's compound. The complainant entered into the house with the appellant. He said she stayed there for about an hour. He said there was no one else in the house. He testified that it was "*a long time; we were playing outside with the other boys.*"

25. That evidence was not shaken on cross-examination. I am also alive that the complainant was a *young child* and who was *unable* to testify in person. PW1 had also testified that her other daughter, *S*, disclosed to her after a beating that the appellant had defiled her and the complainant.

26. Our criminal justice system places the *burden of proof* firmly upon the shoulders of the Republic. *Woolmington v DPP* [1935] AC 462, *R v Kipkering arap Koske & another* 16 EACA 135 (1949), *Bhatt v Republic* [1957] E.A. 332.

27. I have considered the *alibi*. The appellant said he was away preparing a grave. True, the *alibi* was being set up well after the close of the prosecution's case. But it did *not* shift the burden of proof to the accused. See *Republic v Johnson* [1961] 3 ALL E.R. 969, *Saidi Mwakawanga v Republic* [1963] E. A. 6.

28. I have weighed the *alibi* against other evidence and particularly that of PW2. See *Wang'ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501, *Republic v Ahmed Bin Abdul Hafid* (1934) 1 EACA 76. The appellant claimed he returned home after 7:30 p.m. whereas the evidence of PW2 places him at the *locus in quo* from 5:30 p.m.

29. Like I have stated, the evidence of Michael (PW2) must be treated with *caution*. Combined with the fact that the complainant had identified *Brandon* immediately after the incident; and, then led her mother to *M's* (PW2's) house the *next day*, some doubt was created on identification of the appellant. However, it was wiped out by the consistent evidence of PW2. He said that when the complainant left the house of the appellant she looked desolate and was about to cry. She was inside the appellant's house for quite some time. Only the appellant and the complainant were inside the *locked* house.

30. The evidence of defilement was *corroborated* by medical evidence. Any gaps would have been sealed completely by a *medical* examination on the appellant. The appellant admitted that the members of the public found a *whitish discharge* on his underwear. The appellant's rebuttal was that he was suffering from gonorrhoea; and, the discharge resulted from the medication. The learned trial magistrate was alive to that matter. She stated in her judgment that "*it is unfortunate that this was not tested*". I blame the police for their slipshod conduct and botched investigation into a serious crime.

31. In the end I am however *certain* that the prosecution proved *all* the elements of the offence beyond *reasonable doubt*. It must follow as a corollary that the conviction was *safe*.

32. The minimum sentence under section 8 (2) of the Act is *life imprisonment*. The upshot is that the conviction and sentence are *upheld*. The appeal is *dismissed*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at MURANG'A this 12<sup>th</sup> day of June 2018.

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

The appellant (in person).

Ms. Gichuru for the Republic.

Mr. Kiberenge and Ms. Dorcas, Court Clerks.