



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**HIGH COURT CRIMINAL APPEAL NO: 156 OF 2016**

**[From Original Conviction and Sentence in Criminal**

**Case No. 732 of 2015 of the Chief Magistrate's**

**Court at Gatundu]**

**JOHN WAINAINA WANJIRU.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T.**

1. This is the judgment in a **Criminal Case No. 156 of 2016**. The appellant **JOHN WAINAINA WANJIRU**. The said appellant was charged with **Defilement** contrary to **Section 8 (1) (2)** of the Sexual Offence Act, **No. 3 of 2006**.

Particulars thereof were that on diverse date between **March 2015** and **17<sup>th</sup> June, 2015** at [**particulars withheld**] village, **Gatundu** South Sub-County, within **Kiambu County** intentionally and unlawfully did an act which caused penetration with his genital organ namely penis into genital organ namely vagina of **M W M** a child **10** years old.

2. **An alternative charge was:**

Committing an **indecent act** with a child contrary to **Section 11 (1)** of the Sexual Offence Act **No. 3 of 2006**.

Particulars thereof were that on the diverse date between **March 2015** and **17<sup>th</sup> June, 2015** at [**particulars withheld**] village, **Gatundu** South Sub-County, within **Kiambu County**, intentionally and unlawfully touched the vagina of **M W M** a child aged **10** years old.

3. The accused, **JOHN WAINAINA WANJIRU** denied the charge. Therefore, the case went for full trial at which trial the prosecution marshalled **(5)** five witnesses for the prosecution. In his judgment the trial magistrate convicted the accused and sentenced him to **life imprisonment**.

4. **THE APPEAL.**

The accused being aggrieved and dissatisfied has brought the appeal against both the conviction and sentence.

5. **HIS GROUNDS OF APPEAL ARE:-**

1. That the trial magistrate convicted the appellant on the basis of evidence that did not meet the required standard.
2. That the trial magistrate shifted the burden of proof to appellant in breach of **Section 107 (2)** of **Evidence Act**.
3. That the trial magistrate failed to summon essential witnesses in contravention of **Section 150** of the **Criminal Penal Code**.
4. That the trial magistrate failed to evaluate and analyse the evidence and thus reached a wrong finding.

5. That the trial magistrate failed to comply with **Section 169** of **Criminal Penal Code**.

6. **SUPPLEMENTARY GROUNDS ARE:**

6. That trial magistrate failed to observe that the elements that constitutes defilement were not conclusively proved as required by the law.

7. (This is **similar** to **grounds 3**, above).

8. That trial magistrate by relying on evidence of **PW1** to convict, evidence that as obtained through coercion.

9. That trial magistrate did not comply with **Section 124** of the **Evidence Act**.

10. (This is **similar** to **ground 1**, above).

11. That trial magistrate relied on my weak defence to convict me contrary to the law.

7. When the appeal came up before, the appellant was not represented, he conducted his appeal in person. He relied wholly on his home made written submissions which he handed to the court and stated that he wanted the court to know that he relied wholly on the said submissions had nothing further to add. These submissions are as **itemized** here **above**:

8. **The state's Response to the Appeal.**

The state through prosecution counsel, through **Madam Wambwa** submitted as follows:

**On ground 1:** that the evidence tendered was sufficient. This is a charge of defilement and the prosecution proved the age of the victim to be **10** years. Birth certificate, Exhibit I. The prosecution produced medical evidence by **PW3** who confirmed that the hymen was broken, therefore he proved penetration.

The prosecution, also proved identity of the appellant who was known to **PW1, PW2 & PW3**, and his identity was revealed when **PW2** asked the name, she gave the name of the appellant to **PW2** in the presence of **PW4**. Therefore the case was proved to the required standard.

**On grounds 2:** I submit that the case was proved beyond reasonable doubt and the burden never shifted.

**On grounds 3:** Under **Section 143**, of **Evidence Act**, there is no required number of witnesses to be summoned to prove a fact of sufficiently.

**On grounds 4:** this is not relevant.

**On ground 5:** I submit that the prosecution complied with **Section 169** of the **Criminal Penal Code**.

**On supplementary grounds:**

**On ground 1** – Spent

**On ground 2** – Spent

**On ground 3** – I submit that the evidence was truthful by **PW1**, the trial court conducted the *voir dire* process on **PW1** as required by law and found the minor's evidence was credible. There is no evidence on record that there was coercion.

**PW1** testified that she had been defiled (**5**) times. **PW2** knew when **PW4** asked her why the child comes late these days, **PW1**, said she had been visiting the appellant at coffee plantation where they were having carnal knowledge. This was not coercion.

**On ground 4** – is not relevant

**On ground 5** – Spent

**On ground 6** – Spent

Therefore, the evidence by the prosecution was sufficient to convict appellant.

9. **First Appeal**

This being a first appeal, this court has a duty of reconsidering and evaluating the evidence afresh with a view to reading its own conclusions in the matter making allowance only for the fact that it neither saw nor heard the parties when they appeared before the trial court. **See**

generally, Okeno Vs Republic (1972) E.A. 32.

**10. Questions for Determinations.**

- 1. Was there penetration in the victim’s genital organ i.e vagina by the genital organ i.e penis of the appellant?
- 2. Was the appellant identified/recognized?

**11. Proceedings: Analysis.**

**PW1 – M W M** – the victim’s testimony was consistent. She narrated that on **17/06/2015** at **5.00p.m.** was coming from school when she bumped into the appellant, **JOHN WAINAINA WANJIRU**. He told her that there was something he wanted to tell her. When she went to him, he asked her to lift her dress. It was bush at coffee plantation. He asked her to remove her pants and he had sex with her after removing his own clothes. She felt pain. He gave her 50 bob and warned her not to tell anybody. This sex sessions were five with the appellant. She knew the appellant, his home was not far from her home. PW1’s testimony was corroborated by **PW3** – Dr. Patrick Obanga Tigoni District Hospital. He confirmed that her hymen was broken. She was also HIV negative. He produced a P3 form as Exhibit.

Thus penetration was proved and the appellant is known person, a neighbour to the victim’s home.

**12. FINDINGS**

The offence of defilement and its ingredients were proved. The appellant was the person who defiled the victim **M W M** on **17/06/2015**. This appeal is hereby dismissed.

Right of appeal – **14** days.

**JUDGMENT WRITTEN AND SIGNED BY:**

**C. B. NAGILLAH**

**JUDGE**

**JUDGMENT DELIVERED, DATED AND COUNTERSIGNED IN KIAMBU BY:**

**THIS 10TH DAY OF MAY 2017**

**JOEL NGUGI**

**JUDGE**

**In the Presence of:**

.....**the Appellant**

.....**for the Respondent**

.....**for the Court Assistant**