



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 33 OF 2015**

**KENNETH MSUKO WAWUDA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 209 of 2014 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon G.M. Gitonga(RM) on 8<sup>th</sup>May 2015)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Kenneth Msuko Wawuda, was tried and convicted by G.M. Gitonga, Resident Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act. He was sentenced to serve fifteen (15) years' imprisonment for the offence of defilement.
2. The particulars of the main charges were as follows :-

**“Between August 2013 and 10<sup>th</sup>May 2014 at [particulars withheld] Village in Maktau Location within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of V C , a child aged 16 years.”**

**ALTERNATIVE CHARGE**

**“Between August 2013 and 10<sup>th</sup> May 2014 at [particulars withheld] Village in Maktau Location within Taita Taveta County, intentionally and unlawfully touched the vagina of V C , a child aged 16 years.”**

3. Being dissatisfied with the said judgment, on 16<sup>th</sup> June 2015, the Appellant filed a Petition of Appeal in which he listed the following grounds of appeal:-
  1. **THAT the Learned Trial Magistrate erred in law and fact by failing to see that the charge of defilement was not proved beyond reasonable doubt hence conviction was unsafe.**
  2. **THAT the Learned Trial Magistrate erred in rule of law (sic) by convicting him on failing to see (sic) that Section 150 of the Criminal Procedure Code was violated.**
  3. **THAT the Learned Trial Magistrate erred in law and fact in finding his conviction and sentence by failing to see (sic) that the same was harsh and excessive.**
  4. **THAT the Learned Trial Magistrate erred in law and fact in failing to see (sic) that the**

**investigations carried out by the prosecution were totally shoddy.**

5. **THAT the Learned Trial Magistrate failed to consider his reasonable defence.**

4. On 7<sup>th</sup> March 2016, the Appellant filed Amended Grounds of Appeal which were as follows:-

1. **THAT the Learned Trial Magistrate erred in law and fact relying on the merely (sic) circumstantial evidence from the Prosecution witnesses.**
2. **THAT the Learned Trial Magistrate failed in law and fact that (sic) the investigation officer could be a star witness by visiting the scene (sic).**
3. **THAT the Learned Trial Magistrate erred in law and fact by convicting him relying on the evidence of one extended family (sic).**
4. **THAT the Learned Trial Magistrate erred by convicting relying (sic) on the evidence of PW 6 which was not enough concerning the broken hymen and penetration.**
5. **THAT the Learned Trial Magistrate erred in law and fact without (sic) thorough investigation to see that this was the Chief and Village elder's case since he was working there and he decided to leave the job for unfair treatment of his salary as he had stated in Cross-examination(sic).**
6. **THAT the Learned Trial Magistrate erred in law and fact to (sic) rely and call PW 1 a star witness since her evidence was merely exaggeration to lost him (sic).**
7. **THAT the Honourable Magistrate erred in law and fact that (sic) he did not take into consideration his defence submission (sic).**

5. He filed his Written Submissions on 16<sup>th</sup> March 2016 while the State filed its Written Submissions dated 30<sup>th</sup> March 2016 on 31<sup>st</sup> March 2016.

6. When the matter came up in court on 7<sup>th</sup> April 2016, both the Appellant and the State informed the court that they would rely entirely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

### **LEGAL ANALYSIS**

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

8. The court identified the following as the real issues for determination by this court:-

- a. **Whether or not the Prosecution had proved its case beyond reasonable doubt?**
- b. **Whether or not the Learned Trial Magistrate considered the Appellant's defence submissions?**

10. The court therefore dealt with the issues under the separate heads shown hereunder.

### **I. PROOF OF THE PROSECUTION'S CASE**

11. The court did not attach any weight to the Appellant's submissions regarding the amendment of the Charge or his suggestion that the Prosecution witnesses were coached for the reason that the same were not listed as grounds of appeal.

12. Suffice it to state that the Appellant could not purport that there was no fair trial on the ground that the Charge Sheet was amended on 23<sup>rd</sup> September 2014, the same day the hearing proceeded for the first time. It is clear from the proceedings of the Trial Court that he pleaded **“Not guilty”** to the Charge and indicated that he was ready to proceed with the hearing on the same date.

13. Turning to the more substantive issues, the Appellant argued that the Learned Trial Magistrate relied on circumstantial evidence to convict him. He pointed out that No 92295 PC John Mule, the Investigation Officer herein (hereinafter referred to as "PW 5") did not visit the scene and only recorded hearsay evidence.
14. He also stated that the Complainant (hereinafter referred to as "PW 1") exaggerated her evidence and that her testimony of where she was found was not corroborated. He said that PW 1 told the Trial Court that she had had sex the previous night which was about four (4)- six (6) hours after she had been taken to the doctor. He was categorical that Charo Zacharia's evidence (hereinafter referred to as "PW 6") did not show any connection between him and PW 1's broken hymen.
15. It was his further contention that he had been employed by the brother to M M (hereinafter referred to as "PW 4") and that the Village elder was PW 1's uncle which ensured that their evidence corroborated each other. He was emphatic that the case against him was fabricated as he did not want to work anymore and that PW 4 ought to have confirmed his defiling PW 1 to the doctor immediately he reported about the incident to Rita Dawa Wanjala (hereinafter referred to as "PW 2").
16. Evidently, as the State submitted, PW 1 testified that she was engaged in sexual relations with the Appellant herein. She gave a very detailed account of how this took place between August 2012 and May 2014 when she and the Appellant were caught in the act by PW 4. In her Cross-examination, she stated that she did not report the incident or cry while having sex because she and the Appellant had agreed to do so.
17. PW 2 stated that the Appellant worked as a herdsman at her brother-in-law's house, a fact the Appellant admitted during his Cross- Examination. She told the Trial Court that PW 1 had been given a room at her mother-in-law's house, the same compound the Appellant stayed. She said that she took PW 1 to her house after she was caught in the act by PW 4.
18. She contended that upon enquiring from her about the goings- on, PW 1 told her that she was a girlfriend to the Appellant herein. She testified that PW 1 subsequently ran away and was traced at Maungu Village but that she only came out of her hide out through police intervention.
19. She further stated that she was accompanied to this Village by Oscar Rombo (hereinafter referred to as "PW 3") and a Village Elder by the name of Mr Mwachofi. PW 3 confirmed that they found PW 1 sleeping in a room and that the Appellant was outside the house at the time.
20. According to PW 4, he had found PW 1 and the Appellant in a room in a compromising position as if they were about to have sex or had had sex. He said that PW 1 was tried to hide under the bed and that both PW 1 and the Appellant ran away the following day.
21. Notably, the proviso to Section 124 of the Evidence Act Cap 80 (Laws of Kenya) is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.
22. Section 124 of the Evidence Act stipulates as follows:-

**“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.**

23. As there were no actual eye witnesses to the alleged sexual activity between PW 1 and the Appellant herein, it boiled down to PW 1's word against that of the Appellant. Her testimony about her sexual relationship with him was so detailed and cogent and was sufficient to sustain the Charge against him, a fact that was correctly averred by the State and found by the Learned Trial Magistrate.

24. It was irrespective that PW 4 found the Appellant fully dressed. It was also not necessary for PW 5 to have visited the scene of crime as the Appellant had argued. PW 4's evidence that PW 1 had attempted to hide under the bed, which the Trial Court and this court found to have been credible, was indicative of her guilty conscience. This was merely corroborative of PW 1's evidence and that of PW 6 that showed that PW 1's hymen was broken.
25. It is important to point here that had PW 1 not admitted to having had sexual relations with the Appellant herein, then the person who caused the hymen to break would have been a material fact for determination both by the Trial Court and this court.
26. After carefully analysing the evidence that was adduced by the Prosecution witnesses, this court found that there were no inconsistencies of the evidence that was adduced by the Prosecution witnesses, a fact that was again rightly pointed out by the State herein.
27. The Appellant failed to demonstrate that the charges that had been brought against him were fabricated or at all. Indeed, his contention that the said Charges were preferred against him as he did not want to work for PW 2's brother-in-law, who was PW 4's brother, or that the evidence herein was adduced by extended family members to fix him were unfounded and merely an afterthought. There is no law that bars members of a family testifying in a case on facts that they themselves can attest to as witnesses.
28. In that respect, Grounds Nos 1, 2, 3, 4, 5 and 6 of the Appellant's Grounds of Appeal were without merit and are hereby dismissed.

## II. APPELLANT'S DEFENCE

29. The Appellant gave sworn evidence. He said that he was at home when three (3) people came and asked him to accompany them to Maktau Police Station. He stated that he was later taken to Wundanyi Police Station and charged with an offence he knew nothing about.
30. In his Cross-examination, he admitted that he used to work at PW 1's home as a herdsman in August 2012. He contended that he left employment in April 2013. It was his further evidence that PW 1 told him that she was seventeen (17) years of age and denied ever having defiled her or committing an indecent act with her.
31. The evidence by PW 2, PW 3 and PW 4 was overwhelmingly convincing. It was very consistent and further buttressed by that of PW 1. The Appellant's evidence that he was arrested after he left his employer's place was not persuasive as he did not show what motive the Prosecution witnesses had to accuse him falsely.
32. From the Judgment of the Trial Court, it was clear that the Learned Trial Magistrate considered the Appellant's defence. He stated that he did not find reason to believe the Appellant as he had engaged in sexual relations with PW 1 on more than one occasion.
33. Indeed, as was rightly pointed out by the Learned Trial Magistrate, the Appellant had the opportunity to engage with PW 1 in the manner that he did as they stayed in the same compound. Indeed, it would have been a defence to the Charge if the Appellant had argued that PW 1 misled him to believe that she was over eighteen (18) years of age as the sexual relations would have been backed by her legal consent.
34. His evidence relating to PW 1's age was disjointed as the context in which he revealed that fact during his Cross-examination was not demonstrated. It was merely a hanging statement and which this court found to have been an afterthought.
35. This court was not therefore persuaded by the Appellant's submissions that the Learned Trial Magistrate did not consider his submissions or defence. He did so and in fact arrived at a correct conclusion.
36. In this regard, this court found that Ground No 7 of the Appellant's Amended Grounds of Appeal was not merited and the same is also hereby dismissed.

## III. SENTENCE

37. The sentence for defiling a child of PW 1's age is given in Section 8(3) of the Sexual Offences Act Cap 62A (Laws of Kenya). The same provides as follows:-

**“A person who commits an offence of defilement with a child between the age of sixteen**

**and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”**

38. Accordingly, this court was persuaded by the State’s submissions that the conviction and sentence herein ought not to be disturbed as the same was proper and lawful.

**DISPOSITION**

39. As the court found that the Prosecution had proved its case beyond reasonable doubt, it found the Appellant’s Amended Grounds of Appeal not to have been successful. The same are hereby rejected. Instead, this court therefore affirms the conviction and sentence herein.

40. The upshot of this court’s Judgment was that the Appellant’s Appeal that was lodged on 16<sup>th</sup> June 2015 was not merited and the same is hereby dismissed.

41. It is so ordered.

**DATED and DELIVERED at VOI this 9<sup>th</sup> day of May 2016**

**J. KAMAU**

**JUDGE**

In the presence of:-

Kenneth Msuko Wawuda-Appellant

Miss Anyumba-for State

Simon Tsehlo– Court Clerk