

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 517 OF 2013

(Appeal against Conviction and Sentence in Kangema SPM Criminal Case No 80 of 2013 - A Too, Ag SRM)

EDWARD MAINA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **Edward Maina Mwangi**, was convicted after trial of **defilement of a child** contrary to **section 8(1) as read with (2)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged that on diverse dates in January 2012 [*particulars withheld*] within Murang'a County he intentionally caused his penis to penetrate the vagina of **A W S**, a child aged 8 years. He was sentenced to life imprisonment. He has appealed both conviction and sentence. His grounds of appeal are to the effect that the charge against him was not proved beyond reasonable doubt.

2. Learned prosecution counsel for the Respondent does not support the conviction upon the ground that the prosecution did not prove the charge beyond reasonable doubt.

3. I have read through the record of the trial court in order to evaluate the evidence tendered before it and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have however borne in mind that I never saw nor heard the witnesses myself, and I have given due allowance for that fact.

4. The Appellant's conviction was based upon the unsworn testimony of the complainant (PW1). Although in sexual offences a court can convict without corroboration of the testimony of a child of tender years if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (*proviso* to **section 124** of the **Evidence Act, Cap 80**), there were major shortcomings in the prosecution case. The complainant testified as to how the defilement took place in a classroom in the presence of many other pupils. However, no other pupil alleged to be present was called to testify, and no reasons were given for failure to call them.

5. The mother of the complainant (PW2) testified that she learned of the complainant's defilement through the grandmother of another pupil. Neither the grandmother nor the pupil who gave her the information testified.

6. Medical evidence came from PW4. He noted that the hymen of the complainant was broken, but there were no tears or lacerations in the labia, vagina or cervix. His report was not definite regarding penetration; this was not surprising as the examination of the complainant took place about 2 months after the last act of the alleged defilement.

7. The Appellant, who was a teacher in the complainant's school gave an unsworn statement in his defence. He alleged that during coffee harvesting seasons parents tended to withdraw their children from school to harvest coffee. He had taken a strong stand against that practice, upon which some 5 parents had threatened revenge against him, including causing his transfer. His submission therefore was that the charge against him was contrived.

8. Upon my own evaluation of the evidence placed before the trial court, I am not satisfied that the charge against the Appellant was proved beyond reasonable doubt. His conviction is unsafe. I will therefore allow this appeal in its entirety; the conviction entered against the Appellant is hereby quashed and the sentence of life imprisonment set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 3RD DAY NOVEMBER 2016

HPG WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 4TH DAY OF NOVEMBER 2016