



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 317 OF 2012**

CHARLES WAMBUA KIVUNO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in Criminal Case Number 912 Of 2009 in the Chief Magistrate's Court at Makadara delivered on 26/7/12 by Hon. T. Mwangi, S.R.M)*

**JUDGMENT**

The Appellant was charged with defilement of a child contrary to **Section 8(1)** as read with **Section 8(3) of the Sexual Offences Act No.3 of 2006**. The particulars were that on the 24<sup>th</sup> day of February 2009 at *[particulars withheld]* Estate Ngei in Nairobi within Nairobi Area Province, intentionally and unlawfully committed an act which caused penetration of his male genital organ into the genital organ of J A a child aged 13 years. The alternative charge was of indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No.3 of 2006**. The particulars being that on the 24<sup>th</sup> day of February 2009 at Mathare North Area 4 in Nairobi within Nairobi Area Province intentionally and unlawfully committed an indecent act with S N by touching her private part namely vagina.

He was convicted in the main count and sentenced accordingly but preferred to appeal. His appeal was premised on ten grounds which are condensed into the following six:

1. That the charge sheet was defective.
2. That the trial court relied on contradictory and uncorroborated evidence.
3. That essential witnesses were not called to testify.
4. That the complainant's age was not assessed.
5. That incompetent witnesses were called to give evidence.
6. That the trial magistrate did not comply with Section 200(3) of the Criminal Procedure Code.

He argued his grounds relying on written submissions dated 8/10/15. In summary, his submissions were that the charge indicated that the alleged offence was committed on 24/2/09 while the evidence of PW2 indicated that the offence was committed on 24/1/09. Further, that the age of the complainant was indicated to be 13 years whereas the evidence of PW6 indicated that the complainant's age was 15 years. He submitted that there were contradictions in the evidence of PW1 and PW3. It was also his submission that the investigating officer whose evidence was very crucial to the case was not called to court to testify. He added that there were other witnesses who were neighbours to the complainant who were not called to give an account of the incident. He submitted that PW6 was not qualified to give evidence prepared by

another doctor as it was contrary to **Section 33 and 77 of the Evidence Act.**

Mr. Mureithi who was Counsel for the Respondent opposed the appeal. His submissions were that the Complainant was consistent in her evidence. She was pulled by the Appellant to his house where he defiled her. The Appellant's house neighboured that of the Complainant's. She screamed for help as the Appellant defiled her and PW2 and PW3 arrived right after the defilement had occurred. They arrested the Appellant in his own house. He submitted that PW4 took samples of the complainant's spermatozoa two days after the ordeal and concluded that she had had sex with a person whose blood group was O. The Appellant happened to be of the same blood group. He submitted that PW4's evidence was corroborated by that of PW5 and 6 as they indicated the presence of spermatozoa in the private parts of the complainant and also found that her hymen was torn. He submitted that PW7 arrested the Appellant when he was taken to Huruma Police Station by members of the public. He submitted that the evidence adduced was water tight and that the Appellant's defence was a mere denial. He urged the court to dismiss the appeal.

Having considered the rival submissions, it is now the duty of this court to re-evaluate the evidence on record and come up with its own independent conclusions. See **Pandya Vs Republic (1957) EA 336.**

Seven prosecution witnesses were called. **PW1**, J A was the complainant. Her account was that on 24/2/09 at about 4:00a.m. as she prepared to go to school, went outside to use the toilet. On her way back to her house, she was grabbed by the Appellant who pulled her into his house and defiled her. She remembered that there was electricity light in the house. She was found by her aunt who beat up the Appellant and later took him to the police. Her aunt, B K testified as **PW2**. Her evidence was that on 24/2/09 (although this date is indicated as 24/1/09 in the typed proceedings) at 4:00am, she went out of the house and heard a muffled scream in the Appellant's house which sounded like that of PW1. She screamed and called her husband but before he arrived neighbours were drawn to the scene. As the Appellant tried to escape, she saw PW1 in his house. The neighbours wanted to beat up the Appellant but he was rescued by her husband and later taken to the police. There was no contrast between her evidence and that of her husband M L W who testified as **PW3**. He recalled that on 24/2/09, at around 4:00 a.m, he was told by PW2 that she heard PW1's voice outside their house. He went outside the house where he found both the Appellant and PW1. PW2 was beating the Appellant. There were neighbours who also wanted to lynch him. He rescued the Appellant and took him into their house. When it was safe for him to go out he went and made a report at the Police Station and later hired a motor vehicle which took both the Appellant and PW1 to the Police Station. Afterwards, he hired another motor vehicle which took PW1 to Nairobi Women's Hospital for examination. **PW4**, Albert Gathuri, a Government Analyst got a vaginal swab from PW1 and concluded that there was presence of semen and degenerated spermatozoa. Her underpants had seminal stains of Group O secreta and numerous degenerated spermatozoa. He testified that the blood and saliva samples taken from the Appellant indicated that he was of Group O secreta.

**PW5**, Doctor Zephania Kamau examined PW1 three weeks later. However, the medical report dated 26/2/09 from Nairobi Women's Hospital presented by **PW6**, Doctor Nsiza Liku on behalf of Dr. Muhombe who passed on after examining PW1, indicated that there was no tear or laceration of her vagina but her hymen was torn and there was spermatozoa in her urine.

A number of Police Officers investigated the case. PC Cyrus Mauti was the arresting officer. He testified as **PW7**. He recalled that on 24/2/09 he received a report that the Appellant had defiled a minor and proceeded to arrested him. The Investigating Officer PC Thuraira did not appear in court to testify. PC Peter Shitemi who took over the investigations in January 2010 did not say anything other than that he took over the investigations from PC Thuraira after she was transferred to Kasarani Police Station.

The Appellant's defence was that on the material date, in the morning, he heard a knock on his door. When he opened the door, he was arrested by a police officer and taken into custody and charged. He told the court that he was framed. He gave an unsworn evidence that was not subject to cross examination.

On summary of the above evidence and the respective submissions, I conclude that the issues for determination are whether the Appellant was the culprit.

The evidence of PW6 clears the first issue. Although the vaginal examination showed no tear or laceration, the same revealed that PW1's hymen was torn. This is a clear indication that there was penetration which is an essential ingredient of the offence of defilement. On the second issue, PW1 testified that it was the Appellant who put his "urinating thing" in hers. She was in a position to see the Appellant since his house was lit with electricity bulbs. PW2 heard soft screams coming from the Appellant's house and almost caught him red handed with PW1 in his house. The medical analysis done of PW4 indicated that the blood and saliva samples of the Appellant were of Group O secreta which matched the seminal stains found on PW1's underpants. Regarding the age of PW1, she firmly told the court during a voire dire examination that she was 13 years old. She went to school at Junior School Academy and was in class five at the time. The magistrate observed that PW1 was too young to give evidence under oath. This alone indicated that she was indeed a minor. In this respect, the Appellant's ground that the complainant's age was not assessed does not carry much weight since in defilement cases, where there is absence of medical evidence, the age can also be assessed by Birth Certificate, the victim's parents or guardian or by observation and common sense. See **Francis Omuromi V Uganda, Criminal Appeal No.2 of 2000.**

On corroboration of the prosecution's evidence, I revert to **Section 124 of the Evidence Act** which provides that a victim of a sexual offence can give evidence whether or not it is corroborated and the court can go ahead and convict on such evidence if it is satisfied that the alleged victim is telling the truth. The evidence of PW1 and PW2 was sufficient corroboration of the charges against the Appellant. The absence of the investigating officer who did not show up after being summoned by the prosecution did not negate the fact that PW1 was defiled. PW7, the arresting officer gave sufficient evidence on circumstances leading to the arrest of the Appellant. PW6 being a doctor who had worked with the late Doctor Muhombe was a competent witness to produce the medical report on her behalf. Suffice it to note is that the witness was conversant with both the handwriting and signature of Doctor Muhombe.

In the end, I find that the prosecution proved its case to the required standard. The Appellant's defence that he was framed is not merited. The appeal is accordingly dismissed.

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> Day of November, 2015.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

The Appellant in person

Mr. Murithi, for the respondent