



REPUBLIC OF KENYA



**Wamugi v Republic (Criminal Appeal 18 of 2018)
[2025] KECA 839 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 839 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 18 OF 2018
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
MAY 9, 2025**

BETWEEN

BONIFACE WANGI WAMUGI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyahururu (R.P.V. Wendoh, J.) dated 12th April 2018 AND REPUBLIC RESPONDENT in HCCRA No. 129 of 2017)

JUDGMENT

1. The appellant, Boniface Mwangi Wamugi, was charged with the offence of defilement of a girl contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act in Nyahururu CMC Criminal Case (SO) No. 1236 of 2014. The particulars of the offence were that on 22nd March 2014 in [Particulars withheld] location within Laikipia County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LJW alias LWM, a child aged 13 years old. The appellant also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and in the same place, the appellant intentionally and unlawfully caused his penis to touch the vagina of LJW alias LWM, a child aged 13 years old.
2. The appellant was arraigned before the trial court to answer to the charges where he pleaded not guilty. After a full trial, the appellant was convicted on the main charge of defilement and sentenced to serve 20 years imprisonment. The appellant appealed before the Nyahururu High Court in Criminal Appeal No. 129 of 2017 where Wendoh, J. dismissed his appeal both on conviction and sentence.
3. The appellant is dissatisfied with those findings. He has filed his notice of appeal dated 25th April 2018. He also filed his amended grounds of appeal dated 31st January 2024. The appellant impugned the findings of the learned judge on the following summarized grounds: he decried that he had been



framed on account of the fact that a disagreement ensued between himself and the complainant's family and his defence was not considered; the prosecution failed to discharge its burden of proof to the required standard of proof; and the sentence meted out was harsh and excessive. In view of the foregoing circumstances, the appellant urged this Court to find merit in his appeal.

4. This appeal was heard on 18th February 2025. The appellant was present and appeared in person while the respondent was represented by Senior Assistant Director of Public Prosecution, Mr. Omutelema. The parties adopted their respective written submissions.
5. The appellant's written submissions dated 31st January 2024 argues that based on his defence, it was apparent that he had been framed to extort or force him to give his domestic animals as a condition for dropping the charges. He maintained that he did not commit the offence that he was charged with. He continued that all the ingredients to a charge of defilement, namely the age of the complainant, the aspect of penetration and the identification of the perpetrator were not proved beyond reasonable doubt. He was particularly critical of the evidence of penetration and the identity of the assailant stating that the evidence of the witnesses was exceptionally contradictory. Regarding the sentence meted out against him, the appellant submitted that the same was harsh and excessive against the sentencing policy guidelines and recent jurisprudence on the minimum sentences imposed by the law.
6. The respondent filed written submissions, a case digest and a list of authorities all dated 15th April 2024. Learned counsel submitted that all the ingredients to the offence of defilement were proved beyond any shadow of a doubt. He submitted that the appellant was identified by PW4 who was seen speaking to the complainant at 10:00 p.m. He dismissed the appellant's defence as failing to shake the prosecution's watertight evidence. On sentence, learned counsel submitted that the same was lawful and ought not to be disturbed. In view of the foregoing, the respondent prayed that the appeal be dismissed.
7. Our jurisdiction as a second appellate Court is couched in section 361 of the *Criminal Procedure Code*. In the same vein, and without the need to belabor, this Court will not interfere with findings of fact by the two courts below unless it is demonstrably clear that the two courts considered matters that they ought not to have considered, failed to consider matters that they ought to have or were plainly wrong. In *Boniface Kamande & 2 Others vs. Republic*, Crim. App. No 166 of 2004, this Court stated:

“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it.”
8. The facts set out by the prosecution as per the record before us are as follows: PW1 LWM alias LJW the complainant testified that she was a 13-year-old class 7 student at Okoa Academy. She recalled that on 22nd March 2014, PW1's grandparents visited their bereaved neighbors to pass their condolences. She was living with them at that time. PW1's grandparents were accompanied by the appellant who was their neighbor. She recalled that the appellant on several occasions came to their home to assist the family with shopping and therefore recognized him. PW1's grandparents locked the gate and handed the keys to the appellant. PW1 was left at home with her aunt Margaret Muthoni PW4, who was nursing her baby.
9. The appellant came back to PW1's home alone that night at 10:00 p.m. PW1 opened the gate for him. PW1 then made him a cup of tea. The appellant was then asked to leave. As he was leaving the compound with PW1 escorting him in order to open the gate, the appellant grabbed her, covered her



mouth and threw her down. He then removed her clothes and sexually assaulted her. The appellant was then found by PW4 in the company of PW1.

10. When the appellant saw PW4 he immediately left the compound.
PW1 narrated to her aunt concerning what had transpired. PW4 called PW1's grandmother, PW3 LWM who returned home instantly. They then took the complainant to the Salama District Hospital where she was examined. The following day, which fell on a Saturday, PW1 was taken to Nyahururu District Hospital and was treated. The incident was later reported at the police station. PW3 denied that the complainant was taken to the hospital by the appellant. She also denied that the complainant was epileptic adding that she had lived with her since she was nine months old.
11. PW3 confirmed that she had left their home to pay condolences to their neighbor. On their way there, she met the appellant who was their neighbour. She testified that on several occasions, she would send the appellant to do some shopping for her. He informed her that he would like a cup of tea at her home upon which PW3 informed him that the complainant was at home with her mother. PW3 later that night received a phone call from PW4 that the appellant had defiled the complainant. On return home, PW3 found the appellant outside her gate but later vanished. PW3 was accompanied by her husband to take PW1 to Salama Hospital and later to Nyahururu district hospital. The incident was later reported at the police station. She denied that it was the appellant who took them to the hospital. She further refuted claims that PW1 was epileptic.
12. PW4's evidence was that on that fateful night, she had put her baby to sleep. She asked PW1 to get her a radio. Wondering why she had taken too long to retrieve it, PW4 left the bedroom to investigate what could be happening. She then heard the appellant's voice saying "Lucy what is wrong." She followed the direction from where the voice was emanating and found the appellant together with PW1. After the appellant escaped, PW1 informed PW4 that the appellant had sexually assaulted her. She then called PW3 who returned back to the home with her husband. Together, they escorted PW1 to the hospital.
13. PW5 PC Odak was the investigating officer in this matter. He received the complaint on 23rd April 2014 at around 3:p.m. He conducted his investigations, interrogated the witnesses, gathered the evidence and proceeded to charge the appellant with the present offence. He testified that the offence occurred on 21st March 2014 but the appellant disappeared but was arrested on 15th May 2014.
14. PW6 Dr. Joseph Karimi Kinyua, working at Nyahururu District Hospital produced the P3 form filed on 24th March 2014 on behalf of Dr. Mwangi Waguru who had since left the institution. He produced the evidence in pursuance of the court order issued on 25th January 2016. On observation of PW1, it was recorded that her hymen had ruptured and the surrounding areas inflamed. The time of rupture was estimated as fresh shortly after the incident had occurred. She had scanty proteins. There was also the presence of spermatozoa. He confirmed that the victim was first seen at Salama Health Clinic. He also produced the Post Rape Care (PRC) form filled on 22nd March 2014. That according to the medical reports, the incident occurred on 21st March 2014. Finally, his evidence was that this was the minor's first sexual encounter.
15. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. The appellant called two witnesses in his defence. The appellant's sworn testimony was that on 21st March 2014, he met PW3 together with her husband at the junction at 9:30 p.m. His evidence was that PW3 asked him to go to her home and check up on PW1 and PW4. He was then given the keys to access the homestead. He was assured that he would be served tea.



16. The appellant proceeded to the home where PW1 opened the gate for him. She was then served with tea by PW1. After he was done, PW1 escorted the appellant to the gate. While at the gate, the appellant testified that PW1 fell ill and leaned against the fence. He then asked her what was wrong prompting the attention of PW4. Together with PW4, they helped PW1 to the house. Thereafter, PW3 was called and returned home together with her husband.
17. It was his further evidence that PW1 was interrogated privately.
Shortly thereafter, the appellant was informed that PW1 had disclosed that he had defiled her. He suggested that the matter be resolved at the police station. His evidence was that he took the complainant, her grandfather and PW4 all to Salama Health Centre with his bodaboda. They were then advised to go to the police station. At the police station, the appellant received a note to head to the hospital. They were referred to Nyahururu District Hospital but instead went back home.
18. The following day, the appellant took PW1 and PW3 to Nyahururu District Hospital. He was asked to wait outside. On calling them, they did not pick or return his calls. Come 25th March 2014, the appellant got wind of the fact that a report was made at the police station on that day that he had defiled the complainant. He met PW3 and PW4 at Karamton. He was then asked by a police officer to go to the police station to which he declined to go.
19. It was his further evidence that he was subsequently arrested on 26th March 2014. He was released on a cash bail of Kshs. 5,000.00 that was refunded to him the next day. One week later, the police and the complainant's family members began to demand for his domestic animals in exchange for parting away with the case. He was later arrested on 15th May 2014. He denied committing the offence. He also testified that he was informed that the complainant was epileptic. The appellant confirmed that there was no grudge between the two families and that is why he was invited to have tea. He denied that he went underground as alleged by the prosecution.
20. DW2 Joseph Karimi Maina testified that on 22nd March 2014, he was in the company of the appellant at around 9:00 a.m. He was carrying the complainant together with her grandparents. The appellant then informed him that he was being accused of defilement. He confirmed that appellant's calls went unanswered when calling PW3. In a quest to resolve the issue, DW2 was part of a reconciliatory team that visited the complainant's home. PW3 requested him to tell the appellant to admit the offence and settle the hospital bill to which the appellant refused.
21. DW3 Michael Githiaka Kimani informed a police officer on 25th March 2014 that he knew appellant as a co-bodaboda operator. On 3rd April 2014, appellant informed him that the police had confiscated his motorbike. The officer informed him that he was being charged with the offence of defilement. He stated that the appellant was given a Kshs. 5,000.00 cash bail to which DW3 lent him Kshs. 2,000.00. He was part of the reconciliatory team together with DW2 and confirmed that appellant refused to admit that he committed the offence. He stated that appellant did run away.
22. In order for a conviction to be sustained in a charge for defilement, the prosecution must establish three essential conjunctive ingredients: the age of the complainant, penetration, and the identification of the perpetrator. On the age of the complainant, the trial court relied on the evidence of PW3 and the P3 form to prove that the minor was 13 years of age at the time of the offence. The first appellate court also made the same findings adding further that it was also PW1's evidence that she was 13 years old. We therefore find that the age of the minor was proved beyond reasonable doubt and see no reason to interfere with those findings.
23. On penetration, both the trial court and the High Court relied on the medical evidence of PW6 which disclosed that PW1's hymen was freshly ruptured and the surrounding areas inflamed. There were also



visible scanty proteins and presence of spermatozoa. We find that penetration was proved in line with section 2 of the Sexual Offences Act and we see no reason to disturb those findings.

24. Was the appellant the perpetrator? Invoking section 382 of the Criminal Procedure Code, the High Court rightly found that the offence took place on 21st March 2014 after looking at the evidence of PW1, PW3, PW4, PW5 and the appellant. Both courts also congruently confirmed that the appellant was well known to the victim. He was given tea by the complainant before turning on her and sexually assaulting her as narrated by PW1. The courts further found that his defence and witnesses were a sham and afterthought not shedding any iota of innocence on the part of the appellant. After cautioning itself on the dangers of convicting an accused person on the evidence of a single identifying witness, the learned trial magistrate found that PW1 was a truthful witness in line with the dictates of section 124 of the Evidence Act. These findings were elaborately reinforced by the High Court. We find that the appellant was the assailant and uphold those findings.
25. Taking the above into account, we come to the conclusion that the appellant's appeal against his conviction lacks merit. It is hereby dismissed. On sentencing, the appellant was sentenced to 20 years imprisonment in line with the provisions of section 8 (1) as read with section 8 (3) of the Sexual Offences Act. This sentence was meted out taking into account the age of the child as 13 years old. This sentence was upheld by the High Court. A reading of the provision against the findings of the two courts finds that the sentence meted out was lawful. We therefore find that the appeal against the sentence lacks merit and it is hereby dismissed.
26. In the end, we find that the present appeal is unmeritorious and it is dismissed. Accordingly, we affirm the conviction and uphold the sentence.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCI Arb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

