



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)**

**CRIMINAL APPEAL NO. 61 OF 2014**

**BETWEEN**

**RICHARD WAHOME CHEGE..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(An appeal from Judgment of the High Court of Kenya at Nyeri***

***(Wakiaga, J.) dated 6<sup>th</sup> June, 2013***

***in***

***H.C.CR. A No. 151 of 2009)***

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**JUDGMENT OF THE COURT**

1. RICHARD WAHOME CHEGE was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**. The Information was that on 13<sup>th</sup> March, 2009, in Muranga West District within Central Province he unlawfully had carnal knowledge of TW a girl under the age of 11 years. The appellant was tried and convicted by the trial magistrate and sentenced to the maximum life imprisonment.
2. Aggrieved by the conviction and sentence, the appellant lodged a first appeal to the High Court. The learned Judge, (Wakiaga, J.), confirmed the conviction and sentence meted upon the appellant. In his home-made supplementary grounds of appeal before this Court, the appellant cites four grounds as follows:
  - i. ***The learned Judge erred in law while upholding conviction on the purported visual identification by recognition by PW1 a single identifying witness in light of no first report to the police.***
  - ii. ***The learned Judge erred in law without considering that no medical report was produced to ascertain the age of the complainant.***

iii. ***The learned Judge erred in not analyzing and evaluating the entire evidence on record.***

iv. ***The learned Judge erred in law in not fully complying with Section 169 (1) of the Criminal Procedure Code.***

3. At the hearing of the appeal, the appellant was in person while the State was represented by the Senior Prosecution Counsel ***Mr. J. Isaboke.***

4. The testimony in support of the prosecution case was given by TW. She testified as follows after a *voire dire* examination by the trial court:

***“I am a pupil at [Particulars withheld] in standard 4. I am ten years old. I know I am the complainant in this case. I go to church. I know the meaning of telling the truth. My name is T W. I do recall on 13<sup>th</sup> March, 2009, at 4.00 pm I was on my way from school alone heading home. I was walking on the Kiarithe road. On the road, I met the accused near church. The accused held my hand and led me behind the church which is under construction. Accused removed my school uniform and underwear. He pushed me to the ground and laid on me after removing his trouser and underwear. Accused inserted his penis into my vagina. I felt pain and cried. Afterwards, accused released me with a warning not to tell anybody. He threatened to kill me if I tell anybody what he did to me. I saw blood coming from my private parts after the accused released me. ... Accused is well known to me. He is called Wahome Chege. Accused comes from our village [particulars withheld]”.***

5. PW 2, VW, testified that she is the mother of the complainant; that PW1 is ten years old and in class 4 at [particulars withheld] Primary School; that sometimes in March, 2009, she saw the complainant walking in difficulties and she called her demanding to know what had happened to her. That PW1 informed her that on 13<sup>th</sup> March, 2009, while walking home from school she met Wahome (the appellant), who got hold of her and defiled her in the bush next to the church. PW2 testified that she reported the matter to the police and the appellant was arrested.

6. PW 3, Danson Maina, testified that he is a clinical officer who examined PW1 a girl 10 years old. That he examined her on 20<sup>th</sup> May, 2009, and established she had been defiled; her hymen was broken and there was blood coming out from the vagina; that there were pulses without sperm; that he signed the P3 Form.

7. In his defence, the appellant testified that he was a farmer and on 22<sup>nd</sup> March, 2009, he work up at 7.30 am and after milking his cow he took it for grazing and was later arrested. That he was taken to Kangema police station and charged with the present offence of which he knows nothing. That he knows the mother to the complainant who was his lover and they had stayed together for 4 months as husband and wife. That the mother to the complainant insulted him after leaving home and this is why he has been fixed with the present offence; that the complainant was coached to tell lies.

8. At the hearing of this appeal, the appellant tendered a handwritten submission and urged us to allow the appeal. In his submission, the appellant confirms that the alleged offence took place at 4.00 pm during broad daylight and PW1 did not make an immediate report to the police and did not give the name of the alleged offender. It was submitted that if indeed PW1 recognized and knew the appellant, she should have been able to give the name to the police; that the complainant's allegations were simply a concoction and no name was given or disclosed to the doctor who examined the complainant. The appellant emphasised that the evidence of recognition relied upon by the two courts below was unworthy of belief; that PW1 never stated the duration or time she took to observe and recognize the appellant and never described the clothes worn by the appellant; that due to these gaps in the prosecution case, the identification of the appellant was not positive and free from error. The appellant further submitted that neither PW2, PW3 nor PW4 produced any documentary evidence to prove the age of the complainant; that no birth certificate

was produced and this violated the dicta in the case of ***Jon Gardon Wagner – v- R, eKLR 2010*** where it was stated that in a case of defilement, it is essential to prove the age of the complainant either by way of medical evidence or through other evidence since the ***Sexual Offences Act*** has different categories of offences and sentences for different ages. That since no age assessment was done on the complainant; the prosecution did not prove its case to the required standard. The appellant took issue with the P3 Form that was tendered in evidence stating that the learned Judge failed to note that PW3 was not the one who filled and signed the P3 Form but it was signed by a Dr. D.K. Maiwa and no reason was revealed to court as to why the doctor who filled and signed the P3 Form did not testify. That failure to call the doctor who filled the P3 Form rendered the said Form to lack a probative value that could be relied upon. The appellant further submitted that the defence evidence was not considered by the two courts below; that as an accused person, he was under no obligation to prove his innocence.

9. The State in opposing the appeal submitted that identification of the appellant was done through recognition; that the offence was committed in broad daylight and there was no possibility of mistaken recognition by the complainant. That the appellant was a person well known to the complainant as they are from the same village; that the complainant gave the name of the appellant to her mother PW2. As regards the age of the complainant, it was submitted that age was proved through the testimony of PW1, PW2 and PW 3 the clinical officer who examined the complainant. The State submitted that the High Court properly re-evaluated the evidence on record and established that the defence by the appellant was considered and did not displace the prosecution case.

10. We have taken into account the submissions by the appellant and the State. This is a second appeal which must be confined to points of law. In ***David Njoroge Macharia – v- R, [2011] eKLR*** it was stated that under ***Section 361 of the Criminal Procedure Code***:

***“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic, (1984) KLR 213).***

11. The gist of this appeal is whether the High Court was correct in upholding that the appellant was properly identified through recognition by PW1. The trial court found that it is the appellant who defiled the complainant. The High Court stated that the conviction of the appellant was safe. On our part, we are satisfied that the appellant was a person known to PW1 as they hailed from the same village; PW 1 knew the name of the appellant and she disclosed the name to her mother PW2. There is nothing on record to dent the credibility and veracity of the testimony of PW1. The offence was committed in broad daylight and there is no possibility of mistaken identity. We have no doubt in our minds that the identification of the appellant by PW1 through recognition was positive and free from error or mistake.

12. On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself.

13. Having analysed the judgment of the High Court, we are satisfied that the learned Judge properly re-evaluated the evidence on record and did not err in law in confirming and upholding the conviction and sentence of the appellant. The two courts below considered the defence testimony and correctly found that it did not displace the prosecution case which was proved to the required standard. On our part, we observe that the issue is not whether the appellant had an affair with PW2; which issue was properly analyzed by the two courts below and found to lack in

merit. The critical question is whether it was the appellant who defiled PW1. The evidence on record against the appellant is watertight; PW1 testified that it was the appellant who defiled her; this evidence remains uncontroverted. The upshot is that we find this appeal has no merit and is hereby dismissed.

*Dated and delivered at Nyeri this 15<sup>th</sup> day of July, 2014.*

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

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***JUDGE OF APPEAL***

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**