



**Mwiti v Republic (Criminal Appeal E206 of 2022)
[2023] KEHC 21176 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E206 OF 2022**

**LW GITARI, J
JULY 27, 2023**

BETWEEN

ELPHAS MWITI APPELLANT

AND

REPUBLIC PROSECUTOR

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on September 4, 2022 at around 15.30 Hours in Imenti South Sub-County within Meru County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of PKK, a child aged 3 years. The Appellant faced the alternative charge of committing an indecent act with a child.
2. He pleaded not guilty and after a full trial, the trial court found him guilty, convicted him, and sentenced him to serve fifteen (15) years' imprisonment.
3. Dissatisfied by the said judgment, the Appellant has instituted this appeal vide the Petition of Appeal filed on December 29, 2022. The Appellant consequently preferred the following amended grounds of appeal:
 - i. That the learned trial magistrate erred in matters of law and fact by failing to note that the complainant was not called despite that she narrated to her mother and the investigating officer what had happened to her.
 - ii. That the learned trial magistrate erred in matters of law and fact by failing to note that the clinical report was questionable.
 - iii. That the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution case was not properly investigated by the investigation officer.



- iv. That the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution did not prove their case to the required standard of proof as required by the law.
 - v. That the learned trial magistrate failed to take into consideration the defense of the Appellant.
4. The appeal is opposed by the Respondent and the same was canvassed by way of written submissions.

Appellant's Submissions

5. It was the Appellant's submission that the evidence adduced by the prosecution against the Appellant was not sufficient to prove the charge beyond reasonable doubts since the prosecution failed to call the complainant to give evidence of what transpired. That since the complainant was able to give information to her mother and the investigating officer about what transpired, it means that she was able to express herself.
6. It was further the Appellant's submission that the evidence of PW1 shows that the Appellant was framed. That PW1's evidence was contradictory as she stated that she called out the complainant's name and she came outside the Appellant's house and then she indicated that she met the complainant at her house. The Appellant thus submitted that the evidence of PW1 proves that she did not find the complainant at the Appellant's house.
7. In addition, it was the Appellant's submission that the evidence of the Clinical Officer that the complainant had a broken hymen was not proof of defilement. That the redness in the vagina of the complainant was not proof of defilement. That since there was no blood or severe bruises noted in the complainant's genitalia, penetration was not proved.
8. Further, it was the Appellant's submission that there was a possibility of mistaken identity of the Appellant as the investigating officer did not connect the Appellant with the subject offence. That the failure by the investigating officer to visit the scene of crime in order to interrogate the people who live at the Appellant's rentals shows that the complainant was defiled by a stranger.
9. The Appellant thus prays for this appeal to be allowed by quashing his conviction, setting aside his sentence and setting him at liberty.

Respondent's Submissions

10. The Respondent, relying on the case of *George Opondo Olunga v. Republic* [2016] eKLR submitted that the key ingredients of the offence of defilement are penetration, age of the victim and identification or recognition of the perpetrator.
11. On age, it was the Respondent's submission that the same was proved during trial. The complainant was 3 years old at the time the incident took place.
12. On penetration, the Respondent submitted that the medical evidence provided by PW2, the clinical officer who produced in evidence the complainant's medical documents, proved beyond reasonable doubt that there was penetration.
13. On identification, it was submitted by the Respondent that the complainant positively identified the Appellant as the perpetrator at the police station and even called him by name.
14. On the issue of the complainant not being called to testify as a witness, the Respondent submitted that the trial court had the opportunity to see the complainant as she was 3 years old and found that she was vulnerable and not intelligent enough to testify. That notwithstanding the fact that the complainant



did not testify, there was independent evidence of the complainant's mother, the clinical officer, and the investigating officer that linked the Appellant to the offence of defiling the complainant.

15. The Respondent submitted that the assertion by the Appellant that the trial magistrate rejected his defence without giving cogent reasons is false. That the trial court did consider the Appellant's defence and found that the same was a mere denial as the prosecution's evidence placed the Appellant at the scene of the crime.
16. Finally, on the issue of the sentence meted out against the Appellant, it was the Respondent's submission that the same was proper and within the law noting that the victim was 3 years old. It was thus the Respondent's submission that the case against the Appellant was proved beyond reasonable doubt and the sentence of life imprisonment was not harsh and excessive considering that the complainant was an innocent and vulnerable child of tender years who need protection from sexual predators. The Respondent therefore prayed for the Appellant's conviction and sentence be upheld.

Issues for determination

17. I have considered the grounds of appeal as well as the submissions of the parties. The main issue that arises for determination by this Court is whether the prosecution proved its case beyond any reasonable doubt.

Analysis

18. This is a first appeal. A first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. [See: *Okeno v R* [1972] EA 32 and *Pandya v R* [1957] EA 336]
19. Based on this authority which lays down the duty of the first appellate Court, I shall now evaluate the respective cases of the parties.

The Prosecution's Case

20. PW1 was SK, the complainant's mother. She recalled that the material day was on a Sunday. They had come back from church. She stated that at about 4.00 p.m– 4.30 p.m, children came and called the complainant who is PW1's three (3) year old daughter. That the children and the complainant left and went to the Appellant's house. PW1 stated that they are tenants at the Appellant's rental houses. That later, she went to ask her other child where the complainant was and that upon calling out her name, her daughter came out of the Appellant's house. According to PW1, she interrogated the complainant who after some reluctance, told her that the Appellant had removed her clothes and placed his penis in her vagina. PW1 reported the matter at Igoji Police Station where she was then referred to take her daughter to hospital. She presented the complainant in court and the learned trial magistrate observed her and held that she was not intelligent enough to testify.
21. PW2 was Timothy Mberia, a clinical officer at Kanyakine Sub-county Hospital. It was his testimony that the complainant a minor was taken to hospital on September 4, 2022 with a history that she had been defiled by someone known to her the same day at about 4 pm. That on examination, PW2 founds that the minor had redness on her labia minora and her hymen was missing. That lab tests were conducted and the HVS showed epithelial cells and urinalysis showed pus cells. He assessed the degree of injury as grievous harm and issued the appropriate medication. PW2 produced in evidence the minor's P3 form, treatment card, and lab test report as P. Exhibits 1, 2, and 3 respectively. He testified that the redness of labia minora and loss of hymen is indicative of penetrative sexual intercourse.



22. PW3 was PC Mercy Mugo, the investigating officer. She stated that on the material day at around 5 pm, she was called by one IP Kiaga who informed her that there was a minor complainant at the police station who had gone to report allegations of defilement by a neighbour, the Appellant. That the minor narrated to her how the Appellant defiled her and that PW3 then escorted the Appellant and the complainant to hospital at Kanyakine and thereafter recorded their statements. She produced the minor's birth certificate as P Exhibit 3. It shows that the date of complainant's birth is 3rd January, 2019 and was therefore three and half (3½) years at the time of the incident.

The Defence Case

23. When put on his defence, the Appellant denied committing the alleged offence. He raised the defence of alibi stating that on the material day, he left work at 7 am. That he went to feed pigs and then went to a hotel to take tea. It is his testimony that he was with one Kaburu where he worked to purchase firewood and that they parted ways at 12 pm further, that he went to bed at 5 pm. and when he woke up, he was arrested.

24. From the above facts, I shall now move to analyzing the issues arising for determination by this Court.

a. Whether the failure to call the minor-complainant as a witness was fatal to the prosecution's case

25. The critical ingredients that constitute the offence of defilement are: the age of the complainant, proof of penetration, and positive identification of the assailant. [See: *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013] In *George Opondo v Republic* [2016] eKLR cited by the respondent the court stated that the ingredients of the charge of defilement are-;

1. Age of the victim
2. Identification of or recognition of the perpetrator
3. Penetration.

These constitute the ingredients of the offence which the prosecution is duly bound to prove beyond any reasonable doubts.

26. The minor complainant in this case was not called as a witness. According to PW1, the minor's mother, her daughter disappeared from home for about 30 minutes and when she returned, she told her that she had been defiled by the Appellant.

27. On her examination in chief, PW1 stated that the incident took place on a Sunday at about 4-4.30 pm. That they had come back from church and the children went to the Appellant's house. In her cross examination, PW1 stated that the other children went back to church and the complainant was left in the Appellant's house when she was allegedly defiled.

28. It was the prosecution's case that the minor complainant was alone with the Appellant at the time the alleged offence took place. The complainant was brought to court on October 3, 2022 and the trial magistrate held that she was not intelligent enough to testify. She then proceeded to call the mother to testify. When a child of tender years is a witness the trial magistrate is supposed to conduct a *voire dire* examination of that witness. Section 19 of the *Oaths and Statutory Declarations Act* sets out the procedure for taking evidence of a child of tender years. The Section provides -;

“ 19. Evidence of children of tender years-;

- (1) “Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called



as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code (Cap 75), shall be deemed to be a deposition within the meaning of that section. [Act No 42 of 1954, s 2, Act No 46 of 1963, Second Sch.]

- (2) If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.”

29. The child of tender years is defined under the *Children's Act*. However, the Court of Appeal in *Maribett Loonkomok v Republic* Court of Appeal Mombasa Criminal case No 68 of 2015 the definition of a child of tender years under the *children Act* was held not to apply under Section 19 of oaths or Statutory Declarations Act. The courts have held that for the purpose of *Sexual Offences Act*, a child of tender years is one under the age of fourteen years, see *Kabageny Arap Kolie v R* (1959) EA 82 and *Patrick Kathurima v Re*. Nyeri Cr Appeal No 131/2014. Where a child of tender years is called as a witness the court should conduct a *voire dire* examination before allowing a child to testify. It is necessary for a trial court to conduct a *voir dire* examination to assist it to determined-;
- I. whether the child understands the nature of the oath, in which case the evidence may be received on oath,
- II. To ascertain whether, if the child does not understand the nature of the oath, the child possesses sufficient intelligence and understands the duty to tell the truth. If she finds in the affirmative, the evidence may be received though not given on oath.
30. In this case the trial learned magistrate did not conduct a *voire dire* examination. Mere observation of the minor was not sufficient for the trial magistrate to conclude that the minor was not intelligent. The procedure adopted by the trial magistrate was flawed and her finding was not based on any evidence.
31. From the record, the three witnesses told the court that it is the child who told her mother who defiled her. This was also the testimony of the Clinical Officer. The P.W 3 on her part testified that it is the child who told her who defiled and even called him when they were at the police station. These testimonies show that the minor could talk and express herself, the trial magistrate erred by failing to conduct a *voire dire* examination.
32. The victim was a vulnerable witness as children are included under part 3 of *the constitution*. Where a child is required to give evidence, they must be allowed to give evidence with the help of an intermediary. Article 50 (7) of *the Constitution* provides that-;
- “In the interest of justice a court may allow an intermediary to assist a complainant or an accused person to communicate with the court”
33. On the other hand, the *Sexual Offences Act* under Section 31 puts in place measures to protect a child. It is imperative for the prosecution to apply that the child be declared a vulnerable witness. The court has discretion to invoke Section 31 of the *Sexual Offences Act* and appoint an intermediary where the



witness is a child and can invoke Section 31 (2) on its own motion. Section 31 of the *Sexual Offences Act* provides-;

‘31. (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is –

- (a) The alleged victim in the proceedings pending before the court;
 - (b) A child; or
 - (c) A person with mental disabilities.
- (2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused a vulnerable witness if in the court’s opinion he or she is likely to be vulnerable on account of -;
- (a) Age;
 - (b) Intellectual, psychological or physical impairment;
 - (c) Trauma;
 - (d) Cultural differences;
 - (e) The possibility of intimidation;
 - (f) Race;
 - (g) Religion;
 - (h) Language;
 - (i) The relationship of the witness to any party to the proceedings;
 - (j) The nature of the subject matter of the evidence; or
 - (k) Any other factor the court considers relevant.
- (3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.
- (4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures –;
- (a) Allowing such witness to give evidence under the protective cover of a witness protection box;
 - (b) Directing that the witness shall give evidence through an intermediary;
 - (c) directing that the proceedings may not take place in open court;
 - (d) Prohibiting the publication of the identity of the complainant or of the complainant’s family, including the publication of information that may lead to the identification of the complainant or the complainant’s family; or



- (e) Any other measure which the court deems just and appropriate.
- (5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.
- (6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.
- (7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may –;
 - (a) Convey the general purport of any question to the relevant witness;
 - (b) Inform the court at any time that the witness is fatigued or stressed; and
 - (c) Request the court for a recess
- (8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including –;
 - (a) Any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness’s age and maturity;
 - (b) Any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
 - (c) The need to protect the witness’s dignity and safety and protect the witness from trauma; and
 - (d) The question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.
- (9) The court may, on its own initiative or upon the request of the prosecution, at anytime revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefore at the time of the revocation or variation.
- (10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.
- (11) Any person, including a juristic person, who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatsoever reveals the identity of a witness in contravention of a direction under this section, is guilty of an offence and liable on conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both if the person in respect of whom the publication or revelation of identity was done is under the age of eighteen years and in



any other case to imprisonment for a term of not less than three years or to a fine of not less than two hundred thousand shillings or to both.

(12) Any juristic person convicted of any offence under this section shall be liable to a fine of one million shillings. 22 No 3 of 2006 *Sexual Offences Act* Rev. 2009]

(13) An accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.

34. The Court of Appeal in the case of *MM v R* [2014] eKLR states as follows:

“It is clear from the section 31(2) and 32 that first and foremost section 31 (2) and 32 that it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition the court as we have earlier observed, can on its own motion thro’ voir dire” examination declare a witness vulnerable and proceed to appoint an intermediary.... The procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so sue moto.’

35. The learned trial magistrate erred by failing to conduct a voir dire” examination and failing to appoint an intermediary for the complainant. I find that it is in the interest of justice that the testimony of the victim be received since there is evidence which shows that there was evidence of defilement.

36. Accordingly, I find that the trial Magistrate erred by failing to conduct a voire dire examination to determine the admissibility of the complainant’s evidence or her competency. (see Duhaime, Lloyd. Voire dire “definition” Duhaime’s legal Dictionary). In the case of *Johnson Muiruri v Republic* [1983] KLR, the court stated the purpose of a voire dire as follows;

“Where in any proceedings before any court a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of the oath in which his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking.” It is therefore well settled that the only way the court can determine whether a child of tender years can give evidence is through a voire dire examination. That examination must of necessity involve putting question to the witness and based on the answers, the trial magistrate then determines whether the evidence should be received. In this case since the witnesses stated that the child is the one who informed them as to what happened, it was incumbent upon the trial magistrate to examine her and not merely to observe her.

37. I should then determine the consequences of not conducting the *voire dire* examination and failure to call the complainant as a witness. It is clear from the record that no voire dire examination was conducted. The complainant did not adduce evidence. It was erroneous for the learned trial magistrate to deliberately fail to conduct voire dire examination after merely observing her.

38. In *Manipett Loolukomok v R Court of appeal, Mombasa* [2016] KLR the Court of appeal stated that evidence taken without examination of a child to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person.

39. In this case the evidence of the child was not recorded at all. Despite this fact all the witnesses who gave evidence stated that it is the child who informed them that it is the appellant who defiled her. This



brings me to the next question that is what is the consequence of not calling the child to testify? It is trite that the victim of the crime is the prime witness on behalf of the Republic. In the circumstances of this case failure to call the victim of the crime vitiates the conviction because the testimony of (PW 1) the complainant and that of (P.w 4), the Police Officer is hearsay. I find that failure by the trial magistrate to examine the complainant and failure to call her to adduce evidence vitiates the conviction. I do not agree with the submissions by the state that, notwithstanding the fact that the complainant did not testify, there was independent evidence by the complainant's mother, the clinical Officer and the investigating Officer. This is because all of them adduced hearsay evidence.

40. In the case of *Kenyatta v Republic* Cr Appeal No 60/1983 (CA) it was held that –“Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying. It is not original evidence and is inadmissible”
41. *The constitution* provides that evidence obtained in a manner that violates the rights of an accused should be excluded if it would render the trial unfair. See Article 50 (4) of *the Constitution*.
42. The rule against hearsay or indirect evidence is that it is inadmissible. The evidence of a witness whose object is to establish the truth of the statement of a witness who was not called amounts to hearsay and is inadmissible. The evidence of Pw 1, and Pw 4 would only have been admissible if the complainant had testified.
43. I find that this is a matter where I should order a retrial as there was clearly an error by learned trial Magistrate failure to conduct a *voire dire* examination of the complainant and failure to call her as a witness. Having arrived at this finding, I need not consider the other grounds of appeal.
44. I order that a retrial shall be conducted by a magistrate with Jurisdiction either than the learned trial Magistrate. The appellant shall be remanded at Nkubu Police station. He be produced at Nkubu law Courts on July 31, 2022 for plea taking.
45. To that extent the appeal succeeds.

DATED, SIGNED AND DELIVERED AT MERU IN OPEN COURT THIS 27TH DAY OF JULY 2023

IN PRESENCE OF

Court Assistant – V. Kiragu

Gitonga for the State

Appellant – present

Hon. Lady Justice L. Gitari

High Court - Judge

