



REPUBLIC OF KENYA



KENYA LAW
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**Mwiti v Republic (Criminal Appeal E062 of 2022)
[2023] KEHC 26130 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E062 OF 2022
DK KEMEL, J
NOVEMBER 30, 2023**

BETWEEN

BENJAMIN MWITI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. B.M Mararo PM
in Nanyuki CM's Sexual Offences No. E038 of 2021 delivered on 21/10/2022)*

JUDGMENT

1. The appellant was arraigned in the subordinate court facing charges of defilement contrary to Section 8(1) as read with section 8(2) of the [Sexual Offences Act](#). It was alleged that on 5th June, 2021 at Buuri West Sub-County within Meru county intentionally and unlawfully caused his penis to penetrate the vagina of PN, a child aged seven years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006 with the particulars being that on the 5th day of June, 2021 at Buuri West Sub County Meru County within the Republic of Kenya unlawfully and intentionally touched the vagina of PNM a child aged seven years with his penis.
2. The appellant denied the charges and the matter proceeded to hearing wherein evidence was adduced as follows.
3. The victim testified as PW-1 and stated that on the material day, her mother had gone to the shop and her father was away and that she was playing with her sister. That the appellant came and sent the sister to the shop and called the victim into his house, closed the door and defiled her and that she felt a lot of pain. That the appellant later told her to put on her underpants and wash. That thereafter, she went to a neighbour's and when her mother came back in the evening, she reported what had happened. The mother took her to Timau Police Station and later to hospital for check up.



4. PW-2, AN, the victim's mother stated that the appellant was her employee. That she had gone to the shop on that day and had left her children with a mama Ruth and at 10.00 am, she sent her employee known as Gatwiri to give them food and come back. That when she came at 8.00 pm, the victim informed her about what the appellant had done to her and on examining her private parts, she noticed it was swollen. She later took her to the police station and later to Nanyuki Hospital where the doctors confirmed that she had been defiled. On cross-examination, she stated that the appellant who had been their worker did not run during his arrest.
5. PW-3 PC John Kibe stated that he received a report of defilement case on the same day. He proceeded with the victim and her parents to Nanyuki Teaching and Referral Hospital for medical examination where the defilement was confirmed. He recorded witness statements and charged the appellant.
6. PW-4 Salat Ngare, a clinical officer from Nanyuki Teaching and Referral Hospital stated that he examined the victim and filled a P3 form which he produced into evidence. According to his findings, the labia minora was reddish and that the hymen had been freshly broken thereby indicating evidence of penetration. He produced the PRC and P3 forms as exhibits.
7. The trial court subsequently put the appellant on his defence and he elected to offer unsworn evidence which was to the effect that he did not commit the offence. That the complainant had asked him to accompany him to Timau but took him to the police. That he was owed Kshs 51,000/- as he had not been paid for five months.
8. By a judgment of that court, the appellant was convicted and sentenced to thirty years' imprisonment. Aggrieved, the appellant moved this court on appeal raising the following grounds;
 - a. The learned trial magistrate erred by failing to note that the prosecution did not prove their case beyond reasonable doubt.
 - b. The learned trial magistrate erred by not appreciating that the complainant gave conflicting evidence.
 - c. The learned trial magistrate erred by failing to note that the appellant was not placed squarely at the scene of crime.
 - d. The learned trial magistrate erred by failing to note that all the prosecution witnesses apart from the complainant were not the initial witnesses who recorded statements.
 - e. The learned trial magistrate erred by failing to note that the accused's right to cross-examine witnesses provided for under Article 50(2)(k) of *the Constitution* of Kenya were contravened.
 - f. The sentence meted out on the appellant was harsh and excessive.
9. By directions of the court, the appeal was disposed of by way of written submissions. The parties duly complied.

Analysis And Determination.

10. Having perused the proceedings before the trial court as well as the petition of appeal and the submissions on record, I propose to first deal with the issue raised in relation to violation of the appellant's rights under article 50(2)(k) of *the Constitution* since it is my view that a determination of the issue will inform whether to analyze the other grounds of appeal.
11. Article 50(2)(k) of *the Constitution* provides that every accused person has the right to a fair trial, which includes the right to; to adduce and challenge evidence



12. I have perused the record and note that the trial court after conducting a voire dire examination found that the minor was not properly seized of capacity to undertake the importance of an oath. Thereafter, the minor proceeded to tender unsworn evidence. There was no evidence that she was cross-examined either by the appellant.

13. The Court of Appeal in *Gailord Yambwesa Landi v Republic* [2019] eKLR after reviewing a number of authorities on the issue of whether failure by an accused person rendered the trial a mistrial held;

Clearly there was a misstep or omission on the part of the trial court. It was the appellant's right to test the child's evidence through cross examination..... The election on whether to cross-examine or not is the prerogative of the accused and not of the witnesses or of the court. And the record does not show the appellant was afforded the opportunity and elected not to cross examine the child. In view of this apparent lapse in the trial process, we are satisfied that the appellant was not afforded a fair hearing, which was contrary to the stipulations of *the Constitution* and the law.

14. In arriving at the decision, the court considered an earlier decision in *Paul Kinyanjui Kimauku vs Republic* [2016] eKLR, where it had been held;

“...the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of *the Constitution*, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined.”

15. Taking cue from the above authorities, I am satisfied that the trial in this matter fell short of the constitutional dictates. I hereby proceed to find that the failure by the trial court to accord the appellant the right to cross-examine the witness fell short of the constitutional requirement and hence the eventual conviction arrived at by the trial court was not safe. The same cannot be sustained.

16. Stemming from the above finding, the next question is the appropriate orders to be issued in the circumstances. The options available as stated by the Court of Appeal in *Gailord Nyambwesa (supra)* are; acquit the appellant, or disregard the complainant's evidence and determine the appeal on the basis of other witness evidence, or whether to declare a mistrial and remit the case back to the trial court for rehearing.

17. The court proceeded to analyze the various options and found that;

..... the record shows that the appellant was charged with the offence of defilement on 29th March 2016. The trial court rendered its judgment on 11th July 2016. The appellant was dissatisfied with the judgment of the trial court and appealed to the High Court which rendered its judgment on 16th April 2018. Between the time that the appellant was charged and the date the High Court rendered its judgment is approximately 2 years. At the commencement of the trial the complainant was eight years old. At this point in time she would be about 12 years old. In our view, remitting the case back to the trial court for retrial



3 years after the appellant was charged with the offence is not an inordinately long period, and we do not envisage that any prejudice will be occasioned to either the complainant or the appellant. Additionally, despite the passage of a period of 2 years, we do not consider that there will be any serious challenges faced in tracing the witnesses.

18. Applying the above facts to the present case, the incident took place on 5th June, 2021, trial proceeded and the sentence passed on 21/10/2021. That is a period of slightly over two years gone by. I find the same not to be a long period such that it can be said that the witness recollection of the events may have been lost. It is also believed that the witnesses are still available. It is noted that both the appellant and the victim are entitled to justice and therefore I find that the matter is fit for a re-trial.
19. In view of the foregoing observations, it is my finding that the appeal has merit. The same is allowed. The conviction is quashed and sentence set aside and is substituted with an order that a re-trial do commence. The matter is now fixed for mention on the 3/12/2023 before the Chief Magistrate Nanyuki law court for the purposes of a re-trial.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NANYUKI THIS 30TH DAY OF NOVEMBER, 2023

D.KEMEI

JUDGE.

In The Presence Of:-

Benjamin Mwiti Appellant

Miss Kimani for Respondent

Savuni Court Assistant

