



REPUBLIC OF KENYA



**JWN v Republic (Criminal Appeal 30 'A' of 2016)
[2022] KEHC 16999 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL 30 'A' OF 2016
GWN MACHARIA, J
DECEMBER 20, 2022**

BETWEEN

JWN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in the
Chief Magistrate's Court at Naivasha in Sexual Offence Case No.
5A of 2014 delivered by Hon. S. Muchu (RM) on 30th June, 2016)*

JUDGMENT

1. The Appellant, JWN, 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 were that on 31st December, 2013 in Gilgil Township within Nakuru County, intentionally and unlawfully caused his genital organ namely penis to penetrate the vagina of JW, a girl aged 4 years. He 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. The particulars were that on 31st December, 2013 in Gilgil Township within Nakuru County, he intentionally and unlawfully caused his genital organ namely penis to come into contact with and touched the vagina of JW, a girl aged 4 years with his hands.
2. The Appellant pleaded not guilty to both charges. Upon trial, he was convicted of the offence of defilement and sentenced to serve life imprisonment. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

Grounds of Appeal

3. The Appeal is based on five grounds contained in the Appellant's Amended Grounds of Appeal filed alongside his written submissions. These are:



1. That the learned trial magistrate erred in law and fact by failing to appreciate that the correct procedure of admitting evidence through an intermediary was not followed thus causing the Appellant great prejudice.
2. That the learned trial magistrate erred in law and fact by failing to find that there were crucial witnesses who were never called upon to testify by the prosecution.
3. That the learned trial magistrate erred in law and fact by failing to find that the prosecution did not discharge its duty of moving its case against the appeal beyond reasonable doubt.
4. That the learned trial magistrate erred in law and fact when she failed to consider the Appellant's defence and misdirected herself on the same by alluding to facts which were not canvassed in evidence.
5. That the sentence imposed was not only extremely harsh but also excessive since it was applied in mandatory terms without consideration of the facts of the case, antecedents of the Appellant's mitigation.

Summary of Evidence

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See *Okeno v Republic* (1972) EA 32).
5. The prosecution's case can be summarized as follows: On the evening of 29th December, 2013, PW2, MW, a soap hawker from Tam Tam in Gilgil was at [Particulars Withheld] Bar when the Appellant herein walked in with the complainant, the child victim. The Appellant approached her and asked her to direct them to a place where they could sleep since they had come from far. PW2 offered to take them to her house where she gave them food and a place to sleep. PW2 had three children herself. The eldest was a boy aged eighteen years, followed by a girl aged fourteen years and the youngest was a seven years old boy. The Appellant slept with the complainant on the ground. He told PW2 that his wife died in Kutus and asked PW2 to marry him.
6. On 30th December, PW2 went to Alone to a mama Muthoni to sell her bed since they had agreed with the Appellant that they would go to Mwea together to sell rice. She returned at 4.00pm and found the Appellant, the complainant and her three children at home. PW2 slept with the Appellant on the same bed that night. On 31st December, 2013, PW2 left for Bondeni at 7.00am with the Appellant and a lady called Faith to look for a buyer for her bed. Her 18-year old son had also gone to work earlier on at 6.00am. On her way back, a lady called her and told her that the complainant had been defiled by the Appellant. She went and found the child outside the house. She checked her and confirmed that she had discharge in her vagina. A mob started beating the Appellant. They took him to Gilgil Police Station.
7. The investigating officer, PW4, PC Cephas Oluoch attached to Gilgil Police Station – Crimes and Investigations Department was at the station on 31st December, 2013 at around 10.00am when he heard some noise. He went outside and found members of the public leading the Appellant to the Station while carrying twigs and leaves. He rescued the Appellant from the mob and took him in for interrogation. He found out that the Appellant who was not a resident of Gilgil, had met PW2 in a club and they instantly agreed to stay together as husband and wife. They had also agreed that PW2 would sell her belongings and then the two would move to Kirinyaga where the Appellant hailed from. PW4 established while looking for a market to sell her items, PW2 heard that the Appellant had defiled



- the child he came with. The Appellant told him that the child was his daughter but he had no proof. After interrogations, he took both the child and the Appellant to hospital.
8. Upon examination, the child had an inflamed vagina, broken hymen and greenish yellow discharge. A high vaginal swab revealed the presence of pus cells although no spermatozoa was seen. A urinalysis test also revealed pus cells. The child's P3 Form was filled on 2nd January, 2014. On examination, there was inflammation of the vulva, torn hymen, mild labial edema and whitish green discharge. The P3 and PRC Forms were produced in evidence by PW3, Dr. Seif Salim of Gilgil District Hospital.
 9. Thereafter, PW4 took the child to Saidia Children's Home while the Appellant was remanded in prison.
 10. During trial, the court appointed an intermediary, PW1 Eunice Njeri Njuguna, the District Children's Officer, Gilgil to testify on behalf of the child. PW1 stated that the child's mother died a long time ago. Further, that on 31st December, 2013, the child's father removed her pants, defiled her and threatened her not to disclose to anyone what had happened then he left the house. Later, a neighbor saw her walking in difficulty and called her and examined her private parts. The child later saw her father being arrested by many people. PW1 produced a statement recorded by the child at the police station, on the child's behalf.
 11. When placed on his defence, the Appellant gave a sworn testimony and did not call any witness. He testified that he has three children namely: the complainant herein JW, CM and SN. He used to stay with two of his children and his wife where he had secured employment while the third one stayed with their grandmother. That his wife ran off with one of the children and left him with the complainant. He used to work at Olkalau in Nyandarua. On 28th December, 2013, he decided to go to Lamu where his mother and some of his sisters stay. He boarded a motor vehicle with his daughter, the complainant, and they alighted at Gilgil. They entered a hotel and took food. PW2 came and asked him to buy her food which he did. She asked where he was going with the child and he told her that his wife had escaped and so he had decided to go back home. PW2 claimed it was God who had made them meet because she was also looking for a husband.
 12. They talked and agreed on the same day that he would marry her and they would go to his home. On the way out, PW2 asked him for 200/= in order to get her phone from a man she owed that amount. She went and retrieved the phone then they went to her house at [Particulars Withheld] in Gilgil. He found out that she had four children and his child was mixed with the others. The children made food and they ate and slept. PW2 told him that she could only sell her bed because other items were easily portable. On 29th December, 2013, she asked him to accompany her to get a buyer for her bed. They went out but did not get a buyer. They did the same thing the next day. He tried to persuade her to leave the bed behind if she was unable to get a buyer but she insisted that they had to sell it.
 13. On 30th December, 2013 when they were supposed to travel to his home, he heard a lady called Faith knocking at their door calling PW2. She asked PW2 whether they were leaving because she wanted to buy them liquor for the last time. Faith took them to a place where they took chang'aa then they left her there and decided to go back home. On their way, a certain lady called PW2 aside. They kept on conversing while looking at him and laughing. They went ahead of him. On reaching the plot, he found about four (4) people with PW2 and that lady armed with twigs. They attacked him claiming he had defiled the complainant. More people joined in and PW2 hit him with a twig on the legs causing him to fall. He told them that there was no way he could have defiled his child yet he had stayed with her all that while. They stole 9,000/= from him. To rescue himself, he ran towards the police station. The child was also escorted to the station then they were taken to the hospital. PW2 claimed that the mother of his child had died. He was shocked by that allegation because PW2 knew nothing about him.



14. He was later brought to court and charged with the subject offence. On the hearing date, the complainant was brought to court and she kept saying that she knew nothing about this matter. When the court ordered PW4 to find out about his family and establish whether he had kidnapped the child, PW4 said the motor vehicle did not have enough fuel to take them up to where he used to stay. Further, he testified that he later came to know that PW2 was a bad person even though he was ready to live with her from their first meeting.

Analysis and determination

15. Upon carefully re-evaluating the evidence on record and considering the parties' respective written submissions, I find that the following are the issues for determination:
- a. Whether the correct procedure of appointing and admitting evidence through an intermediary was followed by trial court.
 - b. Whether the prosecution proved its case beyond a reasonable doubt; and
 - c. Whether the sentence imposed was proper.

Whether the correct procedure of appointing and admitting evidence through an intermediary was followed by trial court.

16. The Appellant contended that the procedure of appointing and admitting evidence through an intermediary was not followed to the letter. He took issue with the fact that PW1 testified without the victim being physically present in court and the fact that PW1 was not reporting verbatim what the victim was saying. Further, the Appellant challenged the fact that the questions in cross-examination were not directed to the victim by PW1 so that she could answer them instead of PW1 answering them as an independent witness.
17. Section 2 of the *Sexual Offences Act* defines an intermediary as –
- “...a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker”.
18. Article 50(7) of the *Constitution* as read with Section 31(2) of the *Sexual Offences Act* allow the court to appoint an intermediary to assist a victim of sexual offence testify either on its own initiative or on request of the prosecution or any witness. Notably however, it is for the court to assess the witness and determine that indeed she/he is vulnerable and decide whether or not to appoint an intermediary. In *NM v Republic* [2014] eKLR, the Court of Appeal said thus;

“It is clear from sections 31 (2) and 32 that, first and foremost 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, through voire dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.”



19. The Court was clear that the trial court must ascertain;

“...the expertise, possession of special knowledge or relationship with the witness through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness’ testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary’s participation in the proceedings.” (Emphasis)

20. In this case, Hon. S. Mwinzi who partly heard the case appointed PW1 as an intermediary on the request of the prosecution due to the tender age of the victim and directed that she would testify on behalf of the child. He clearly did not follow the correct procedure for such appointment as he simply made the decision to appoint the intermediary without assessing or seeing the victim.

21. Further, in the evidence in chief of PW1, she alluded to the child being present in court. However, it appears as though she was giving the evidence as an independent witness by reference to a statement recorded by the victim at the police station which she tendered in evidence rather than as an intermediary. Further, there is nowhere in the court record where it is indicated that the child was ever brought to court. The law is very clear that an intermediary is not a mouth piece of a vulnerable witnesses. Under the provisions of Section 31(7) of the *Sexual Offences Act*, an intermediary’s role is to convey the general purport of any question to a vulnerable witness, inform the court at any time that the witness is fatigued or stressed and to request the court for recess. In *NM v Republic (supra)*, the Court of Appeal emphasized the role of an intermediary as follows:

“The intermediary’s role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness’ emotional and psychological state and concentration, and to alert the trial court of any difficulties.”

22. I therefore find that the trial court did not follow the correct procedure for appointing and admitting evidence through an intermediary. In *Peter Anthony v Republic* [2020] eKLR, the High Court, when faced with a similar situation held that such an approach denies an Accused the opportunity to cross-examine the victim and in effect also denies him the right to fair trial guaranteed under Article 50(2) of the *Constitution*. I agree with the said position because the Accused person ought to get first hand information of what transpired from the complainant. In this case however, it was the intermediary who appeared to give her own evidence, albeit on behalf of the complainant. No doubt in this scenario Appellant herein was prejudiced with the manner in which the evidence of the intermediary was taken. thus, denting him the right to fair trial.

23. I hasten to add that this rule is not cast in stone as there may be instances when a complainant may completely be unable to testify on her/his own even in the guided manner as elucidated by the Court of Appeal. But even in such circumstances, the trial court must record the reason(s) why the complainant should testify through an intermediary and its observation of the inability of the complainant to speak on his/her own behalf. To me, this underpins the guidelines in *NM v Republic (supra)*.



Whether the prosecution proved its case beyond reasonable doubt.

24. Section 8(1) of the *Sexual Offences Act* provides as follows regarding the offence of defilement:
- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
25. In determining this offence, the court is required to consider whether the prosecution proved the following ingredients to the required standard: proof of penetration, age of the victim and the positive identification of the Appellant as the perpetrator of the offence.
26. As regards the age of the victim, I note that no birth certificate, birth notification, baptism card or age assessment report was tendered in evidence in this regard. Hon. Muchungi (RM) who wrote the judgment in the trial court admitted that she never had a chance of seeing the child since the matter had partly been heard by Hon. Mwinzi at the time she took over. However, the learned magistrate noted that there was ample evidence before her to show that the victim was a child of tender years. I have carefully re-evaluated the evidence record. PW1 who had met the child stated that the child was about 5 years. The investigating officer PW4 stated that the child was of very tender age and was being carried around most of the time. Again, the Appellant in his defence stated that the child was five years as at June 2016 when he tendered his defence.
27. In the premises, I am satisfied that the complainant was indeed a child of around 5 years for purposes of establishing the offence of defilement. I am also in agreement with the learned magistrate’s finding that the child was below eleven years and fell within the age bracket specified in Section 8(2) of the *Sexual Offences Act*.
28. As regards penetration, it is my considered view that the medical evidence produced by PW3 which showed that the child had an inflamed vagina and broken hymen, was conclusive evidence that her genitalia was penetrated.
29. The question that this court has to grapple with now is whether the prosecution proved beyond reasonable doubt that the Appellant is the one who penetrated PW1’s genitalia. The Appellant submitted the prosecution’s case was full of contradictions and inconsistencies which caused him great prejudice as he was convicted on the basis of evidence that did not prove his guilt beyond a reasonable doubt. In this regard, he took issues with the testimony of PW2 both in examination in chief and cross examination. Further, He noted that PW4 insinuated that PW2 was alone when she went to look for a buyer for her bed yet PW2 testified that she went with the Appellant and another lady.
30. It was also the Appellant’s contention that the prosecution failed to call two very crucial witnesses namely, the victim of the offence and the woman who allegedly discovered the defilement. He submitted that the woman would shed light on how she came to know and believe that it was the Appellant who perpetrated the act. He therefore urged the court to make an adverse inference that the evidence of the uncalled witnesses would have been adverse to the prosecution hence the reason they were not called to testify.
31. Additionally, the Appellant faulted the trial magistrate for failing to adequately consider his defence in light of the facts and circumstances of the offence. He accused the learned trial magistrate of having had a pre-conceived mind about his guilt.
32. From the judgment, I note that the learned magistrate relied on the evidence of the intermediary, PW1, and PW2 in establishing that the Appellant was the perpetrator of the offence. However, as I have noted hereinabove, the evidence of PW1 was not properly taken. PW1 simply referred to the recorded



statement of the child in giving her testimony. The court did not have an opportunity to observe the child so as to determine whether what was recorded in her statement and conveyed to the court by PW1 was truthful enough to warrant conviction.

33. Further, I have also carefully evaluated the evidence of PW2 and am not convinced that it points to the Appellant as the perpetrator of the offence. Firstly, PW2 stated that on 30th December, 2013, she left the Appellant at home with her three children and found them all together when she returned at 4.00pm. It was also her testimony that upon her return, they stayed at home until they slept and the Appellant slept in her bed that night. She was categorical that she did not notice any problem with the child during that time and the child did not say she had a problem. More importantly, PW2 confirmed that on the morning of 31st December, 2013, she left for Bondeni with the Appellant and only learnt about the alleged defilement on their way back when a lady called her and informed her about it.
34. The question that rises in my mind at this point is whether there was any opportunity for the Appellant to defile the child on the morning of 31st December, 2013 as alleged under the circumstances explained above. I am not convinced that there was any, especially considering the fact that PW2's house had only two rooms being the children's room which was occupied by her children and her room in which she slept with the Appellant and left with him to go and look for a buyer for her bed. The doubt created herein can only be resolved in favour of the Appellant.
35. The other notable gap in the prosecution case is the failure to call the lady and/or neighbour who discovered the alleged defilement to testify in court. I say so because the evidence tendered was barely adequate. What is on record is hearsay evidence by PW1 and PW2. The lady or neighbour was a critical witness who should have been called to testify. Whilst there is no particular number of witnesses that the prosecution should call (see Section 143 of the *Evidence Act*), this is a proper case for the court to draw an adverse inference on account of the prosecution's failure to call the said witness. My finding is supported by the case of *Bukenya v Uganda* [1972] EA 549, where the court stated that where the evidence called is barely adequate the court may infer that the evidence of the uncalled witness would have tended to be adverse to the prosecution.
36. In view of the foregoing, I find that the prosecution did not prove its case against the Appellant beyond any reasonable. The trial court therefore erred by convicting the Appellant of the said offence.

Conclusion

37. Consequently, the appeal is allowed. The Appellant's conviction is hereby quashed and the sentence set aside. The Appellant is hereby set at liberty unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 20TH DECEMBER, 2022.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.
2. Mr. Michuki for the Respondent.

