



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NUMBER 257 OF 2010**

**JOHN WANJALA MACHIO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the original conviction and sentence from Adult Criminal Case Number 14 of 2010 by the Hon. C. A. Otieno (Resident Magistrate) at Nakuru Chief Magistrate's Court)***

**J U D G M E N T**

1. According to the evidence on record, on 29<sup>th</sup> January 2010, SKN the mother to five (5) year old PN a pupil at [Particulars Withheld] Primary School was expecting her complainant to be home at 1.45 p.m. from school. The complainant did not arrive, and she became worried. She went to enquire from the neighbour whose complainant was in the same school and learnt that the neighbour's complainant already arrived from school. She went back home, and that is when one Mama Wangeci told her she had seen PN standing at the neighbour's gate. This neighbour had a workman. Mama Wangu had earlier warned her not to allow PN to go to the neighbour's house because there was a male workman

2. According to PW6, Lydia Muthoni she was locking her gate to take her cow to the farm when she saw the complainant at the neighbour's gate. For some reason which she did not reveal, after taking the cow to the farm she went to look for the complainant's mother. She did not find her. She found the complainant's aunt to whom she reported about seeing the complainant at the neighbour's gate. Later that evening is when she saw the complainant's mother who called her and she saw a man accused of defiling the said complainant being taken to the police station. She said she did not know him by name.

3. SKN was the complainant's mother. She told that court that on 29<sup>th</sup> January 2010, when PN arrived home she told her that she was coming from school with a friend, and when they reached Mama Shiko's shop they met the neighbour's workman who carried them on his bicycle. He dropped her friend at her home but went with her to his house where he cooked ugali and eggs which they ate. That after eating the man told her to undress, after which he put his penis in her vagina.

4. SKN on hearing this called a neighbour, in whose company she went and confronted the man about the alleged defilement. The man denied defiling the complainant. He was arrested by the neighbour. The complainant identified the man as the person who defiled her after he was arrested by the neighbour. SKN testified that the appellant's employer 'a doctor' examined the complainant and confirmed that the complainant had been defiled.

5. They reported the matter to Lanet Police Station, where they were issued with P3 and the complainant was taken to the Nakuru Provincial General hospital for treatment.

6. According to PN she testified,

***"I attend S.... Primary School. I am in class one. One day when I was coming from school with my friends who is called son, she is a girl. When we reached near mama Shiko, the accused person (pointing to the accused person before court) put us on his bicycle. He dropped my friend at their house. He went with me to his house. He cooked eggs and ugali. He told me to remove my dress. I was in school uniform. I removed my dress. The accused person also told me to remove my biker, and I also removed my biker. He also told me to remove my pant, I also removed my pant.***

***The accused person then put his penis in my private part which he uses to urinate (pointing to her vagina) he later told me to go home. He asked me to return again later. I did not go back to his house. The accused person later came back to our house and was arrested. I told my mother what the accused person had done to me. The accused person had never carried me on his***

*bicycle before.”*

7. According to No. 62445 PC Peter Mureithi of Lanet Police Station he was on duty when the report was made. The complainant arrived with her mother and the appellant was brought by members of the public who had tied him with a rope. He said the minor told him that the appellant carried her on his bicycle and took her to his house where he defiled her. He issued her with P3 and charged the appellant with defilement. He confirmed the age of the complainant from the mother, that she was five (5) years old.

8. PW5 a Senior Medical Officer at Provincial General Hospital Samuel Onchere testified that he examined the complainant on 2<sup>nd</sup> February 2010, after it was alleged that she was defiled on 29<sup>th</sup> January 2010. He said she was seen at casualty on the 29<sup>th</sup> January 2010. That on examining her genitalia she had highly inflamed introitus to birth canal, her hymen was freshly broken, no spermatozoa, and he concluded she had been defiled. He produced the P3 and Post Rape Care form. On cross examination he said he saw bruises on her genitalia and the hymen was broken.

9. PW3 Waithera Kariuki was the employer of the accused person. She was also a community nurse. On the evening of 29<sup>th</sup> January 2010, at 7:30pm she came home and found nobody at home. She heard that there was an allegation that the appellant had defiled a neighbour's child. She went to the house and found the complainant who had returned from the PGH. She examined her. According to her, there were no bruises or injuries on the complainant's genitalia.

10. On the foregoing evidence the appellant was charged with defilement Contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act**, but the charge was amended to read **8(2)** on account of the complainant's age. The particulars were that he **JOHN WANJALA MACHIO: On the 29<sup>th</sup> day of January 2010 at Ndege area in Nakuru District within the Rift Valley Province intentionally and unlawfully committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of PWN a complainant aged 5 years.**

In the alternative he was charged with:

**INDECENT ACT WITH A COMPLAINANT CONTRAY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006** where it was alleged that he **JOHN WANJALA MACHIO: On the 29<sup>th</sup> day of January 2010 at Ndege area in Nakuru District within the Rift Valley Province intentionally and unlawfully committed an indecent act by touching the female genital organ (vagina) of PWN a complainant aged 5 years.**

11. After hearing this evidence, the trial court put the appellant on his defence.

12. He made a sworn statement.

13. He told the court that on the material date he had been working on the farm. He went home after 12 p.m. Then he was going to the shop to buy salt. That is when he met the neighbour's child, the complainant. She told him she had gone home and not found her mother. She then went into his house as he went to the shop. On his way back he met the sister to the complainant who was in his house. She asked for a lift and he carried her on his bicycle to his house. He cooked for both. After they ate the complainant went home. At 5.30 p.m. some young men went to his house, arrested him and took him to the police post where he was accused of defilement which he denied, and continued to deny.

14. In her judgment dated 19<sup>th</sup> August 2010 the trial court found the appellant guilty, convicted him and sentenced him to imprisonment for life.

15. The appellant was aggrieved and filed his appeal on 26<sup>th</sup> August 2010. He later filed his amended and supplementary grounds of appeal. He stated:

*1. THAT my Lords, the trial learned magistrate faulted both in law and facts when erroneously failed to consider that the appellant was held in police custody for more than 24 hours contrary to Article 4991) (f) (i) (ii) 50(2)(4) 25(9) (c) of the Constitution. Given the fact that there was no satisfactory explanation tendered in court as to why the fundamental rights of the appellant were grossly violated.*

*2. THAT my lords, the trial learned magistrate once more faulted both in law and fact when he miserably failed to note that the prosecution case was not proved beyond reasonable doubts as required by the law, there was no valid document produced in court by the prosecution to affirm the age of the complainant, there was no birth certificate neither medical age assessment tendered in court to support the prosecution allegation.*

*3. THAT my lord, the trial learned magistrate further faulted both in law and fact when maliciously failed to consider there was variant between the evidence in record and the particulars of the charge sheet about the age of the complainant. The evidence adduced in consideration given to that effect in violation to Sec 48(1) of the Evidence Act CAP 80.*

*4. THAT, my Lord the trial learned magistrate similarly faulted both in law and fact when seemingly overlooked and objected the appellants sworn defence without cogent reasons yet the same was remarkably comprehensive in casting considerable doubts to the strength of the prosecution case.*

16. The appellant also filed his written submissions together with the grounds, in which he argued that the prosecution's case fell short of proof beyond a reasonable doubt, there was lack of proof of age, there was contradiction between evidence of PW3 and PW5, there was no evidence of what caused the penetration, and the trial court to had failed to consider his defence, that he never committed the offence.

17. Later he instructed counsel who filed submissions and also argued the appeal. Ms. Daye argued the appeal on behalf of the appellant, Ms. Chelang'at appeared for the state.

18. The appellant put out two (2) issues for determination.

**1) Whether sufficient evidence was adduced before the court, court to prove the ingredient of the offence of defilement to the required standard.**

**2) Whether there were contradictions in the evidence that would vitiate the conviction against the appellant.**

19. As the appellate court, I am required to re-evaluate, re-assess the evidence placed before the trial court and draw my own conclusion, always bearing in mind that I neither saw nor heard the witnesses testify, **Okeno v Republic**.

20. I must also keep in mind the provisions of section 33 of the **Sexual Offences Act** which states;

**“S. 33. Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove -**

**(a) whether a sexual offence is likely to have been committed-**

**(i) towards or in connection with the person concerned;**

**(ii) under coercive circumstances referred to in section 43; and**

**(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.”**

The provision requires that the circumstances of the offence be considered to determine;

**1) Whether an offence was committed as alleged.**

**2) The quantum of sentence**

The two (2) issues are also a good guide not only in the trial of the offence but also in re -evaluating the evidence.

21. It is submitted for the appellant that the testimony of PW6 and that of PW1 regarding the circumstances surrounding the offence created an inconsistency that rendered PW1's testimony unreliable. PW1's version was that the complainant was late from school and she is the one who went looking for her. PW6 however said she saw the complainant at the neighbour's gate, and went to look for the mother. The mother was not at home, and she found an aunt to whom she reported the whereabouts of the complainant.

22. PW1 also testified that the appellant's employer examined the complainant and confirmed that the complainant had been defiled. This was contrary to PW3's testimony that when she, a community nurse examined the complainant on the same evening the complainant was alleged to have been defiled she found neither injuries nor bruises in her genitalia. Either PW1 or PW3 lied on oath and it was the submission on behalf of the appellant that the evidence of these witnesses was unreliable.

23. It was also submitted that the trial court did not evaluate the testimony of PW6. This evidence was to place the complainant with the appellant. The PW6 never said she was aware that the mother SKN was looking for her. And even if the PN's mother was looking for her PW6 would have been expected to ask the complainant what she was doing there and take her with her as she was going to her home. It does not appear to make any sense that she would see the complainant standing there, not speak to her, leave her there and go looking for the complainant's mother. She did not know the neighbour's workman, but saw a man being led away on allegations of defiling the complainant.

24. PW6's testimony corroborated the appellant's defence that he found the complainant at his gate and the complainant told him that she had been at her home and her mother was not at home.

25. It was also submitted that the complainant did not identify the person who defiled her for arrest.

26. From the record the evidence of arrest is this: PW6 reported to the aunt of the complainant she had seen the complainant at the neighbour's gate. Later the complainant arrived home and reported her whereabouts from the time she came from school including that *a worker of a neighbour... carried them on his bicycle.* This person was not identified by any other description, her mother testified that *“I called my neighbour who confronted the man. He denied defiling PW1”*.

27. How SKN identified the *worker of a neighbour* described by the complainant is not indicated. According to PW3 she had told her mother where she had seen the child that day. She too had not seen the child with the appellant. So it is PW2 who went to identify the man who allegedly defiled the complainant. She testified that the man in court was the man who had defiled the complainant. It was submitted from the appellant that the complainant did not identify her attacker for purposes of arrest. PW1 on her part told the court that, *“the accused person later came to our house and was arrested. I told my mother what the accused person had done to me.”* The evidence of PW2 that the culprit was arrested from his own house and that of the complainant that he was arrested from her home are two different scenarios, creating the impression that there were two suspects.

PW1's and PW2's evidence on arrest creates doubt as to who was arrested for the alleged defilement. PW2's and PW6's testimony is also doubtful on the circumstances surrounding the offence. In the case of Ndungu **Kimanyi VR [1979] KLR 283** it was held that:

*“The witness in a criminal case and upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthy or do or say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”*

28. It is noteworthy that the complainant spent quite some time with the appellant even on the appellant's admission. He cooked food for her and her sibling and they ate. She would therefore not have found it difficult to identify him on sight. However, his testimony is that after the children ate, they went home. The complainant ate lunch at about 1:00pm. The mother was confronting the appellant at 5:30 pm. The time between eating lunch and getting home is not accounted for. Where was the complainant all this time? The testimony of the other child was crucial in establishing the time they parted ways with the complainant. The sibling mentioned by the appellant ought to have been interrogated and even called to rebut the appellant's testimony that after the two children ate lunch in his house the complainant left for home. The fact that this child was not called as a witness can be read to mean that her testimony would have been adverse to the case for the prosecution

29. The evidence about the arrest and identification of the defiler is not consistent. It is PW1's testimony that the man who defiled her came to her home and was arrested. That it was after this arrest that she told her mother what the arrested man had done to her. It is after this arrest that the complainant told her mother what had happened, hence her mother's testimony that the complainant went home and told her that she had been defiled, then she went to confront the person she thought was the defiler is inconsistent with that of the complainant. From the complainant's evidence it is when the appellant was taken to her house that she told her mother she had been defiled. This is inconsistent with the case for the prosecution and creates doubt as to what happened on the material date.

30. The language attributed to the complainant in the proceedings is also doubtful. That the complainant is recorded to have stated in Kiswahili:

*“the accused inserted his penis in my private part.... We were only two of us in your house when you put your penis into my vagina...”*

The mother's testimony indicates that the complainant told her that the accused inserted his penis into her vagina. It is unlikely that a five (5) year old would utter those words in Kiswahili let alone utter them in conversation with her mother.

31. The doctor who filled the P3 on 2<sup>nd</sup> February 2010, PW3, who examined the complainant on the same night of the alleged offence were contradictory, he saw a highly inflamed introitus and freshly broken hymen, on 2<sup>nd</sup> February 2010. She saw no injuries and no bruises on 29<sup>th</sup> January 2010. Whose testimony did the prosecution want the court to rely on? The prosecution placed before the court two (2) contradictory statements from their own witnesses on the same issue, one witness rendered part of the testimony of the other a lie on oath, yet neither of them was declared a hostile witness, nor did the prosecution attempt to explain the anomaly. The testimony on oath that on 29<sup>th</sup> January 2010, the complainant had no injuries in her private parts questions the other testimony on oath that she had a freshly torn hymen, and highly inflamed introitus seen on 2<sup>nd</sup> February 2010, on the 5<sup>th</sup> day after the alleged defilement. On 2<sup>nd</sup> February 2020, the doctor indicated that there was no spermatozoa but epithelial cells were present clear sign of defilement. Yet he made no effort to connect the findings with the alleged defilement of 29<sup>th</sup> January 2020. There is also no explanation why the appellant who was allegedly arrested on the date of the alleged defilement was not taken to hospital for examination.

32. The complainant gave an unsworn testimony, for it to be relied upon it required some other supporting evidence yet, that of the mother is inconsistent, the medical evidence is contradictory. The effect of that is seen in the case of **Jamaal Omar Hussein v Republic [2019] eKLR the court of appeal cited with approval its holding in May v Republic (1981) KLR (Law Miller & Potter, JJA.) as follows;**

*“An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case.”*

33. In other words, unsworn evidence can still be relied on but it would require corroboration before it can form a basis for conviction. In more recent decision, this Court in **Mwangi v Republic (2006) 2 KLR 94** held that it is prejudicial for an accused person to be convicted on the basis of unsworn evidence.

34. The issue of the age of the complainant was testified upon by the mother who said she was born on 3<sup>rd</sup> June 2004, the Post Rape Care did not indicate any age. The P3 stated that age was noted from a clinic card, which card was not produced. Why was the clinic card which was said to be available not produced in court? While the testimony of the mother could be acceptable proof of the date of birth, where documentary evidence was available it ought to have been produced, otherwise a scenario is created where the presumption can be drawn that the same would not have supported the case for the prosecution.

35. Regarding the appellant's statement of defence. The same was made on oath, the appellant did not deny being with the complainant on that day and cooking lunch for them. However, that as soon as they finished eating she left for home. The prosecution left it for the appellant to prove his innocence as no investigations were conducted to confirm the alleged circumstances of the offence. The other child was not interviewed, the scene was not visited, the whereabouts of the complainant after leaving the house of the appellant were not traced, and the fact that the appellant was identified by the after his arrest, all compromised the case for the prosecution upon whom was the onus the prosecution to prove the charge beyond a reasonable doubt. Held against the case for the prosecution in the circumstances of this case, the appellant gave a plausible defence.

36. On the issue of the violation of appellant's right to fair trial, the appellant demonstrated that that police held him for more than twenty four (24) hours before taking him to court and gave no explanation for the same. The trial court did not also extract this information from the police. The appellant urged this court to consider the that that violation rendered his trial in the subordinate court a nullity. In their response the prosecution was of the view that that ought to have been raised before the trial court. I have perused the authority cited **Republic v Amos Karuga Karatu [2008] eKLR**

It is now settled that that the failure to produce a suspect before court within 24 hours per se does not render the trial a nullity, but he has a recourse in damages. The appellant has the right to sue the persons who violated his rights for damages.

37. In the upshot, I find that the appeal has merit. conviction was unsafe. The same is quashed, the sentence set aside and the appellant be set at liberty unless otherwise legally held.

**Dated and Signed and Delivered at Nakuru this 3<sup>rd</sup> day of August, 2020.**

**Mumbua T. Matheka,**

**Judge**

**In the presence of: VIA ZOOM**

Martin Court Assistant

For state: Ms Wambui

Munene Chege & Co. Advocates for the appellant N/A

Appellant present