



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 138 OF 2017**

**BERNARD KYALO MAYOLI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant was charged with offence of defilement contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.
2. Particulars being that on the 13<sup>th</sup> day of April 2014, in Mukaa District within Makueni County Bernard Kyalo Mayoli intentionally and unlawfully caused his male organ namely penis to penetrate to the female organ namely vagina of D K M, a child aged 12 years.
3. Alternative charge was committing an indecent act with a child contrary to Section 11 (a) of the Sexual Offences Act.
4. Particulars being of the offence are that on 13/04/2014 in Mukaa, Bernard Kyalo Mayoli intentionally and unlawfully touched the Vagina of D K M a child aged 12 years using his penis.
5. He pleaded not guilty and after full trial, he was convicted and sentenced to serve twenty (20) years after full trial.
6. The Appellant was unhappy with verdict thus lodged appeal setting out eight (8) grounds which sum up to:-
  - a. The prosecution case was not proved beyond reasonable doubt.***
  - b. The case was full on inconsistencies.***
  - c. The trial was not fair in manner it was conducted.***
  - d. The medical report showed no injuries occasioned.***
7. The parties agreed to canvass appeal via written submissions but only Appellant who filed same.
8. The Appellant submissions and supplementary grounds were:-
  - i. THAT, the trial magistrate erred in matters of law and facts in failing to note that he was not provided with the witness statements in violation of Article 50(2) (j) of the Constitution.***
  - ii. THAT, the trial magistrate erred in matters of law and facts in failing to consider that the testimony of PW 1 and that of PW2 was not supported by the medical report.***
  - iii. THAT the trial magistrate erred in matters of law and facts, whereas penetration which is the main element in defilement was not conclusively proved.***
  - iv. THAT, the trial magistrate erred in law and facts in convicting him on the prosecution's case that fell below the required standard.***

v. **THAT, the prosecution violated his constitutional rights in failing to provide him with the witnesses' statements.**

vi. **THAT, the allegations put forward by PW2 and PW3, that, PW1 had been defiled was not supported by the medical report.**

vii. **THAT, there was no conclusive proof of penetration.**

9. In a nutshell, that the prosecution did not prove its case beyond reasonable doubt as required by the law.

10. He argued that his conviction was unfounded hence, an acquittal was legitimately deserved. His key points of contention are as outlined herein below; **ON VIOLATION OF ARTICLE 50(2) (C) & (J) OF THE CONSTITUTION.**

11. He submitted that he pleaded with the court to be given the witness statements but the same was not given. On 08/03/2016, at page 4 line 6, the accused told the court that he had not been given the witness statements.

12. The court ordered that he be given the statements of witnesses.

13. Further, on 29/03/2016, at page 6 lines 17-18, he did tell court that he had not been issued with the witness statements. The court reiterated that the case was being delayed and also that he be issued with statements.

14. The prosecution was granted the last adjournment on the case. On 06/04/2016, he once again told court that could not proceed without the witness statements. See at page 10 lines 2-3 where he told the court: - ***"I have never been given statements in this case. I cannot proceed in the absence of the statements"*** but the same was ignored.

15. At page 13 lines 6 the court stated that: - ***"accused admits that he received the statements yesterday"*** but nowhere was accused is recorded as having received same. The appellant's constitutional rights were ignored and the case proceeded.

16. In the case of **Thomas Patrick Gilbert Choimondeley -Vs- Republic (2008) eKLR**, the court of Appeal stated that:

***"we think it is now established and accepted that to satisfy the requirement of a fair trial guaranteed under our constitution 2010 (this case was decided before the promulgation of constitution 2010), the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statement of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."***

17. The Supreme Court of India in the case of **NATASHA SIGH VS CB (2013) 5 SCC 741** held as follows:

***"Fair trial is the main object of criminal procedure and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim, and of the society, and therefore, fair trial include the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a Constitutional as well as a Human Right. Thus, under no circumstances can a person's right to a fair trial be jeopardized."*** (emphasized).

18. In the case of **R V WARD (1993)2 ALL ER 557**, the court of Appeal in England was unanimous that:-

***"The prosecutions duty at common law is to disclose to the defence all relevant material .i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statement to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so."***

19. He thus urges court to find that by the prosecution failing to give him the said statements and court proceeding with hearing thereof, was a gross violation of my constitutional rights.

#### **TESTIMONIES OF PW2 AND PW3 NOT SUPPORTED BY THE MEDICAL EVIDENCE**

20. It was the testimony of PW2 that she told her mother (PW1) that she had been told by PW3 that I had defiled her. It was also the evidence of PW2 that appellant had defiled her while grazing in the bush.

21. According to PW4, a doctor from Sultan Hamud Hospital who read the documents on behalf of Dr. Kamwea who had examined PW3, everything was normal except that the hymen was broken. At page 24 lines 12-15, it states: -

***"Upon examination, the doctor found that Kavata's hymen had been broken. The other parts of the genitalia were normal and had no injuries. There was no blood stains or vaginal discharge from the complainant."***

22. This was so despite the fact that the Dr. Kamwea had the advantage of examining the complaint the same day of the incident.

23. For a child of 12 twelve years to have been defiled by a man of over 40 years, the doctor could have noticed more than just a broken hymen.

24. In a defilement case, penile penetration must be adequately proved if conviction is to be justified. He thus submitted that the evidence did not conclusively prove the penile penetration of PW3's genitalia.

25. The broken hymen recorded by Dr. Kamwea to the complainant was not explained as being consistent with penile penetration to the exclusion of any other reasonable explanation. The hymen is a relatively fragile tissue that is easily torn.

26. Although the medical examination report was carried out a day after the alleged defilement, no findings consistent with defilement e.g. presence of spermatozoa etc. The trial magistrate in his judgement at page 3 stated that the complainant had a vaginal infection and which indicated that she had been defiled. He stated that this was as per the evidence of PW4.

27. He admitted that in such a case appellant ought to be medically examined as well in order to find whether he suffered from the same infection and therefore link him with the commission of the alleged offence, but the same was not carried out. However, on careful reading of PW4 evidence, he nowhere states that there was noted some infection.

28. Nevertheless, Section 36(1) of the Evidence Act requires the Appellant to be subjected to DNA testing to determine whether he was connected with the offence, which was not done.

29. This provision is not couched in mandatory terms. The court of appeal has held that medical or DNA evidence is not the only evidence by which commission of the sexual offence may be proved.

30. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person.

31. It is his contention in this case that since defilement was not proved beyond reasonable doubt (as will be shown later); there was need for the medical evidence to link him with the alleged offence. A DNA test would have sufficed as a concrete hammer to nail him.

32. It is for this reason that he contends that the case that PW3 had been defiled was not proved beyond reasonable doubt and that no medical report linked him with the commission of the alleged offence. The said medical evidence did not prove conclusively that he had committed the alleged offence.

#### **NO CONCLUSIVE PROOF OF PENETRATION**

33. Appellant contends that according to the prosecution's evidence on record, there is no conclusive proof that the complainant's genitalia were penetrated.

34. At page 24 lines 12-15., PW4 stated: -

***“Upon examination, the doctor found that K's hymen had been broken. The other parts of the genitalia were normal and had no injuries. There were no blood stains or vaginal discharge from the complainant.”***

35. It is to be noted that this was the only medical evidence that was tabled before the court. The doctor who is alleged to have examined the minor was represented by Dr. Kamwea.

36. It is to be noted in this case that nothing was noted except that the hymen was broken. Could a broken hymen without any other evidence be a proof that there was penetration?

37. The answer is no as hymen can be broken by other objects other than through penetration.

38. The trial magistrate in his judgement stated that there were some infections that were noted according to PW4. However, according to the evidence on record, PW4 did not give such testimony in court during the trial. The trial magistrate did not consider the evidence of PW4.

39. In the case of **Charles Wamukoya Karani -Vs- Republic, Criminal Appeal No. 72 of 2013**, it was held as follows:

***“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”***

40. It is his contention that penetration of PW3's genitalia was not conclusively proved for a conviction.

#### **ON PROSECUTION CASE NOT PROVED BEYOND REASONABLE DOUBT**

41. He submitted that the prosecution must prove its case albeit beyond reasonable doubt. It is a fundamental right enshrined in the constitution and other international instruments, (international convention on civil and political rights, African charter of people's rights and fundamental freedoms. European convention human rights) that the accused is presumed innocent until proven guilty.

42. The burden of proof at all times rests on the prosecution until discharged beyond reasonable doubt and no attempt to whittle it down shall be entertained; **Woolmington -Vs- Dpp 1935 Ac 462, 481 (Uk).**

43. See also the case of **Amos Kinyua Kugi (2015) eKLR and the case of 1997** the Supreme Court of Canada in **R vs Lifchus**.

44. **THE RESPONDENTS SUBMISSIONS** were:-That there was sufficient evidence to warrant conviction. Four witnesses were called. PW1, mother, PW2 sister, PW3 victim, PW4 Doctor, PW5 Police Officer PW1 proves age of victim 12 years. Born in 2002, see exhibits. See PW4 evidence. Identification is not contested. He was a neighbour and known.

45. The report was made immediately to PW2 by PW3 who informed PW1 and she was taken to hospital. PW4 page testified for another doctor who had filed P3 form.

46. As to production of medical report, Respondent said he would say that there was a mistrial and seek retrial but evidence is very strong. The child was 12 years old. The defence was considered as sham.

47. The duty of a first appellate Court was set out in the celebrated case of **Okeno V. Republic (1972) E.A. 32** in the following terms;

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (3365) and the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters Vs. Sunday Post [1958] E.A. 424.”***

### **EVIDENCE TENDERED**

48. PW2 testified that on 13/04/2014, D.K came from herding cattle and she called her outside and told her that the accused had defiled her.

49. PW3 D.K also testified that she and the accused met while she was herding cattle and the accused defiled her in one of the bushes.

50. DW3, K K testified that the accused, as at 2014 was a herd’s man in the neighborhood. It has therefore been proved that on 13/04/2014, D.K had gone to herd cattle in the neighboring bushes.

51. D.K testified that while she was herding cattle, the accused told her to restrain some goats which were nearby and when she went to tie the goats, the accused followed her and told her to lie down. She testified that she did lie down and the accused removed her under pant and he also removed his trouser and underwear.

52. The witness testified that the accused touched her on the vagina and then he put his penis inside her vagina. It was her evidence that after they had sex, they put on their clothes and continued herding cattle.

53. In cross-examination, the witness confirmed that she did not scream when she was being defiled and that other children were nearby herding cattle but none of them saw the accused defiling her.

54. At the hearing of this case, the state counsel made an application to have Dr. Charles Mwendwa testify and produce the medical records of D.K as Dr. Kamwea who filled the P3 form left government service and he relocated to Sudan which application was allowed.

55. PW4 Dr. Charles Mwendwa Mutisya testified that on examination, D.K did not have any visible injuries in her genitalia. He testified that laboratory tests were also done on D.K and she was found to have a vaginal infection.

56. The witness testified that D.K hymen was perforated and this is shown in the treatment card (Pexh 2), P3 form (Pexh 1) and post rape care form (Pexh 3) produced in evidence. The doctor did not testify whether D.K’s hymen was freshly perforated or not.

57. In his defence, the accused gave an unsworn statement and stated that on 13/04/2014 he was not at home but was in Nairobi where he used to work as a mason. I note that the accused did not raise this defence at the earliest opportune time to enable the prosecution lead evidence to rebut the same.

58. The accused did call 2 witnesses and unfortunately those witnesses did not corroborate the alibi defence raised by the accused. DW2 and DW3 when cross examined by the court testified that the accused is said to have taken place.

59. In fact DW3 confirmed that the accused was a herd’s boy in the neighbour hood and that corroborates the evidence of D.K that she and the accused met while they were herding livestock.

60. DW2 and DW3 also testified that PW1 and her family have a grudge against the accused and his family and that is why they made up this case against him.

### **ISSUES, ANALYSIS AND DETERMINATION**

61. After going through the evidence on record and the submissions herein, I find the following issues arise;

*i. Whether the appellant was accorded fair trial?*

*ii. Whether prosecution proved its case beyond reasonable doubt?*

62. The appellant complains that he was not accorded fair trial in that the witnesses statements were never supplied despite court order for him to be supplied and thus he was not accorded fair trial.

63. On 08/03/2016, at page 4 line 6, the accused told the court that he had not been given the witness statements. The court ordered that he be given the statements of witnesses.

64. Further, on 29/03/2016, at page 6 lines 17-18, he did tell court that he had not been issued with the witness statements. The court reiterated that the case was being delayed and also that he be issued with statements.

65. The prosecution was granted the last adjournment on the case.

66. On 06/04/2016, he once again told court that could not proceed without the witness statements. See at page 10 lines 2-3 where he told the court: - **“I have never been given statements in this case. I cannot proceed in the absence of the statements”** but the same was ignored.

67. At page 13 lines 6 the court stated that: - **“accused admits that he received the statements yesterday”** but nowhere was accused is recorded as having received same.

68. The court finds that the trial proceeded without appellant being supplied copies of witness statements and other documentary evidence contrary to the constitutional and precedents principles.

69. In the case of **Thomas Patrick Gilbert Choimondeley -Vs- Republic (2008) eKLR**, the court of Appeal stated that:-

*“We think it is now established and accepted that to satisfy the requirement of a fair trial guaranteed under our constitution 2010 (this case was decided before the promulgation of constitution 2010), the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statement of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”*

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71. In the case of **R Vs WARD (1993)2 ALL ER 557**, the court of Appeal in England was unanimous that:-

*“The prosecutions duty at common law is to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statement to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so.”*

72. The appellants right were denied by violation of **ARTICLE 50(2) (C) & (J) OF THE CONSTITUTION;**

73. Thus there was a mistrial and thus the entire proceedings a nullity. The court need not deal with issue on merit of the case.

74. The court notes that the witnesses can still be availed and case be reheard without any further delay thus the court makes the following orders;

**i. The conviction is quashed and sentence set aside.**

**ii. The case shall be reheard afresh by the court in Kilungu law courts on priority basis.**

**SIGNED, DATED AND DELIVERED THIS 18<sup>TH</sup> DAY OF JUNE, 2018, IN OPEN COURT.**

**C. KARIUKI**

**JUDGE**

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