



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KERUGOYA**  
**CRIMINAL APPEAL NO. 31 OF 2014**

**JAMES KARIUKI MWAI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence of the Principal Magistrate's Court*

*(S. Jalang'o) at Baricho, Criminal Case No. 24 of 2013 delivered on 20<sup>th</sup> June, 2014)*

**JUDGMENT**

1. The appellant **James Kariuki Mwai** was charged with defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act** before the Resident Magistrate's Court at Baricho Criminal Case No. 24 of 2013.

2. The particulars are that on the 1<sup>st</sup> and 2<sup>nd</sup> day of January, 2013 at [particulars withheld] Village in Kirinyaga West District within Kirinyaga County intentionally and unlawfully caused his penis to penetrate the vagina of S W W a child aged seven (7) years.

3. The appellant denied the charge. After a full trial the appellant was found guilty, convicted and sentenced to serve life imprisonment as provided under the law. He was dissatisfied with both conviction and sentence and filed this appeal.

4. The appellant initially filed eight grounds of appeal. He later filed amended grounds of appeal together with submissions. He raised the following grounds:

*i. The trial magistrate erred in both law and facts by not conducting a proper and complete voir dire inquiry before admitting the evidence of the minor witnesses as required by the law.*

*ii. The learned trial magistrate erred in facts by failing to observe and consider that a crucial witness was not called to testify.*

*iii. The trial magistrate erred in both laws and facts by admitting the evidence of the alleged Clinical Officer who was not the author of the P3 form (MF1 II) and who also did not prove to the court that he was qualified in the field.*

*iv. That the trial magistrate erred in both laws and facts by not according me a fair trial as per Article 50(2) and Article 48 of the Kenyan Constitution.*

5. The prosecution called six witnesses. P.W. 1 the complainant S W testified that she is aged eight years. She told the court that on the 1<sup>st</sup> January, 2013 she went to the house of appellant in company of P.W. 2) and while there the appellant called her and P. to enter his bedroom which is separated from the sitting room by a curtain. The appellant gave toy cars to C to play with while in the sitting room. The appellant defiled the complainant in the bedroom. He also defiled P. The complainant testified that C peed in the room as the appellant was defiling them. She testified that the appellant had defiled her severally before including one time when he defiled her in the bush. The complainant informed her mother what had happened after C. disclosed to her. That was on 2<sup>nd</sup> January, 2013. She was taken to hospital and later to the Police Station.

6. The evidence of the complainant was not shaken in cross-examination. The appellant stated that he had no questions in cross-examination. Though the complainant was not sworn, the Court conducted a *voir dire* examination and allowed her to testify. This is as provided under **Section 19** of the **Oaths and Statutory Declarations Act** which provides:

***“Where in any proceedings before any court or person having by law or consent of parties, authority to receive evidence, if any child of tender years called as witness does not in the opinion of the court or such person understand the nature of the Oath, his evidence may be received though not given on oath if in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence in any proceedings against any person for any offence, though not given on oath.....”***

The Court could receive the evidence of the complainant. This being a sexual offence, the Court could rely on the evidence of the complainant to convict as proved under **Section 124** of the **Evidence Act** which provides:

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.”***

The Court had no reason not to rely on the evidence of the complainant. Be that as it may, the evidence of the complainant was corroborated, firstly by the testimony of P.W. 2 C M a minor aged seven years and secondly by the medical evidence adduced by P.W.6.

7. P.W. 2 C M who testified that when they went to the house of the appellant he gave him two toy cars to play with at the sitting room while he went to the bedroom with the complainant and P. He testified that while in the bedroom, the appellant and the two girls engaged in what he called “Tabia mbaya”. He said he saw appellant on top of S and both were naked. He stated that they stayed in the bedroom for a long time as he played with the toys which he identified in court as exhibit 1a and b.

8. P.W. III A W M is the mother of the complainant S W She testified that on 2<sup>nd</sup> January, 2013 at about 3.00 p.m. (P.W. 2) informed her that the accused had engaged in sex with S. She was with her sister L N P.W.4. P.W. III enquired from S and she admitted. She examined the complainant and found that the anus was wet and wide open. P.W. III A W M took her daughter to hospital and they were told to report to the Police. She reported and they were issued with a P3 form. According to P.W. III P.W. 1 was born on 18<sup>th</sup> May, 2005 as per the birth certificate No. [particulars withheld] which was produced as exhibit 1. So at the time of the incident she was seven years old. It was the testimony of P.W. 3 that P.W. 1 told her that she usually engaged in sexual intercourse with the appellant and that the first time it happened in the bush. She told the court that the accused was his neighbour and that he led Police to his house and he was arrested.

9. P.W. 4 S W is the mother of C M (P.W. 2). She testified that C had told her that on 1<sup>st</sup> January, 2013 he was given money four shillings while in company of P. and S C also informed her that he had found S and appellant naked with appellant on top of S She testified that C told her he was given money so as not to discuss what transpired on 1<sup>st</sup> January, 2013.

10. P.W. 5 L N M. who is an aunt to S the complainant, testified on how she received the information from (C, P.W. 2) together with the complainant's mother and later reported the matter to the Police. The doctor confirmed that S was defiled.

11. P.W. 7 John Mwangi is a clinical officer based at Kerugoya District Hospital who examined the complainant and filled the P.3 form. He testified that on examination he found that the hymen was broken but not fresh. The anal splinter was loose. The anal mucosal was eroded. He confirmed that there was penetration of both the vagina and the anus. He filled the P.3 form which he produced in Court as exhibit. I find that the evidence of the clinical officer corroborated the evidence of the complainant that she was defiled. The evidence also confirms the evidence of the complainant that the appellant has severally defiled her before and hence the missing hymen in an eight year old girl.

12. The evidence adduced before the trial magistrate was consistent and overwhelming. It cast no doubt that the child was defiled by none other but the appellant. In my view it was proper for the trial magistrate to rely on the evidence to convict. The appellant never alleged anything that could have made the two children to frame him. There was no denial by the appellant that these children knew him very well before and there was no possibility of mistake. The complainant's mother knew the home of the appellant. She led Police to the house where two toy cars exhibit 1a and b were recovered. The Police officer found that the house was the way the complainant had described it, that is, sitting room and bedroom separated by a curtain. It confirms that the complainant was in that house with P.W.2 and that is when she was defiled.

13. The issues arising from the grounds of appeal are, firstly that *voir dire* enquiry was not properly conducted. In his submissions the appellant states that the trial magistrate admitted the evidence of the two minors, a boy and a girl notably without enquiring or telling them the need and importance and duty to speak the truth. The appellant cites **Section 19** of the **Oaths and Statutory Declarations Act**, which I have quoted (supra) and emphasis on "understands the duty of speaking the truth". That a child of tender years is defined under **Section 2** of the **Children's Act** to mean a child under the age of ten (10) years. The appellant contends that the trial magistrate did not conduct the inquiry in a proper manner. They were not informed or cautioned on the need to speak the truth.

14. To test whether the witness is telling the truth, the evidence is challenged through cross-examination. From the record, the evidence of the complainant, S was not challenged in cross-examination. As for the second child, C he was only asked two questions. There is nothing arising from the testimony of these two children to suggest that they were not truthful. The appellant did not challenge the testimony of the two children at this stage when he failed to do so before the trial court though he was given a chance to do so.

15. From the record, *voir dire* examination was conducted on the S W The minor was asked questions including whether she knows the meaning of the oath to which she answered that she did not. The Court found that she did not understand the purpose and the meaning of the oath. As for P.W. 2 C M, a *voir dire* examination was conducted. The Court found that he did not understand the meaning of the oath.

16. The appellant relies on the case of **Peter Kiriga Kiura Criminal Appeal No. 77 of 1982** and **Johnson Nyoike Muiruri -V- Republic (1982-1988) 1 KAR 150**. Also **Kinyua -V- Republic (2003) KLR 301**. I have considered the authorities. In a recent Court of Appeal decision in the case of **Maripett Loonkomok -V- Republic (2016) eKLR**, it was stated:

*It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar*

*circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No. 10 of 2014.....*

*It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;*

*“In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge.....the court may still be able to uphold the conviction.”*

P.W. 1 and P.W. II were aged 8 and 7 years of age respectively and are therefore considered as children of tender years. *Voir dire* examination was conducted and the trial court held that they did not understand the meaning and purpose of an oath therefore they gave unsworn statement. As seen in the above Court of Appeal case, failure of the trial magistrate to conduct *voir dire* examination or a proper *voir dire* examination is not fatal to the case if there is sufficient independent evidence to support the charge.

In this case *voir dire* examination was properly conducted and in addition, there was sufficient evidence to support the charge. The medical evidence proved that hymen was not intact but was not freshly broken. There was also anal penetration.

17. As submitted by the State, the evidence of P.W. 1 and 2 was well corroborated by all the prosecution witnesses. The evidence was watertight and unchallenged. Evidence of P.W. 1 on occurrence of the offence was corroborated by P.W. 2 the only eye witness. It was not contradictory. I have stated that the medical evidence corroborates the evidence of the complainant. P.W. 3, 4 and 5 is well corroborated on how they discovered the complainant was defiled. From the above decision of Maripett even in situations where *voir dire* was not conducted, with independent evidence to support the charge the Court may still convict. The Court did conduct a proper *voir dire* examination. What is required is corroboration as provided under Section 124 of the Evidence Act *supra*. The trial magistrate noted that the evidence of P.W. 1 and 2 placed the appellant at the scene of offence and found the evidence overwhelming. He did not give reasons for believing the complainant but followed the direction that the evidence was corroborated. This was proper in view of the provision of Section 124 of the Evidence Act, *supra*. This ground must fail.

18. The second ground was that crucial witness was not called. The appellant submits that P.W. 1 and 2 stated that they were in company of another child called P who they allege was also defiled and was not called as a witness. I have considered the submission. This witness P, from the record it was stated that she left for Nairobi with her mother and it is not known whether she reported or not. The appellant was not charged in relation to the defilement of P. As such P is not a complainant. She could only have come as a witness in this case. It is well settled that no particular number of witnesses are required to prove a fact. Each case must be taken on its own circumstances. Section 143 of the Evidence Act provides:

*“No particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for proof of any fact.”*

*“In BUKENYA & OTHERS VS UGANDA (supra), the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;.....*

While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the Evidence Act (Cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any

fact. In this appeal, it is not clear to us what value the evidence of Violet would have added to the evidence of PW2, which the court found trustworthy, as well as the medical evidence. In our opinion, violet would have been a peripheral witness as she was said to merely have happened to pass by when the appellant was with PW2 on a different occasion.

The proviso to **Section 124** of the **Evidence Act** allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

In this case though P. was not called, the evidence of the complainant and P.W. II was consistent that it was the appellant who had defiled her. Her medical evidence also proved that she had been defiled. I am of the view that the prosecution had adduced enough evidence to prove the fact of defilement and no inference may be made on failure to call P as a witness. The appellant faults the evidence of the clinical officer which he states was doubt-ridden and did not attain the required threshold. The appellant submits that the clinical officer P.W. 7 was not the person who first treated the complainant. It is also submitted that the clinical officer did not give his qualification. From the record, the clinical officer John Mwangi(P.W. VI) testified and stated that he is a clinical officer attached to Kerugoya County hospital. The appellant cross-examined him at length but he did not dispute that he was a qualified clinical officer. The appellant was given a chance to interrogate his credentials when he was given a chance to cross-examine. It is now too late to dispute his qualifications.

19. The Court in the case of **Kyalo Kiswii -V- Republic [2015] eKLR** when addressing the issue of competence of clinical officer had this to say:

***“The issue of whether or not a clinical officer is a competent person to give medical evidence was settled by this Court in Raphael Kavoi Kiilu v Republic [2010]eKLR (Criminal Appeal No. 198 of 2008). In that appeal, it was alleged that a clinical officer was not qualified under the Evidence Act to give evidence in matters relating to sexual offences. The Court held that a clinical officer was in fact, authorized under the Clinical Officers (Training, Registration and Licensing) Act and therefore is fit to give medical evidence.....”***

***We agree with this proposition. A clinical officer, being authorized under the Clinical Officers Act is an authorized person who can render medical services, and further can give medical evidence under section 77 of the Evidence Act. Nothing therefore turns on this ground of appeal as well.***

Refer to **Erick Onyango Ondeng’ v Republic [2014] eKLR**

The Court of appeal held;

***“.....P.W.5 is a clinical officer who testified on behalf of his colleague, Alfred Toronke who examined and treated P.W. 2 at Matuu District Hospital. In our opinion a clinical officer is qualified to fill in a P3 form. This is an area of his competence.....”***

***In regard to the above authorities, P.W, VI was qualified to produce both the P3 form and the treatment notes.”***

It is the evidence of the clinical officer that he physically examined the complainant. He did not rely on the treatment notes alone but also examined the complainant and formed his own opinion. I find that this ground does not hold any water.

20. The ground that the Court failed to consider that the medical report exonerated him from the offence is far from the truth. There was evidence that the appellant had defiled the complainant severally before he was arrested and charged for this offence. The fact that the hymen was not freshly broken pins him to

the allegation and not otherwise. The P.3 form and the treatment notes were produced in evidence as exhibit 4 and in the light of the above authorities, the clinical officer properly produced them.

21. The appellant submits that he was not accorded a fair trial. This he says was because he was not supplied with witness statements to help him to prepare for his defence. That it was unfair for the Court to order that he be supplied with the Occurrence Book extract and the investigations diary at his own costs since he was in custody with no access to any money.

22. The right to fair trial is a constitutional right under **Article 50** of the **Constitution**. On the issue of an accused person being supplied with adequate material to prepare his defence it is provided at **Article 50 (2) (j)** as follows:

***“Every accused person has the right to a fair trial, which includes the right –***

***To be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.”***

I am of the view that the appellant was supplied with the evidence which the prosecution wished to rely on. From the record, the proceedings of 8<sup>th</sup> November, 2013 shows that the appellant was supplied with statement which contained the evidence that the prosecution wished to rely on. He stated:

***“I am sorry I have statements for clinical officer, investigating officer and Lucy.”***

There is nothing on record to show that he had applied for statements and was not supplied. Instead, he confirmed that he had the statements. The trial magistrate did not infringe his right when he ordered him to pay for the costs of the Occurrence Book and the proceedings. **Article 50 (5) supra** provides that an accused person is entitled to proceedings after they are concluded in return for a reasonable fees as prescribed by the law. The fact that the appellant was in remand did not preclude him from paying reasonable fees. The appellant applied for the first report and investigations diary. The Court ordered that he be supplied at his own costs. The appellant did not complain to the trial magistrate that he was unable to pay the costs of making photocopies of the documents. He also never informed the Court that he did not receive the documents. Instead he proceeded with his defence and aptly cross-examined witnesses. I am of the view that the trial magistrate ensure that the rights of the appellant were enforced and he cannot be heard to complain at this stage. Had he informed the trial magistrate that he did not receive the documents just like he made orders for him to be supplied the documents, he could have ensured he got them. As the record stands, there is nothing to show that he did not receive the documents after the magistrate made the order. I find that the ground is without merits. In persuasive decision by the High Court, **Republic v Ernest Ojiambo Mulefu alias Museveni & another [2015] eKLR** the Court had this to say:

***“.....15<sup>th</sup> May 2014, Mr. Wanyama acting for the Accused persons applied that the Defence be furnished with certified copies of certain OB entries. If indeed the Consent order had not been complied with, then one would have expected the Defence to raise it on that day.....If there was substance in this allegation then one would have expected the new Advocate to take up the issue with Court at the earliest opportunity. It is therefore surprising that Mr. Makokha who took over from Mr. Wanyama and conducted the Defence in respect to five witnesses did not find it necessary to raise any complain about non-compliance of the Consent order before the close of the Prosecution case. I do not find any merit in this complaint.***

***Geofrey Muriithi alias Gikundi & another v Director of Public Prosecution [2017] eKLR***

***The Court in holding the same view stated;***

***If the accused persons cannot afford the photocopying charges, the court is informed and further directions may be given to ensure the statements are supplied. In this case, I note that the appellants did not give any indication to the court whether it was within their means to pay***

*photocopying charges. However, the court went further and directed that the statements be supplied at the cost of the court. Most courts have photocopying machines and I believe this is the facility that the magistrate had in mind.*

*The issue of statements was not brought to the attention of the court again and the matter ended there. It would be assumed unless the contrary is proved that the statements were supplied to the appellants. I suppose that if the statements were not supplied, the issue would have been raised in court and recorded in the proceedings. I reach a conclusion that this ground of appeal has not been proved.”*

The appellant when he cross-examined the Police officer, P.C Phillip Kigen referred to Occurrence Book No. 3 of January, 2013. This shows he had the Occurrence Book or he had access to it. It is a flimsy ground. As for proceedings, the above Article is clear that proceedings are to be supplied within a reasonable period after they are concluded and at a reasonable fee. The time he applied for proceedings the case had not been concluded. There was no violation. The appellant has not stated what prejudice he suffered having fully participated in the trial, heard witnesses giving evidence and even cross-examined witnesses. He has not stated that any proceedings which he had the benefit to read when filing this appeal was contrary to what was adduced in Court. The appellant was not prejudiced.

23. The appellant submits that right to fair trial was violated because when he applied for the case to be transferred, the High Court ordered that it proceeds in the same law courts before a different magistrate. That decision was made by a High Court Judge. If the appellant was not satisfied with the decision, he ought to have appealed in the Court of Appeal. Instead, he participated in the trial before a different magistrate to its own conclusion. He cannot be heard to complain at this stage. **Article 165 (6)** of the **Constitution** is clear that the High Court has supervisory jurisdiction over the subordinate courts but not over superior courts. It is provided:

***“The High Court has supervisory jurisdiction over the sub-ordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over superior court.”***

The complaint by the appellant is misplaced and is without merit as the appellant participated in the trial after the case was transferred.

24. The appellant had raised the ground that he was not medically examined. As submitted by the State, the law does not require medical examination of the perpetrator in cases of defilement. All what the prosecution is required to prove is penetration which was done in this case. The appellant did not show how the complainant was coached. The appellant did not cross-examine the complainant. The inference is that he was satisfied with her evidence. Failure to avail the clothes of the complainant is immaterial. There was no allegation that they were torn or soiled. They lacked any evidential value. It was not mandatory that the clothes be produced. They could not be produced in vain. The witnesses who testified were competent and compellable. Nothing prevented the prosecution from calling them as witnesses to the facts.

25. The trial magistrate considered the defence of the appellant. It was a mere denial which was disapproved by the overwhelming evidence on record. The Court considered the defence and framed the issues for determination. One of the issues was whether the appellant was guilty of committing offence of defilement. He found that the charge was proved beyond any reasonable doubts. It is therefore not true to say that the Court did not consider his defence. The Court found the appellant guilty of defilement under **Section 8 (2)** of the **Sexual Offences Act** which provides for a sentence of life imprisonment. The sentence imposed is the sentence provided under the law. As such the sentence was not harsh. I have considered these grounds which were filed in the memorandum of appeal though the appellant filed amended grounds.

26. I am of the view that the conviction of the appellant was based on cogent, consistent and overwhelming evidence. The conviction of the appellant was safe in the circumstances and the sentence lawful. I find no merits in the appeal. I therefore dismiss it.

*Dated and delivered at Kerugoya this 28<sup>th</sup> day of July, 2017.*

**L. W. GITARI**

**JUDGE**

28.7.2017

Delivered in open Court appellant present, Mr. Omayo State Counsel for the State and Court Assistant Martin Mbogo this 28<sup>th</sup> day of July, 2017.

**L. W. GITARI**

**JUDGE**

28.7.2017