



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 52 OF 2016**

**JACOB MWANGOMA MWANDIGHA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 98 of 2015 in the Senior Principal Magistrate's court in Wundanyi delivered by Hon Orange K.I (SRM) on 5<sup>th</sup> May 2016)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Jacob Mwangoma Mwandigha, was charged with the offence of defilement of a girl contrary to Section 8 (1) (4) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the night of 18<sup>th</sup> March 2015 at [particulars withheld] Village in Wundanyi location within Taita Taveta County, the Appellant caused his penis to penetrate the vagina of the Complainant, V W R (hereinafter referred to as "PW 1"), a child who was aged sixteen (16) years at the material time.
2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11A of the Sexual Offences Act No. 3 of 2006. The particulars of this charge were that on the aforementioned date and place, he intentionally touched PW 1's breasts, buttocks and vagina with his penis against her will.
3. The Learned Trial Magistrate Hon Orange K.I., Senior Resident Magistrate, convicted the Appellant on Count I for the offence of defilement and sentenced him to fifteen (15) years imprisonment.
4. Being dissatisfied with the said judgment, on 19<sup>th</sup> September 2016 the Appellant filed a Notice of Motion application seeking to have his Appeal heard out of time, which application was allowed and his Appeal deemed to have been duly filed and served. He relied on six (6) Grounds of Appeal. M/S Mwinzi & Co Advocates subsequently took over conduct of the matter herein and filed Written Submissions on his behalf. He appeared to have adopted the said Grounds of Appeal in arguing the Appellant's case.

**LEGAL ANALYSIS**

5. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial**

**afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

6. Having looked at the Appellant’s Grounds of Appeal, his Written Submissions those of the State, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Prosecution had proved its case beyond reasonable doubt. It therefore dealt with all the Amended Grounds together as they were related. However, this court deemed it more prudent to consider the Appellant’s counsel’s submissions that the proceedings herein were unconstitutional and in violation of the Appellant’s rights.

## **I. CONSTITUTIONALITY OF PROCEEDINGS AND VIOLATION OF APPELLANT’S RIGHTS**

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7. Through his counsel, the Appellant submitted that the conviction and the sentence were not proper on several grounds. Firstly, he contended that the proceedings were unconstitutional and in violation of the Appellant’s rights as the Appellant was never furnished with witness statements and relevant material that the Prosecution relied upon during the trial. He added that the Trial Court neither informed him of his right to obtain the statements nor direct the prosecution to supply these documents.

8. He further submitted that the Trial Court denied him his right to fair hearing when on 27<sup>th</sup> May 2015, it directed that the case continues despite him having requested for documents in order to prepare for hearing. He stated that this was an infringement of his rights as enshrined in Article 50 and 35 (1)(b) of the Constitution of Kenya, 2010.

9. It was his argument that the proceedings were founded on illegality or a nullity and no evidence offered in support could cure the infringement. He relied on the case of **Ann Njogu & 5 Others vs Republic Misc Appl No 551 of 2007** (unreported) where the court cited with approval the case of **Criminal Appeal No 120 of 2004** and **Criminal Appeal No 40 of 2007 Republic vs James Njuguna Nyage** where the court stated as follows;

**“Upon determination that the constitutional rights of the applicants have been violated, any prosecution against them or any of them, on the basis of the events for which attempted charges were being made this morning, 2/8/07 is null and void. And that is so, and will remain so, irrespective of the weight of the evidence that the police might have in support of their case. This is on the simple reason that such a prosecution would be based on an illegality and a null and void case...that there is as yet NO known cure for the nullity that results from attempted prosecution of any person, in this country, once it is shown that his/her constitutional and fundamental rights were violated prior to the purported institution of the criminal proceedings”**

10. He also relied on the case of **Peter Kine vs Republic Criminal Appeal no. 176 of 2008** at Mombasa where the State conceded to the appeal on the basis that the charge against the Appellant was not properly framed.

11. On its part, the State submitted that the Appellant’s rights were not infringed upon as during the first arraignment on 20<sup>th</sup> March 2015, the Trial Magistrate ordered for the Appellant to be supplied with witness statements. It further submitted that when the matter came up for mention on 2<sup>nd</sup> April 2015, 16<sup>th</sup> April 2015, 30<sup>th</sup> April 2015 and 14<sup>th</sup> May 2015, the Appellant never informed the Trial magistrate that he had not been supplied with the statements. When the matter came up for hearing on 27<sup>th</sup> May 2015, the Appellant informed the court he was not ready to proceed on account of not having the witness statements but did not have any reason why he had not procured the witness statements.

12. It averred that the time from the date of plea taking to the time of hearing, the Appellant had sufficient time to prepare himself for hearing. It further averred that the Appellant had sufficient opportunity to inform the court that he had not been supplied with the witness statements well before the hearing date but chose not to.

13. This court carefully perused the proceedings and noted that as the State submitted, on the first arraignment on 20<sup>th</sup> March 2015, the Learned Trial Magistrate directed that the Appellant be furnished with the Statements. When the matter came up on 30<sup>th</sup> April 2015, the Prosecution informed the Trial Court that it was ready to proceed with three (3) witnesses. The Appellant informed the said Learned Trial Magistrate that he was not ready to proceed as he did not have written Statements.

14. However, the Learned Trial Magistrate contended that no good reason had been advanced and that he would proceed to hear the witness. As a result, the Appellant proceeded with the case and in fact Cross-examined the witnesses.

15. It was abundantly clear that the Appellant was not accorded a fair hearing. There could not have been a better reason not to proceed than the one he gave the Trial Court that he was not able to proceed as he did not have witness statements. Notably, he did not say that he was never furnished with witness statements. The least the Learned Trial Magistrate could have done was to enquire from him why he had not obtained the same and asked how much time he would have wanted to be given before the next hearing.

16. Clearly, this was an infringement of the Appellant's right to fair trial and to be accorded sufficient time to prepare his defence in accordance with Article 50(2)(c) of the Constitution of Kenya that provides as follows:-

**“Every accused person has the right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence.”**

17. Indeed, as an accused person's right to fair trial is also enshrined in Article 50 of the Constitution of Kenya, courts must not only look at the victim only. They must also take into account the rights of such accused person as the sword of justice cuts both ways. There was no doubt in the mind of this court that a Re-trial would be a good option to cure the irregularities by the Trial Court.

18. However, a re-trial is not ordered as a matter of course. It depends on the particular circumstances of a case. In this regard, this court fully associated itself with the holdings in the cases of Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481 and re-stated in Fatehaji Manji vs Republic [1966] E.A. 343 that Mutende and Thurairaja Jaden JJ cited in the case of Jackson Mutunga Matheka vs Republic [2015] eKLR where it was stated as follows:-

**“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”**

19. Although the State was adamant that an offence was committed and that the Appeal herein ought to be dismissed, it was the considered view of this court that the Appellant was not accorded a fair opportunity to prepare his defence. The trial was rendered defective once the Learned Trial Magistrate failed to adjourn the matter when the Appellant informed him that he was not ready to proceed as he did not have witness statements.

20. Having proceeded with the trial when the Appellant was not ready was a good reason to proceed for a

re-trial. However, a re-trial is not a matter of course. It has to be shown that it will be in the best interests that a matter be re-tried on merit and that it should not prejudice an accused person. An appellate court must therefore be satisfied that in the event the same evidence was adduced afresh, a conviction against an accused person would ensue. A re-trial ought not to give any party a second bite at the cherry.

## **II. PROOF OF PROSECUTION'S CASE**

21. In this case, the Appellant argued very strongly about the admissibility of the P3 Form. He contended that PW 1 never alluded to the same in her evidence and that No 932293 PC Stella Wanjiru (hereinafter referred to as "PW 4" but indicated as PW III in the proceedings) who filled in the same, did not identify the same. The State did not submit on this issue.

22. A careful perusal of the proceedings shows that, Dreda Wakio (hereinafter referred to as "PW 3"), who was the Chairman of Chume Village was the one who identified the said P3 Form whereafter it was marked as "MF1 1." As was rightly submitted by the Appellant, he was not the maker of the document and having been a stranger, he could not vouch for the same. The only persons who could have marked it for identification were either PW 1 or PW 4.

23. Was this fatal? This court does not think it was. The maker of the P3 Form was Dr Muigai who completed it. As he was not available in court to present the same, Dr Mwana Juma Ali (hereinafter referred to as "PW 5" and shown in the proceedings as "PW IV") acted correctly when he adduced the same as evidence in the case herein.

24. The objective of marking a document for identification is merely a procedural issue for proper marking of exhibits. This court was therefore not satisfied that the same was inadmissible for failure to having had the same marked for identification.

25. The more substantive issues herein was whether PW 1's sole evidence, the P3 Form and the hospital attendance notes could prove that the Appellant was the one who defiled PW 1. The Appellant argued that PW 1's evidence had to be corroborated because she was a single witness. He was emphatic that the Learned Trial Magistrate ought to have recorded reasons in the proceedings which satisfied him that PW 1 was speaking the truth.

26. He argued that the fact that PW 1 slept at his house did not mean that he defiled PW 1 because her hymen was found to have been broken and there were no fresh injuries or bruises. He further argued that the whitish discharge was neither explained in the P3 Form or by PW 5 who confirmed that no spermatozoa was found to have been present.

27. The State argued that Section 124 of the Evidence Act Cap 80 (Laws of Kenya) provides that an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated but that the proviso to the said Section provides an exception.

28. Section 124 of the Evidence Act provides as follows:-

**"Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), where the evidence of the alleged victim is 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.**

29. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye

witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

30. According to PW 1 on the material date and time, the Appellant had invited her to his house when he removed her underwear and had sex with her. They ate and she left his house the following day at about 7am. M N M (hereinafter referred to as "PW 2") stated that the Appellant was working for her at the material time. She gave him food which he divided for two (2) people. It was only after he was arrested that he came to know that he had sexually assaulted PW 1.

31. It is important to point out Section 144 of the Evidence Act provides that the prosecution has the discretion to decide how many witnesses it shall call to prove a particular point. However, failure to call crucial witness can weaken a prosecution's case considerably.

32. In the case of **Criminal Appeal No 31 of 2005 Julius Kalewa Mutunga v Republic**(unreported), the Court of Appeal held that:

**"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."**

33. Notably, the circumstances under which the Appellant was arrested were not given by the Prosecution. PW 2 merely stated that the Appellant was arrested on 19<sup>th</sup> March 2015. PW 4 said that he was brought to their office on the allegation that he had defiled PW 1. There was no plausible explanation that was advanced by the Prosecution why the persons who arrested the Appellant and took him to the police station were not called as witnesses in this case. Indeed, they were critical witnesses as PW 1 left the Appellant's house at 7.00am and no one saw her leave his house at the material time.

34. This was a gap that ought to have been filled. This is because as the Appellant rightly pointed out, there was no evidence that linked him the whitish discharge that was found in PW 1. It was also not clear what kind of discharge it was. Notably, no spermatozoa was found in PW 1's vagina.

35. Going further, this court was also concerned the entry of 20<sup>th</sup> March 2015 in the hospital attendance notes that indicated as follows:-

**"Brought... being defiled 3/7 by a known 24 year old.**

**Child cannot express herself fully-mental retardation. Relative reports she has not showered."**

36. Bearing in mind the said entry in the hospital attendance notes which observation was not noted on 19<sup>th</sup> March 2015 when PW 1 was first referred from Wundanyi Police Station vis-à-vis the person who was examined at the time the P3 Form was being filled and the witness who testified in court, it was not clear to this court how the victim expressed herself in court without an intermediary. In other words, this court was left to wonder if the person who was taken to hospital on 20<sup>th</sup> March 2015 was the same person who testified in court on 27<sup>th</sup> May 2015.

37. This court felt great discomfort in view of this observation and found that PW 1's evidence was not corroborated by the evidence that was on the court record. If she was mentally retarded, she would not have been able to have expressed herself so eloquently in court. Whereas the Learned Trial Magistrate noted in his decision that PW 1 attended special school, this court was unable to reconcile the fact of the entry in the hospital attendance notes that indicated that she was unable to express herself clearly and his observation of this fact.

38. The Learned Trial Magistrate ought to have gone step further to explain to record what led him to believe PW 1 and not the Appellant herein in view of her mental challenges. Noting that she attended a special school was not sufficient for an appellate court that would need to satisfy itself on the basis of written proceedings that the trial court did in fact observe that such a witness was comprehensible while adducing evidence and did not need an intermediary so as to bring her within the proviso of Section 124 of the Evidence Act.

39. Notably, the Appellant adduced unsworn evidence which had little or no probative value. He was under no obligation to assist the Prosecution prove its case. He had a constitutional right to remain silent as the burden of proof lay with the Prosecution to prove its case. In the absence of any proof of penetration by the Appellant as there was no spermatozoa several hours after the alleged incident, this court was of the considered view that sustaining the Appellant's conviction against the backdrop of the aforesaid gaps would be clearly unsafe.

40. In addition, identification of the Appellant by PW 1 as the Learned Trial Magistrate had noted in his decision was not sufficient proof that PW 1's hymen was broken by the Appellant herein as there were no bruises and lacerations.

41. Accordingly, having considered the evidence that was adduced in the Trial Court and having read the Written Submissions by the Appellant and the State, this court came to the firm conclusion that although a re-trial would ordinarily have been ordered in a case where errors or omissions have been made by a trial court such as those that were made by the Learned Trial Magistrate in proceeding with the case when the Appellant had indicated that he was not ready to proceed as he did not have witness statements, this was not a good case to order such re-trial as this court would not have upheld the Appeal based on the evidence that was on record herein. Appreciably, sending the Appellant through a re-trial would greatly prejudice him.

### **DISPOSITION**

43. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 19<sup>th</sup> September 2016 was merited. In view of the doubt that was raised in the mind of this court, it would therefore be unsafe to allow his conviction to stand. The same is hereby quashed. Consequently, the sentence is also hereby set aside.

44. This court hereby orders that the Appellant be hereby set free forthwith unless he be held or detained for any other lawful reason.

45. It is so ordered.

**DATED and DELIVERED at VOI this 21<sup>st</sup> day of November 2017**

**J. KAMAU**

**JUDGE**

In the presence of:-

Mwinzi for Appellant

Miss Anyumba for State

Josephat Mavu- Court Clerk