



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 184 Of 2015.**

**MATHIAS SIMIYU WAMALWA.....1<sup>ST</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara  
Cr. Case No. 350 of 2013 delivered by Hon, Oketch, RM on 2<sup>nd</sup> October, 2015).**

**JUDGMENT**

**BACKGROUND.**

The Appellant was charged with committing the offence of Defilement contrary to section 8(1) of the Sexual Offences Act, 2006. The particulars of the charge were that on diverse dates between the year 2011 and 2012 at **[particulars withheld]** slums in Industrial Area within Nairobi Area Province, intentionally caused his penis to penetrate the vagina of M.A, a child aged 10 years.

He was also charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006. The particulars were that on diverse dates between 2011 and 2012, the Appellant, at **[particulars withheld]** slums in Industrial Area within Nairobi Area province, intentionally and unlawfully committed an indecent act with M.A, a child aged 10 years, by touching her private parts namely vagina.

The Appellant was arraigned in court on the charges and after the trial the learned trial magistrate convicted him on the main charge and sentenced him to life imprisonment. Being dissatisfied by the decision of the court he has lodged the present appeal. In his Petition of Appeal the he set out the following grounds of appeal:

- I. That the learned trial magistrate erred in admitting secondary evidence without following the due process.**
- II. That the learned trial magistrate erred in not properly directing his mind to the degree, standard of proof and law relating to the burden of proof.**
- III. That the learned trial magistrate erred in failing to properly analyze all the evidence on record and in his selective analysis failed to form the necessary balanced view thus prejudicing the Appellant.**

**IV. That the learned magistrate was speculative in his finding and did not take into account all the facts, circumstances and lack of crucial evidence relating to the case especially the dates the alleged offence occurred.**

**V. That the learned trial magistrate failed to consider the obvious discrepancies, contradictions and inconsistencies in the prosecution case.**

**VI. That the conviction was against the weight of evidence.**

**VII. That the trial magistrate erred in failing to consider that crucial witnesses were never called by the prosecution.**

**VIII. That the learned trial magistrate erred in law and fact by failing to properly direct his mind in considering the appellant's defence.**

### **SUBMISSIONS.**

The parties to the Appeal all filed written submissions. The same were highlighted by Mr. Macharia, for Appellant and Ms. Sigei, for the Respondent.

Mr. Macharia argued all the grounds of appeal cumulatively. He submitted that the particulars of the charge sheet as framed were speculative as the particular date or dates the offence was committed was/were not stated. The offences were alleged to have occurred on diverse dates between the year 2011 and 2012 while the Appellant was arrested in 2013. He further submitted that in the evidence, the minor did not indicate when she came into contact with the Appellant and the fact that it took two years to report the offence created doubt as to the accuracy of the evidence adduced.

The Appellant submitted that the complainant said that she saw blood from her private parts which was contradictory of the medical evidence adduced by PW3 and PW4 who testified that there were no injuries to the vagina. Further, the fact that the complainant's hymen was broken was not evidence that the Appellant defiled her.

He submitted that the evidence of PW2 lacked corroborative or probative value. She testified that the complainant had reported the matter while in class one whilst the Appellant said he started teaching her in class three. Further that in her evidence she testified that the complainant reported the matter with others and she did not take any precursory efforts to satisfy herself as to the authenticity of the claim before acting on it.

He submitted that the complainant's parents should have participated in the matter as they were the closest relatives to her. In that case, the court should have summoned them as they were compellable witnesses. He further submitted that the evidence of the complainant pointed to her being coached. Finally, that the trial magistrate erred in not warning himself on convicting on uncorroborated evidence. Mr. Macharia urged that the appeal be allowed.

Ms. Sigei, for the Respondent submitted that all the ingredients of the offence were satisfied. She submitted that with regard to penetration it was proved by the complainant's evidence as buttressed by the evidence of the doctors, PW3 and PW4. On age of the child it was proved by documentary evidence and other evidence. And even if a Birth Certificate was not adduced, age could be proved by other cogent evidence as was held in **Joseph Kithi Self vs. Republic[2014] eKLR** that:

**“It is trite that the age of the victim can be determined by medical evidence and other cogent evidence.”**

But in the present case, she submitted that sufficient documentary evidence proved PW1's age at 10 years. With regards to identification of the Appellant, she submitted that the Appellant was known to the complainant and as such she identified him by recognition given the fact that he was her tuition teacher

and a neighbour.

On failure by the prosecution call crucial witnesses M/s Sigei cited Section 143 of the Evidence Act which provides that there is no requirement in law that a particular number of witnesses should be called to support the prosecution case. She also submitted that the assertion that the charge sheet appeared speculative was baseless as it complied with the legal requirements. Finally, she submitted that the Appellant's defence was sufficiently considered. She urged that the appeal be dismissed.

Before I delve into whether to summarize the evidence, it is important to highlight an issue which will determine the direction of the appeal. The record shows that a voire dire examination on the complainant was insufficiently carried out to meet the criteria set out under Section 19(1) of the Oaths and Statutory Declarations Act, to wit:

**“19. (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”**

This provision was broken down by the then East African Court of Appeal in *Nyasani s/o Bichana v. R(E.A),190* to the effect that:

**“It is clearly the duty of the court under that section to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child**

**“is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.”**

**This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there was due compliance with the section.”**

On the face of the record in this matter, the court wrote the following before the complainant could give her evidence:

**“Examined the accused(ought to have read complainant) on her age, names and schooling. She is 10 years old and knows her school and church, she stays with the parents. Accused is slightly aware of the court, she can proceed un sworn.”**

This particular examination does not appear to have accomplished the purpose of the examination which is to ensure that the child understands the duty of speaking the truth. See *Nyasani s/o Bichana (Supra)* where the court held said:

**“We do, however, emphasize the necessity for strict compliance with the provisions of the section. Non-compliance might well result in the quashing of a conviction in a case where the other evidence before the court was insufficient in itself to sustain the conviction.”**

It is a requirement in voire dire examination that the trial court should put questions to the child witness which will assess her/his level of intelligence. The answers that the child gives should be recorded and will consequently form the basis on which the trial court will make a ruling on whether the child is possessed of sufficient intelligence to tell the truth. In the said answers, the trial court is able to deduce whether the child understands the meaning of taking an oath as a result of which a ruling should be made

on whether the child will give a sworn or an unsworn statement.

It is apparent from the record that the learned trial magistrate only looked at the child and on his own volition formed an opinion that the child should give an unsworn statement. Whereas a voire dire examination is only conducted to children of tender age, if the court felt that there was no need for the same, it ought to have recorded the reasons for so finding. In the present case however, it was clear that the child who was aged 10 years was of tender age, more so by the fact that the magistrate ruled that she would give an unsworn testimony. It has been settled by case law who a child of tender age is. In the case of **Kabangeny Arap Kolil vs R [1959] E.A at page 93**, the following was said:

**“There is no definition in the Oaths and Statutory Declaration of the expression ‘child of tender years’ for the purpose of S. 19. But we take it to mean, in the absence of special circumstances, any child of any age, or apparent ages or under fourteen (14) years.”**

Again, in the dictum of Lord Goddard, CJ in **R vs Campbell [1956] 2ALL ER 272**, the court said:

**“Whether a child is of tender years is a matter of good sense of the court ... whether there is no statutory definition, of the phrase approved.”**

The learned magistrate not having recorded the reasons why the witness should have adduced unsworn evidence was an indication that the finding was not based on any good ground. In any case, the record is clear that he only examined the child on her age, names and schooling. Even then, whatever answers to the examination were given were not recorded. In that respect, I hold that the voire dire examination was not done sufficiently and in accordance with the law. The same vitiated a fair trial. That then would call for an order of a retrial.

A retrial on the other hand will only be ordered if the following conditions are satisfied as set out in the case of **Mwangi vs Republic [1983] KLR 522** where the Court of Appeal held that:

**“That a retrial should not be considered unless the appellate court is of the opinion that, on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result; Braganza vs Republic[1957] E.A 152(CA) 469; Pyarwa Bussam vs Republic[1960] E.A 854**

Several factors have therefore to be considered. These include:

- 1. When the original trial was illegal or defective a retrial will be ordered.**
- 2. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.**
- 3. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.**
- 4. A retrial should not be ordered where it is likely to cause an injustice to the accused person.**
- 5. A retrial should be ordered where the interest of justice so demand.**
- 6. Each case should be decided on its own merits.**
- 7. Whether there is evidence to support the conviction.”**

In the instant case, there is sufficient evidence that PW1 who was the complainant spoke the truth. The Appellant was her tuition teacher who took advantage of their seclusion to defile her. Although PW1 did not report the offence until close to an year later, it is factual that the Appellant had warned her with death if she disclosed what had happened. More so, the medical evidence of PW3, Dr. Maundu Joseph and

PW4, Dr. Kinuthia Mbugua concluded that PW1 had been defiled. On whether physical injuries on PW1's genitals could be seen one year later is a matter for determination by the trial court. This applies to the issue raised that PW1's mother did not testify. But for record purposes, it is clear that she was no longer living with PW1 who was staying with her step-mother. In that regard, I am of the view that the retrial will not be aiding the prosecution to close any gap in their case. Further, no prejudice will be occasioned to the Appellant if a retrial is ordered. Should he be convicted he is liable for imprisonment for life. He was only sentenced on 2<sup>nd</sup> October, 2015 and has therefore been in prison for only one year. Furthermore, the offence of defilement is serious and requires that a fair trial should be conducted so that all parties can ventilate their case.

In the end, this appeal partially succeeds. I quash the conviction and set aside the sentence. I order that a retrial be conducted. The Appellant shall be escorted to Industrial Area Police Station not later than 6<sup>th</sup> October, 2016 for purposes of processing him to court to take plea. Thereafter, he shall be presented before the Chief Magistrate, Makadara Law Courts for plea within the period stipulated by the law. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> SEPTEMBER, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Ondieki holding brief for Bosire for the Appellant.
2. M/s Nyauncho for the Respondent.