



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 105 OF 2013

PETER MBURU MWANGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

**(Being an appeal against conviction and sentence in Murang'a Senior Principal Magistrate's Court
Criminal Case No. 385 of 2010 (Hon. I.K. Orange) on 8th October, 2010)**

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to **section 8(2)** as read with **section 8(1) of the Sexual Offences Act, No. 3 of 2006**. The particulars were that on the 22nd day of January, 2010 at *[particulars withheld]* in Murang'a district of the central province, the appellant intentionally and unlawfully did cause his penis to penetrate the vagina of MWC, a child aged five years.

Alternatively, the appellant was charged with the offence of indecent act with a child contrary to **section 11(1) of the Sexual Offences Act, No.3 of 2006** the particulars of which were that on the 22nd day of January, 2010 at *[particulars withheld]* in Murang'a district of central province, the appellant intentionally and unlawfully did indecent act to MWC by causing his penis to come into contact with her vagina.

The appellant denied all the charges and so the case against him proceeded to a full trial in which the state had seven witnesses testify; the appellant chose to remain silent in his defence. In his judgment, the learned magistrate held that the prosecution had proved its case beyond reasonable doubt and the appellant was convicted of the main count and sentenced to serve life in prison.

Being dissatisfied with the learned magistrate's decision, the appellant appealed to this court against both the conviction and sentence. In his grounds of appeal, the appellant has faulted the learned magistrate's decision on the grounds that the learned magistrate erred in law and in fact by relying on uncorroborated evidence of the 1st and 2nd prosecution witnesses to convict the appellant; that the learned magistrate erred in law and in fact in holding the appellant had defiled the complainant and infected her with gonorrhoea yet there was no evidence linking the appellant to the defilement or to the sexual disease of gonorrhoea; the learned magistrate erred in law and in fact in convicting the appellant yet the complainant's age was not ascertained; and that the learned magistrate erred in law and in fact for convicting the appellant without considering that he had been arrested fifteen days after the alleged event and no explanation had been given for the delay.

Amongst the prosecution witnesses who testified were two minors the first of whom was the complainant **M W**. According to the record, the learned magistrate noted that the complainant was five years old and

“may not understand the purpose of oathing”. He also noted that the complainant was a vulnerable witness and proceeded to take an unsworn statement from her.

The complainant said that she was a pupil at *[particulars withheld]* nursery school. She identified her clothes, including her under wear presented in court as prosecution exhibits. She said while she was walking from school, the appellant held her and took her to a thicket. He removed his penis and pushed it inside her as a result of which she felt a lot of pain. She identified the appellant in the dock as the person who had defiled her. She testified that the appellant threatened to beat her up if she told anybody what had happened. The court allowed the appellant to cross-examine the complainant and in answer to the question posed by the appellant, the complainant told the court that she knew the appellant as Mburu and that she found him standing at the thicket where he apparently defiled her.

The second prosecution witness, **EM**, was also described by the learned magistrate as a minor though his exact age was not given; he gave unsworn statement and told the court that he was a pupil in class two at *[particulars withheld]* primary school. He testified that the complainant was his sister. He said that on 22nd January, 2010 at around 3.30 pm he was going home from school when he found the appellant on top of his sister. According to this witness, when the appellant saw him, he put on his pants and told him not to tell anybody. He identified the appellant in the dock. The witness was also cross-examined by the appellant.

C C (PW3) testified as the mother of the complainant; she said she had five children of whom the complainant was the fourth born and was five years old. According to this witness, on the 22nd day of January, 2010 at around 4.30 pm the complainant told her that she had been raped by the appellant; that he removed the complainant’s pant and lied on top of her. She checked her and confirmed that indeed she had been defiled. She went to report the matter at Kahuro police station accompanied by the complainant who was still in her school attire including the green under wear she had been wearing when she was defiled. At the police station she was referred to Muriranjas hospital where the complainant was treated. She was issued with a P3 form which was filled at the hospital.

The clinical officer who treated the complainant was **Samuel Wangai (PW4)**; according to this witness, he was a clinical officer at Muriranjas hospital where the complainant was examined on 22nd January, 2010. In his evidence, he confirmed that the complainant had bruises at the vulva, the hymen was broken and there were bruises at the vagina. There was also a foul smelling vaginal discharge. The complainant had also been infected with gonorrhoea. In the officer’s opinion, the complainant had been raped and infected with a sexually transmitted disease. The officer produced the P3 form which he filled as an exhibit and was admitted in evidence as such. He also produced in evidence the treatment card in respect of the complainant’s treatment as a prosecution exhibit. The officer confirmed that he did not examine the appellant.

Corporal Emily Chebet (PW5) is the police officer who received the complaint’s report at Kahuro police station. In her evidence, she told the court that on 22nd January, 2010 she was in her office when she received the report that the complainant had been defiled by a person known to her. She said that she took the complainant to the hospital at Muriranjas where she was treated. She also issued a P3 from which was duly filled. The officer said that she issued a note to Gatura police base to arrest the appellant, who was ultimately arrested on 9th February, 2010. She also produced in court the complainant’s clothes as prosecution exhibits.

On his part the appellant chose to remain silent when he was put on his defence.

The task of this court, as the first appellate court is to evaluate the entire evidence afresh and come to its own conclusions. In undertaking this task, the court is minded that it does not have the opportunity to hear and see the witnesses like the trial court and therefore limited in making conclusions based on such aspects of evidence as the demeanour of the witnesses. This has always been the position of the law since the court of appeal decision in the case **Okeno versus Republic (1972) EA 32** where it was stated that:-

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates’ findings can 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 page 36).

In evaluating the evidence on record in determination of this appeal, two pertinent questions which ought to be answered are, first, whether indeed the offence of defilement as defined in **section 8(2)** as read with **section 8(1)** of the **Sexual Offences Act, No. 3 of 2006** or in the alternative, the offence of indecent act with a child as defined in **section 11(1)** of that Act was committed. If the answer to that question is in the affirmative, the second question is whether the appellant was the perpetrator of any of these offences. The answers to these question would constitute what is described as the appellate “court’s decision” or “its own conclusions” in the words of the court of appeal’s decision of **Okeno versus Republic** (supra).

Section 8(1) defines the offence of defilement; it states:-

8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

The punishment for the offence of defilement varies depending on the age of the child victim. In **section 8(2)** under which the appellant was charged, the sentence for defilement with a child of eleven years or below like the complainant in the trial court is imprisonment for life.

The penetration referred to in **section 8(1)** of the Act is defined in **section 2** of that Act to mean ***“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”***

The evidence of the clinical officer, **Samuel Wangai (PW4)** who treated the complainant was that the complainant had bruises at the vulva and that her hymen was broken with bruises at the vagina. There was a vaginal discharge of foul smell and the complainant had contracted gonorrhoea. In his opinion, the complainant had been defiled and infected with a sexually transmitted disease. This information was contained in a P3 form which was admitted in evidence. There was also evidence that the complainant had been treated at Muriranjas sub-district hospital on 22nd January, 2010; the treatment card was produced in proof thereof.

The clinical officer’s evidence was neither challenged nor shaken and it left no doubt that the complainant’s genital organs must have been inserted with the genital organs of another person who transmitted a sexual disease to the complainant in the process. Penetration as defined in **section 2** of the Act was established and by extension, the offence of defilement as defined in **section 8(1) of the Sexual Offences Act** was also proved beyond any peradventure.

The next question is whether, from the evidence on record, it was proved to the required standard that the appellant was the villain. The answer to this question largely turns on the evidence of the first two prosecution witnesses who incidentally happened to be children of tender years. By virtue of their age, these were exceptional witnesses whose evidence may be taken or may not be taken on oath or affirmation depending on the circumstances of each particular case.

Legally, it is mandatory for any witness in a criminal case to be examined on oath; this is the tenor of **Section 151** of the **Criminal Procedure Code** which provides that:-

Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.

Despite this mandatory requirement, children of tender years, as the first two prosecution witnesses

appear to have been, are exempt from being examined on oath in certain instances. The exemption and the circumstances under which it may apply are found in **section 19** of the **Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya**. It is provided in that section of the Act that:-

“19. (1) Where in any proceedings before any court or person having by law or consent of the 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 as aforesaid, 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 other person as aforesaid, 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.”

A “child of tender years” as understood in this section was defined in the case of **Kibangeny Arap Kolil versus Republic (1959) E.A 92** where it was held ***“that in the absence of special circumstances a child of tender years could be taken to include a child of any age or apparent age of under fourteen years.”***

Under **section 19** of the **Oaths and Statutory Declarations Act** evidence of a child of tender years may be received on oath if in the opinion of the court, the child understands the nature of an oath. Where, in the opinion of the court the child does not understand the nature of an oath but he is intelligent enough and he understands the duty of speaking the truth, his evidence may be received and admitted though not on oath. On either occasion, the court can only reach an opinion on whether the evidence of a child may be received on oath or not upon enquiry comprising questions directed at the child; this enquiry is what is sometimes referred to as *voire dire* examination. The evidence of a child of tender years, whether sworn or unsworn, can only be received after this examination and the court is satisfied that the evidence may be received in one form or another. Failure to observe this procedure is fatal to a conviction if the evidence in question is so core to the conviction that without it an acquittal would follow. In other words a conviction based on the evidence of a child of tender years, whether sworn or unsworn, without prior examination of the child on whether he understands the nature of an oath or he is intelligent enough and understands the duty of speaking the truth may amount to a miscarriage of justice if there is no other independent evidence linking the prisoner with the offence for which he has been convicted.

In the case of **Sakila versus Republic (1967) E.A**, the court (Platt, J as he then was) referring to the decisions in the cases of **Kibangeny Arap Kolil versus Republic (supra)**, **Nyasani s/o Bichana versus Republic (1958) E.A 190**, **Fransio Matovu versus Republic (1961) E.A 260** and **Oloo Gai versus Republic (1960) E.A 86** said at page 406 that:-

“It is well established that before evidence of a person of tender years is admitted, a voire dire examination should be carried out in order that the court may satisfy itself that the witness is possessed of sufficient intelligence and that he understands the duty of speaking the truth in order to justify the reception of his evidence. And further that where it is clear that he understands the nature of the oath, his evidence may then be received on oath or affirmation. Where this procedure is not carried out and the evidence of a person of tender years is of a vital nature, it may be that the omission may occasion a miscarriage of justice.”

The court went further to say that considering earlier decisions in the cases cited, where there is no other evidence other than that of a child of tender years who has not been properly examined the conviction cannot be sustained. The court allowed the appeal, quashed the conviction and set aside the sentence on this ground.

In **Nyasani s/o Bichana versus Republic (supra)**, which is one of the decisions that the court in **Sakila versus Republic (supra)** relied on, the court of appeal said at page 191 that:-

“It is the duty of the court under that section (that is section 19 of the Oaths and Statutory Declarations Act) 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 has been a due compliance with the section.”

The court concluded that non-compliance might well result in the quashing of a conviction in a case where the other evidence before the court is insufficient in itself to sustain the conviction.

Turning back to the appeal at hand, it is not in dispute that the complainant (PW1) and her brother, **EM (PW2)** were children of tender years. It is not also in dispute that as the victim of the defilement and an eye witness to this crime respectively, their evidence was vital in conviction of the appellant. In his judgment, the learned magistrate underscored this point when he held that the complainant positively identified the appellant and that her brother witnessed the appellant committing the crime.

Despite the importance of their evidence in the conviction of the appellant, the learned magistrate received their unsworn evidence without establishing whether they were intelligent enough and understood the duty of speaking the truth. Neither was there any inquiry to establish whether any of the two witnesses understood the nature of an oath for the learned magistrate to have come to the conclusion that the witnesses could give an unsworn statement. The only remark that the learned magistrate made was in respect of the complainant before her evidence was taken. From the record this is what appears;

“The court notes that the minor is a venerable (sic) witness. She is five years and may not understand the purpose of oathing and recommends to give unsworn evidence.”

No comment whatsoever was made in respect of the second prosecution witness. The court simply did not conduct a *voire dire* examination before taking evidence of the two prosecution witnesses of tender years in outright breach of the provisions of **section 19 of the Oaths and Statutory Declarations Act**. As the cited authorities demonstrate, a conviction based on evidence infringing on **section 19 of the Oaths and Statutory Declarations Act**, in the absence of any other material evidence linking the appellant to the offence for which he was convicted, would be unsafe.

The only other evidence that one would look at is the evidence of the clinical officer. There is no doubt that his evidence established that the complainant was defiled and even infected with a sexually transmitted disease. However there was nothing in his evidence to suggest that the appellant was the person behind this heinous crime. For some unexplained reason, the appellant was not examined, at least to confirm whether there was any connection between the vital traces of the vaginal discharge and the gonorrhoea and the appellant. My conclusion is that the alternative evidence that would have provided proof that the appellant was the person involved in the defilement of the complaint is lacking in some vital respects. It is not sufficient enough to fill the omissions in the crucial evidence of the complainant and the eye witness.

This court has no alternative but to take cue from court decisions that have been reached in similar circumstances and allow this appeal. The appellant is set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 27th day of January, 2014

Ngaah Jairus

JUDGE