



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 101 of 2007

BEN ONDIEKI MOMANYI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From original conviction and sentence of the Senior Resident Magistrate's Court at Nyamira,  
Criminal Case No.1152 of 2005

by L. KOMINGOI, SRM)

JUDGMENT

The appellant was charged with defilement of a girl under the age of 16 years contrary to **section 145(1)** of the **Penal Code**. The particulars of the offence are that on 25<sup>th</sup> of August, 2005 at Bomanyanya sub location in Nyamira district the appellant had unlawful carnal knowledge of **A. B.**, a girl aged about 13 years.

After a full trial the appellant was convicted and sentenced to 20 years' imprisonment. The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. The petition of appeal consists of 13 grounds. I will not set them out herein but will refer to the major ones as were cited by Mr. Nyambati, the appellant's learned counsel. Mr. Kemo, Senior Principal State Counsel, conceded the appeal and stated that there were material contradictions in the evidence by prosecution witnesses.

That notwithstanding, this being the first appellate court, it has a duty to examine a fresh the entire evidence that was tendered before the trial court, re-evaluate the same and reach its own independent conclusion, see **NJOROGE VS. REPUBLIC** [1987] KLR 19.

The prosecution evidence can be summarized as hereunder:

The complainant, PW1, testified that she knew the complainant well since his home was about 70 metres away from their home. On the material day at about 6 p.m, the complainant went to their toilet, which is in front of their house. The appellant followed the complainant into the toilet. He grabbed the complainant, covered her mouth removed her under pants and proceeded to defile her. While the two were in the toilet, the complainant's Aunt, **M. A., PW3** went to the complainant's home. She opened the toilet and found the appellant and the complainant inside. The appellant ran away. PW3 reported what

she saw to the complainant's mother. The complainant was taken to Nyamira Hospital where she was treated and discharged. A report was later made at the Administration Police Post, Nyamira.

PW2 testified that on the material day, when she was going to the complainant's home she heard some commotion coming from a toilet within the compound. When she pushed the toilet door she saw a man inside who pushed back the door. PW3 went and told her sister and they both went to the toilet. They saw the appellant running out from the scene, zipping his pair of trousers. The complainant came out sweating and crying. They proceeded to report the matter to some Administration Police officers and also took the complainant to Nyamira Hospital. PW3 was emphatic that the person whom she saw running out of the toilet was the appellant. It was about 6 p.m. and there was sufficient light to enable her see clearly. She knew him well as he was their neighbour. **Pamela Mokeira Oginga, PW4**, corroborated the evidence of PW3 in all material aspects.

**Juliet Wanjiru Manyaga, PW2**, was a clinical officer at Nyamira District Hospital. She testified that the complainant was first taken to the Hospital on the 25<sup>th</sup> August 2005. On 29<sup>th</sup> August 2005 the complainant was taken back to the hospital so that her P3 form could be filled. Upon her examination on the first day, 25<sup>th</sup> August, 2005, it was realized that there was a whitish discharge from her private parts. There was also flow of blood, which upon examination was realized to contain spermatozoa cells. The witness concluded that there had been sexual penetration. The evidence of PW2 was corroborated by that of **Peter Agai Momanyi, PW7**, the clinical officer who examined the complainant on 25<sup>th</sup> August 2005. In cross examination, PW7 added that with regard to the blood that was observed in the complainant's private parts, the complainant told him that she was having her monthly periods. That notwithstanding, the witness testified that the presence of spermatozoa in the complainant's private parts indicated that there had been sexual penetration.

Police constable **Dominic Kimeli Limo, PW5**, who was stationed at Nyamira Police Station, told the trial court that the appellant was arrested and taken to the police station on the material day at about 6 p.m.

In his defence, the appellant denied having committed the offence as charged with. He testified that on the material day, he heard people talking in the complainant's home. He was told by one of his relatives that there was a man who was in the complainant's toilet. He proceeded to the toilet where they found PW3 standing outside. He was asked by PW3 whether he had seen anyone running away towards the road and he responded in the negative. He was accused by the complainant's mother of having defiled her daughter. As a result, many people came to the complainant's home and the appellant decided to go and report the matter at Nyamaiya Administration Police Post. He was referred to Nyamira Police Station. He added that he was not in good terms with the complainant's father and that was the reason why he was framed up.

Mr. Nyambati for the appellant submitted that the complainant testified on oath but the trial court did not take into consideration the principles that guide courts before recording evidence on oath from minor children. He cited the Court of Appeal decision in **JOSEPH KARANJA MUIGAI VS REPUBLIC**, Criminal Appeal No.157 of 2003 at Nairobi, (unreported). In that case, the appellant had been convicted on three counts of attempted defilement of a girl contrary to **Section 145(2)** of the **Penal Code**. His conviction was based entirely on the evidence of three young girls. The learned trial magistrate did not conduct a **voire dire** examination before receiving the evidence of the three minors. The Court of Appeal restated the proper procedure to be followed when children are tendered as witnesses as was set out in its earlier decision in **JOHNSON NYOIKE MUIRURI VS REPUBLIC**, (1982-88) 1 KAR 150.

In view of the fact that the trial court failed to adopt the correct procedure as regards evidence of the three young girls, the court allowed the appeal.

In the matter that was before the trial court, the learned trial magistrate did not conduct any **voire dire** examination at all. If she did, there was no such indication on the record. She merely stated of the complainant:

*“She is intelligent enough and understands the meaning of Oath to be sworn.”*

The trial court did not comply with the provisions of **Section 19(1) of the Oaths and Statutory Declarations Act** cap 15, which states as follows:

*“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.”*

In **MOHAMED VS REPUBLIC**, [2005] 2KLR 138 at page 147, the Court of Appeal, commenting on the above quoted provision of the law stated:

*“Section 19(1) (supra) requires the court to establish two matters: firstly, whether the child understands the nature of an oath. If the court comes to that conclusion, then It proceeds straight away to swear or affirm*

*the child and to record the evidence.*

*Secondly, if the court is not satisfied on the first test, it should express its opinion, not only that the child is possessed of sufficient intelligence to justify reception of the evidence, but also understands the duty of telling the truth, before proceeding to record the child's evidence."*

In the above-cited decision, the court further stated that the **voire dire** examination need not necessarily be conducted in question/answer form. What is important is that the trial court indicates on its record that the child has been examined in accordance with the provisions of **section 19(1) of the Oaths and Statutory Declarations Act** and an opinion formed as to whether the child understands the nature of an oath and is observed to be of sufficient intelligence to justify reception of the child's evidence and understands the duty of speaking the truth.

If the appellant's conviction was entirely based on the complainant's evidence, failure on the part of the trial court to conduct a **voire dire** examination before receiving her evidence would have been fatal to the prosecution case. However, the complainant's evidence was well corroborated by among others, PW2, PW3 and PW4. Corroboration of evidence of a child of tender age is no longer necessary where a criminal case involves a sexual offence and the only available evidence is that of the child who is the alleged victim of the offence but, the court has, for reasons to be recorded in the proceedings, to be satisfied that the child is telling the truth. This is in view of the recent amendment to **Section 124 of the Evidence Act**. The learned trial magistrate stated that she believed the complainant, saying that she had no reason to frame the appellant. The learned magistrate added that PW3 and PW4 saw the appellant running out of the toilet, zipping his pair of trousers and shortly thereafter the complainant came out of the same toilet sweating and crying.

Mr. Nyambati further submitted that it was not clear what language was used by the trial court in conducting the proceedings. The language of the court was stated on the day when the plea was taken but not on the subsequent hearing dates. **Section 77 of the Constitution** was therefore not complied with, counsel submitted. However, the record shows that the appellant was represented by one Mr. Rogito advocate all through the hearing, except on the day when the judgment was delivered. I reject that ground of appeal.

Mr. Nyambati also took issue with the medical evidence that was adduced against the appellant. He submitted that the P.3 form in respect of the complainant was filled by PW2, five days after commission of the offence. However, PW2 used treatment notes that had been made by PW7, the Clinical Officer who examined the complainant on 25<sup>th</sup> August, 2005 at Nyamira District Hospital. PW7 testified and produced the treatment notes as well. The complainant's external genitalia did not have any tear or bruises but laboratory report indicated presence of spermatozoa in the complainant's vagina. PW7 stated that the flow of blood from the complainant's vagina was as a result of her monthly periods. However, from the laboratory test, PW5 formed the opinion that penetration had taken place.

It was submitted that no D.N.A test was conducted to determine whether the spermatozoa that were found in the complainant belonged to the appellant. While I believe that such a test would have been conclusive, I do not think that failure to carry out the same was fatal to the prosecution case since there was other relevant evidence upon which the trial court based its determination of the case. Such an issue was considered by the Court of Appeal in **KUVUA VS REPUBLIC** [2005] 2KLR 156. The court held

that even in the absence of a DNA test, the appellant therein was rightly convicted, as there was other sufficient evidence to show that he had sexually molested two young girls who were the complainants.

The trial court considered the appellant's defence and rejected the same. Having carefully examined the evidence on record, I am satisfied that the appellant's conviction was proper.

On the issue of the sentence that was handed down by the trial court, I do not think that the same was harsh or excessive, considering the gravity of the offence. The learned trial magistrate exercised her discretion. Before an appellate court can interfere with a trial court's exercise of discretion in sentencing an appellant, it has to be shown that the trial court overlooked some material factor, took into account some immaterial factors, or acted on a wrong principle or that the sentence is manifestly harsh or excessive. See **WANJEMA VS REPUBLIC** [1971] E.A. 493. Neither of the above factors was demonstrated by the appellant. In conclusion, I dismiss this appeal and confirm the lower court's judgment.

**DATED, SIGNED and DELIVERED at KISII this 13<sup>th</sup> day of June, 2008.**

**D. MUSINGA**

**JUDGE**

Delivered in open court in the presence of:

Mr. Nyakundi HB for Mr. Nyambati for the appellant

Mr. Kemo, Senior Principal State Counsel for the Republic

**D. MUSINGA**

**JUDGE.**