**Kithi alias Morgan v Republic (Criminal Appeal E037 of 2021)**
**[2025] KEHC 90 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 90 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL APPEAL E037 OF 2021**

**M THANDE, J**

**JANUARY 17, 2025**

**BETWEEN**

**HAMISI KITHI ALIAS MORGAN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An Appeal arising out of the judgment of Hon. M. N. Wanjiru, RM delivered on 6.9.21 in Kaloleni Sexual Offences Case No. E010 of 2020)***

## JUDGMENT

1. The Appellant herein was tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* (SOA). The particulars of the offence are that on diverse dates between 1.8.19 and 29.19.2020, at Kilifi County, the Appellant intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of MM (the Complainant), a child of 17 years. Upon conviction of the main charge, the Appellant was sentenced to 15 years imprisonment.

2. Being aggrieved by the decision of the trial court, the Appellant has appealed to this Court against both the decision of the trial court. The summarized grounds as set out in his amended grounds of appeal are that the trial Magistrate court erred in law and fact by:

    1. failing to acknowledge that the evidence of PW1 was taken without adhering to the provisions of Section 151 of the Criminal Procedure Code (CPC) and Section 19 of the *Oaths and Statutory Declarations Act*.

    2. failing to appreciate that the alleged victim demonstrated doubtful integrity whose evidence was doubtful.

3. calling for DNA analysis which contravened Article 50(1) and (2) of *the Constitution* and which evidence was produced without following the laid down procedure and without a certificate.

4. finding there was forceful penetration as the conduct of the complainant was consistent with that of an adult and that the defence in Section 8(5) and (6) of the SOA was available to him.

5. imposing a sentence that is harsh and manifestly excessive.

3. The Appellant urged the Court to allow the Appeal.

4. This Appeal will turn on one issue, namely, contravention of Section 151 of the CPC and Section 19 of the *Oaths and Statutory Declarations Act*. The Appellant submitted that while the trial Magistrate, after conducting the voire dire, found that the Complainant understood the nature of an oath, she was not sworn. As such, the unsworn evidence is inadmissible and of no probative value.

5. Section 151 of the CPC makes it mandatory for every witness in a criminal trial to be examined upon oath. Under Section 19 of the *Oaths and Statutory Declarations Act* where a trial court forms the opinion that a minor who is a witness does not understand the nature of an oath but has sufficient intelligence and understands the duty of speaking the truth, the evidence of such minor may be taken but not on oath. It follows that where a minor understands the nature of an oath, such minor shall be examined on oath.

6. The record herein shows that the trial Magistrate stated that the Complainant "is intelligent enough and understands the oath. She shall be sworn." There is no record showing that she was in fact sworn.

7. In the case of Samwel Muriithi Mwangi v Republic [2006] eKLR the Court of Appeal considered an appeal where there was nothing in the record to show that witnesses had not sworn in the trial court and stated:

> In the record before us, there is no way in which we can determine, one way or the other, that the witnesses were or were not sworn before they gave their evidence. Most likely, they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of section 151 of the Criminal Procedure Code and the other provisions we have set out herein. That, in our view, cannot be a matter curable under section 382 of the Criminal Procedure Code. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence.

8. Failure by the trial court to swear the Complainant after finding that she understood the nature of an oath is a grave omission. Taking cue from the holding of the Court of Appeal, I find that to be convicted and sentenced to 15 years' imprisonment on the unsworn evidence of the Complainant must of necessity be prejudicial to the Appellant.

9. Section 382 of the CPC makes provision for reversing or altering a finding on account of an error or omission in charge or other proceedings as follows:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge,

proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

10. It is a mandatory statutory requirement that every witness in a criminal trial including a minor who understands that nature of an oath, shall be examined upon oath. The omission by the trial court to have the Complainant sworn before taking her evidence is not one that can be cured by the provisions of Section 382 of the CPC. The Court of Appeal stated as much in the cited authority.

11. Duly, guided by the Court of Appeal in the cited case, I find that the trial Magistrate fell into error by disregarding the express provisions of Section 151 of the CPC and Section 19 of the *Oaths and Statutory Declarations Act*. Failure by the trial Magistrate to have the Complainant sworn before taking her evidence rendered her evidence inadmissible. On this basis alone and given that it was upon the Complainant's evidence that the trial court relied in convicting the Appellant, the Appeal succeeds.

12. I accordingly quash the conviction and set aside the sentence imposed on the appellant. He is forthwith set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 17TH DAY OF JANUARY 2025**

**M. THANDE**

**JUDGE**