



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT MERU  
CRIMINAL APPEAL NO. 45 OF 2019  
CORAM: D.S. MAJANJA J.

BETWEEN

NICHOLAS MUTUMA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence of Hon. L. Ambasi, CM dated 28<sup>th</sup> February 2019 at the Magistrate's Court at Meru in Sexual Offence Case No. 7 of 2014)*

JUDGMENT

1. The appellant, NICHOLAS MUTUMA, was charged and convicted of two counts of the offence of defilement contrary to **section 8(1)** as read with **section (2)** of the *Sexual Offences Act* ("the Act"). The particulars of the charges were that on the 11<sup>th</sup> March 2017 at [particulars withheld] forest, Kinoru Sub-location in Imenti North District within Meru County he intentionally caused his penis to penetrate the anus of EM, a child aged 7 years and IM, a child aged 3 years.
2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence on grounds of appeal set out in the petition of appeal filed on 8<sup>th</sup> March 2019. He contended that the prosecution failed to prove the offence beyond reasonable doubt. That the medical examination report did not support the prosecution case and that the vital witnesses were not called to testify. He also stated that his cogent defence was not considered and that the case against him was a frame-up.
3. The respondent supported the conviction on the grounds that the prosecution proved all the elements of the offence.
4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] EA 32*). In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.
5. On the material day, two boys, EM (PW 1) and IM (PW 4) were playing when the appellant came to where they were and told them that he had lost his donkey. He asked them to follow him into the forest. PW 1, who testified on oath after a *voire dire*, narrated what happened as follows:

*He told us to follow him into the forest. He then removed his kisusu. ... for peeing. He told me to sit on him. He removed my trousers and underwear. He put his kisusu in my anus. It was painful. He did the same to IM and removed his clothes and did the same to him. He said that if we told anyone he would beat us and take us to the police.*

6. PW 4 narrated what happened as follows:

*I know the accused ..... I was with EM. We were playing when the accused called us and told us to go look for his donkey. Me I refused. He told me it was not far. We went. He took me to a forest then removed my clothes. My trouser and he did me tabia mbaya ..... He removed his thing for urinating and put it inside where I poo poo.*

7. PW 4's mother, PW 2, recalled that on 15<sup>th</sup> March 2017 at about 4.00pm, she was going with him to fetch water. PW 4 told her that they should not go to the river near the forest. When she inquired further, he narrated to her his ordeal with PW 1 at the hands of the appellant. She rushed to PW 1's mother, PW 3, and told what PW 4 had told her.
8. PW 3 recalled that on the same day, PW 2 came to see her. She called PW 1 who confirmed to her what happened. Both PW 2 and PW 3 proceeded to report the matter at the police post. They also testified that they had known the appellant as a neighbour. The children were thereafter taken for examination and treatment at Meru Teaching and Referral Hospital.
9. PW 5, a medical doctor, produced P3 medical forms prepared by the doctor who examined both children on 16<sup>th</sup> May 2017. According to the examination, PW 4 was aged 3 years and had lacerations on both sides of the anal canal while PW 1, who was aged 7 years, had a laceration on the anal canal.

10. The investigating officer, PW 6, told the court that on 11<sup>th</sup> March 2017, he received a call from the public that a suspect was being beaten by members of the public. He proceeded to the scene and found the appellant whom he arrested. He completed the investigation and charged appellant.

11. When called upon to make his defence, the appellant elected to remain silent.

12. In order to prove the offence of defilement under **section 8(1)** of the **Act**, the prosecution must establish that the complainant was a child, that there was penetration and the act of penetration was by the accused person. "*Penetration*" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

13. Both PW 1 and PW 4 gave graphic testimony of what took place. It left no doubt that the appellant committed acts of penetration against both complainants. Both children knew the appellant as he was a neighbour and the incident took place at daytime displacing any doubt about the appellant's identity. The complainants' evidence alone is capable of supporting a conviction as the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** dispenses with corroboration if the trial Magistrate, for reasons to be recorded believes the child to be telling the truth. In this case the trial magistrate expressed the view that, "*In the instant case, it is the finding of this court that both children were truthful and their evidence credible and cogent.*"

14. There was however corroborative evidence to support the testimony of PW 1 and PW 4. The medical evidence in the form of P3 medical reports showed that they had injuries on the anal canals consistent with an act of penetration. The children's credibility was enhanced by the fact that they independently told their parents. PW 1 only revealed what happened when confronted by his mother while PW 4's trauma became apparent when his mother asked him to accompany her to the forest where he had been sexually assaulted.

15. The age of a child is a question of fact. As regards PW 1, he testified that he was 7 years old and was school going. The doctor who examined him recorded that he was 7 years old in the P3 medical form while PW 1 was assessed to be aged 3 years old. In either case the prosecution established that both complainants were children for purposes of the offence.

16. Before I conclude, I note that when PW 4 testified, the record does not show that the appellant was given an opportunity to cross-examine the witness. **Article 50(2)(k)** of the Constitution speaks of the right, "*to adduce and challenge evidence*". It does not matter that the child gave unsworn testimony. The Court of Appeal discussed this issue in **Nicholas Mutuke Wambuke v Republic MSA Criminal Appeal No. 373 of 2006 (UR)** and had this to say;

*The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined..... it would appear that misconception arises from a view that because accused persons are not cross examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined. That thinking is expressed in Section 208 of the CPC which governs hearing of criminal proceedings in the Magistrates' courts. It provides that during the hearing, "the accused persons or his advocate may put questions to each witness produced against him." Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in all criminal trials to obviate an otherwise stable case from being lost on that omission.*

17. In the circumstances, the appellant's right to a fair trial was violated and the resulting conviction cannot be upheld. In the circumstances, I quash the conviction and sentence in respect of Count II.

18. Even though the appellant elected to remain silent, there is nothing that emerged from the evidence to suggest that the children were untruthful and in light of the totality of the evidence I find and hold that the conviction in Count I was properly founded. It is therefore affirmed.

19. I now turn to the issue of the sentence. Under **section 8(2)** of the **Act**, the life sentence is mandatory where victim is below the age of 11 years. In the circumstances, the sentence was lawful. However, the Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; **BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019]eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**. Based on those decisions, I quash the sentence of life imprisonment and substitute the same with a term of 20 years' imprisonment on Count I.

20. For the reasons I have set out I make the following orders:

(a) The conviction and sentence on Count II is quashed.

(b) The conviction on Count I is affirmed but the sentence of life imprisonment is set aside and substituted with a sentence of 20 years' imprisonment

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of MAY 2020.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.

