



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 180 OF 2009

MARTIN KAMAU NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 4539 of 2007 of the Chief Magistrate's Court at Nakuru by Hon. Baraza-Resident Magistrate)

JUDGMENT

1. **Martin Kamau Njoro**, the appellant herein, was convicted in three counts for the offences of defilement contrary to section 8(1) (2) [sic] of the Sexual Offences Act No. 3 of 2006.
2. The particulars in count one were that on 22nd September, 2007 at **[Particulars Withheld] Farm Solai in Nakuru District, of the Rift Valley Province**, intentionally and unlawfully had sexual intercourse with **NWM**, a child aged 8 years.
3. The particulars in count two were that on diverse dates in the month of September, 2007 at **[Particulars Withheld] Farm Solai in Nakuru District, of the Rift Valley Province**, intentionally and unlawfully had sexual intercourse with **GN**, a child aged 10 years.
4. The particulars in count two were that on diverse dates in the month of September, 2007 at **[Particulars Withheld] Farm Solai in Nakuru District, of the Rift Valley Province**, intentionally and unlawfully had sexual intercourse with **JMK**, a child aged 8 years.
5. The appellant was sentenced to serve 25 years imprisonment on each count and the sentence was ordered to run consecutively. He now appeals against both conviction and sentence.
6. The appellant was represented by Mr. Bosire advocate, from the firm of Onchweri, Ngamate & Company Advocates. He raised the following grounds of appeal:
 - a) The learned trial magistrate erred in law and in fact by convicting the appellant based on a defective charge sheet.(Sic)
 - b) The learned trial magistrate erred in law and in fact by admitting alleged evidence of confession.
 - c) The learned trial magistrate erred in law and in fact in that the ages of the minors were not proved.
 - d) The learned trial magistrate erred in law and in fact by relying on contradictory evidence.
7. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards. He urged the court to find that the sentence meted was lawful.
8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
9. Clearly the charge was erroneously drafted. I want to believe this is what the appellant meant when he said the charge sheet was defective. The charge ought to have read:

Contrary to section 8 (1) as read with section 8(2) of the Sexual Offences Act.

From my perusal of the record, I am satisfied that the accused understood the charges against him and fully participated in the trial. He was therefore not prejudiced. The defect is curable under section 382 of the Criminal Procedure Code.

10. The learned trial magistrate erred in admitting and acting on evidence of an alleged confession by unqualified person. This was the evidence of **police constable Evans Waruru (PW7)**. This was in breach of sections 25A (1) and 29 of the Evidence Act. Section 25A(1) states:

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

Whereas section 29 provides:

No confession made to a police officer shall be proved against a person accused of any offence unless such police officer is—

(a) of or above the rank of, or a rank equivalent to, sub-inspector; or

(b) an administrative officer holding first or second class magisterial powers and acting in the capacity of a police officer.

The effect of admission of the alleged confession vitiated the trial.

11. The prosecution is obligated to prove three ingredients of the offence of defilement before a conviction can be founded on the evidence on record. These are (a) that there was penetration, (b) that the person accused was responsible for the penetration; and (c) that the age of the complainant was established. These ingredients were spelled out in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** by the learned judge Joel M. Ngugi. In the instant case I will endeavor to find if these ingredients were established in each count.

12. **NW (PW1)** testified that she was 8 years old. She told the court that while going home from school, she met with the appellant who grabbed her hand, pulled her into mama Kimani's maize farm where he defiled her. She went on to say that the appellant removed her panty then removed his before having sexual intercourse with her. Although she testified that it was quite painful, I have several issues with her evidence.

13. This is a very young girl and in reading her evidence, it emerges that she was using technical words for her age. These are:

“He sexually assaulted me” and “sexual intercourse”

It was erroneous for the trial magistrate to substitute the child's language with her own. The most appropriate way of recording the evidence is by using the actual language of a witness, in this case that of the child. Here language means the style of verbal expression. I would not expect a child of 8 years to express herself in the manner her evidence was captured. There is a danger of putting words in her mouth. I am persuaded in this case that words not uttered by the complainant were imported into her evidence. My finding so is buttressed by her further utterances. She said:

I walked home while crying because accused slept on my chest and it was painful.

We may never know what this witness actually testified before the court.

14. The medical evidence in the P3 form after examination on 1st October, 2007 in respect of **NW(PW1)** states:

Bruises and lacerations, observed tears and shreds of tissues observed and traumatized S.T.I observed.

At page 2 paragraph 3 it states:

Physical strength with use of his penis and his finger using force.

The age of the injuries was indicated as weeks.

15. I have an issue with the medical evidence adduced in respect of the three complainants. Though he stated the ages of each complainant as indicated by the referring police officer, **Simon Njenga (PW8)** the clinical officer did not make his independent observation about the ages of each of these three complainants. This would have assisted the court to make a finding on their ages. No other oral evidence that can be relied upon or documentary evidence was produced. I therefore find that the age of the complainants was not established.

16. Another quarrel with the clinical officer's finding is that each of three P3 forms is word for word of the other. This raises doubts whether there was an examination or it was just mechanical filling of the P3 forms.

17. On each of the complainant there was a finding of sexually transmitted infection. (S.T.I). If this was true, then the easiest way of confirming whether the appellant was the culprit was to subject him to a medical examination. The investigating officer therefore failed in his

duty especially when he testified that the appellant was rescued from a mob that found him in the act.

18. The medical evidence introduced contradictions into the evidence of the complainants. None of them testified that fingers were used, as stated by the clinical officer. We are left wondering where this information came from.

19. The evidence of **GN (PW6)** was that the incident of defilement was on 22nd July, 2007. This is when the appellant defiled her, **NW** and **JM** in a bathroom. Her evidence was at variance with the particulars of the charge which indicated that the offence was committed on diverse dates in the month of September 2007. The evidence of **GN (PW6)** contradicted that **NW (PW1)** who testified that when she was defiled, she was alone. It also contradicted the evidence of **JM (PW2)** whose evidence was to the effect that when she was defiled, she was alone.

20. It is not normal for a child who claims to be 9 years to be defiled by an adult and fail to feel pain. In her evidence, **JM (PW2)** said she did not feel pain. Defilement of a child of 9 years by an adult is an excruciating and harrowing experience.

21. The report that **NW (PW1)** made to **Susan Waithera Njenga (PW3)** was that the appellant took her to a field where he defiled her. **Teresia Wairimu Kimani (PW4)** testified that she was defiled near a cereals' Board toilet. On her part, **NW (PW1)** testified that she was defiled in mama Kimani's maize farm.

22. **Teresia Wairimu Kimani's (PW4)** evidence contradicted the medical evidence. She said she observed that **NW (PW1)** had a swelling between her thighs. The clinical officer who examined her did not make any such a finding.

23. The prosecution witnesses have raised an issue of their credibility and they fit into the description given by the court of Appeal of a witness wanting in credibility. In the case of **Ndungu Kimanyi vs. Republic (1979) KLR 282** the Court held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

24. From the foregoing analysis of the evidence on record, I find that the trial was not only vitiated by admission of inadmissible evidence of purported confession, but, it is also rife with material contradictions. The conviction was unsafe.

25. I accordingly quash the convictions, set aside the sentences and set the accused at liberty unless if otherwise lawfully held.

DATED and SIGNED at Nakuru this 5th Day of December, 2019

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KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 10th day of December, 2019

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JOEL NGUGI

JUDGE