



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CRIMINAL APPEAL NO. 32 OF 2017**

*(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 3151 of 2012 of the Chief Magistrate's Court at Naivasha before S. Muchungi – RM)*

**JESSY NJUGUNA KIMOTHO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....PROSECUTOR**

**J U D G M E N T**

1. The Appellant was tried for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In that on the 15<sup>th</sup> day of October, 2012 within Nyandarua County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the vagina of **D.W.N.** a girl aged 5 years. He was convicted and sentenced to life imprisonment.

2. He appealed to this court, and on the eve of the hearing of the appeal filed what he called amended supplementary grounds of appeal as follows:-

**“1. THAT, the learned resident magistrate erred in law and fact by convicting the Appellant yet failed to appreciate that penetration was not proved.**

**2. THAT, the learned resident magistrate erred in law and fact by convicting the Appellant yet failed to appreciate that age was not accurately proved.**

**3. THAT, the learned resident magistrate erred in law and fact by convicting the Appellant yet failed to appreciate that identification was completely free from error.**

**4. THAT, the learned resident magistrate erred in law and fact by convicting the Appellant yet failed to appreciate that medical evidence did not connect me directly to the offence.**

**5. THAT, the learned resident magistrate erred in law and fact by convicting the Appellant based on contradictory and uncorroborated evidence.**

**6. THAT, the learned resident magistrate erred in law when I was denied access to the evidence that the prosecution intended to rely on, in violation of my Article 50 [2](j) right to a fair hearing, as provided by the Constitution of Kenya, 2010.”**

3. He filed alongside these grounds written, submissions in support of his grounds, primarily grounds 1, 2 and 3. Regarding penetration the Appellant takes issue with the evidence of the minor's mother **PW1** and the doctor who examined the minor **PW5** pointing out that it was contradictory.

4. He submitted that the age of the minor was not proved, as **PW1** merely gave her age as five years and that medical evidence on the fact was not reliable. He also complained that he did not receive a copy of the P3 form at the trial. He further faults the voice identification of the offender by **PW2**, stating that she had not had adequate opportunity to become acquainted with his voice.

5. For the DPP, Mr. Mutinda opposed the appeal, asserting that the complainant's age was established, and penetration proved through medical evidence. He submitted that the Appellant was properly identified during the offence.

6. The duty of the first appellate court remains as stated by the Court of Appeal for Eastern Africa in **Pandya -Vs- Republic [1957] EA 336** as follows:-

**“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”**

7. The prosecution evidence was that the complainant **D.W.N. (PW3)** resided at Wanjohi with her mother **N.A.W. (PW1)** in the material period. On the night of 15<sup>th</sup> October 2012, PW1 left PW3 and a younger sibling in her mud-walled house and went out, locking the door behind her. Apparently, the offender made a hole in mud wall and entered the house. He defiled the minor who recognized his voice.

8. **PW1** took time before returning home and when she did, **PW3** told her what had occurred in her absence. As people started to gather, due to the alarm raised by **PW1**, the Appellant also came to the home. The matter was reported to police. The child was referred for treatment and eventually the Appellant was arrested. He too was subjected to medical examination and found, like the minor to have pus cells in the urine.

9. In his long sworn defence the Appellant admitted that he knew the complainant and her mother. He testified that he had a disagreement with **PW1** over some laundry fee he owed her prior to the material date. After work on 15<sup>th</sup> October, 2012 he spotted **PW1** and another woman at a bar, and on heading home, heard screams at the complainant’s home. **PW1** attacked him and chased him with a panga. When he went to inquire. He was arrested and taken for medical examination. He denied the offence.

10. As to the fact that the minor complainant was defiled, there can be no doubt. The P3 form produced by **Dr. Edith Wachera** is firm proof of that fact. **PW1**, not being a professional, could not tell what amounts to penetration and her evidence to the contrary does not diminish the evidence by **PW5**. Nor can it be taken as contradictory of it. Secondly, the complainant’s age was proved not only through **PW1** but also **PW5**. **PW3** was five years old at the time of the offence.

11. This appeal turns on the question of identification of the Appellant. The offence occurred at night in the darkness of the complainant’s house. **PW3** could not see the person who created a hole in the mud wall and entered the house to defile her. This is what **PW3** testified:-

**“I know Accused. He is called Njuguna. I have seen him at our home. He did bad manners to me. He passed through the wall to get in. Mum was not around. It was at night. I was with Purity (sibling). I knew him as I recognized his voice. He had come to our house once. I felt pain. He did bad manners to this place – touches private parts.....I told mum.”**

12. **PW3** confirmed in cross-examination that she knew the Appellant. The difficulty this court has with the minor’s evidence is that the minor herself did not state what the offender said to her. That was supplied by her mother who did not witness the incident. Equally, apart from stating that the offender had visited her home once, **PW3** did not indicate that she had spoken her or that she had heard him speak prior to the incident.

13. In my own view the risk of mistaken identification is very real in this case. Concerning the test to be applied when considering evidence of recognition by voice, the Court of Appeal stated in **Choge -Vs- Republic [1955] 1 KLR** stated that:-

**“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused’s voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”**

14. Obviously, in handling the evidence of identification by voice, the trial court erroneously supplemented **PW3**’s evidence with the statements made by her mother regarding what she claimed was reported to her by **PW3**. **PW3** in her evidence did not state these things attributed to her by her mother. DNA test could have been performed to confirm whether the discharge on **PW3**’s genitals was connected with the Appellant. The fact that the minor’s genitalia had pus cells, also found in the Appellant’s urinalysis is not sufficient connection. And while dismissing the Appellant’s defence, the trial court erred by suggesting that the Appellant had a duty to prove his innocence.

15. The prosecution case linking the Appellant with the offence rested on weak direct and circumstantial evidence that merely cast suspicion on the Appellant. He was entitled to be given the benefit of doubt in light of the tenuous prosecution evidence. The upshot of the foregoing is that the appeal is allowed. The conviction against the Appellant being unsafe is hereby quashed and the sentence set aside. The Appellant set at liberty unless otherwise lawfully held.

**Delivered and signed at Naivasha, this 3<sup>rd</sup> day of May, 2018.**

In the presence of:-

Mr. Koima for the DPP

Appellant - Present

C/C – Japheth and Kamau

**C. MEOLI**

**JUDGE**