



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 78 OF 2016**

**BETWEEN**

**MESHACK WANYONYI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in Criminal Case Number 1006 of 2012 in the Senior Principal Magistrate's Court at Kimilili by Hon. D.Onyango (SPM) on 23.3.16)*

**JUDGMENT**

**The Trial**

1. The Appellant herein **MESHACK WANYONYI** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**). The appellant was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of **the Act**. The particulars of the main count are that

***On 19th June, 2012 in Bungoma North District within Bungoma County unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of FM a girl aged 10 years***

**Prosecution case**

2. The prosecution called a total of five (5) witnesses in support of its case. PW1, the complainant, aged 11 years recalled that on the material date about 1.00 to 2.00 pm, she was tending to her grandmother's goat when the appellant, whom she did not know before that date and whose name she was told by her brother B to be Meshack, found her, pulled her into a maize plantation and defiled her. She said that she reported the matter to her grandmother M and AP. PW2 Ignatius Okumu, a clinical officer examined complainant on 21.6.12 and found that her hymen was open. He produced the complainant's treatment notes, P3 form and age assessment report which shows that the complainant was 10 years as **PEXH.1**, **PEXH. 2** and **PEXH. 3** respectively. PW3 CM, told court that the complainant was her daughter born in June 2002. It was her evidence that upon receiving a report that the complainant had been defiled, she escorted her to the police station and later to hospital. She told court that complainant was 11 years old. PW4 MLM, the complainant's grandmother confirmed that she sent complainant to untie her goats and she returned later and reported that one Meshack had defiled her. PW5 PC Muruna Litoi, the investigating officer upon receiving complainant's report arrested the appellant and had him charged.

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The Appellant denied the charges.

4. In a judgment dated on 22.3.16, appellant was convicted and sentenced to life imprisonment.

**The appeal**

5. Aggrieved by this decision, the appellant lodged the instant appeal on 31st March, 2016. From the 7 grounds in the amended petition of appeal and written submissions both filed on 7th November, 2018, the appellant's raises the following issues for determination.

***1. Denial of services of counsel***

## ***2. Language used in the proceedings***

## ***3. Doubtful medical report***

## ***4. Contradictions in the prosecution case***

6. When the appeal came up for hearing on 8.11.18, appellant chose to wholly rely on the amended grounds of appeal and also on his written submissions in which he reiterated the grounds of appeal.

7. Mr. Oimbo, Learned Counsel submitted that there were no contradictions in the prosecution case, that penetration was proved by way of a P3 form, that appellant was represented by counsel throughout the trial and that the proceedings were conducted in Kiswahili language which appellant said he understood.

### **Analysis and Determination**

8. In a more recent case of ***Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR***, the Court of Appeal stated as follows on the duty of the first appellate court:

***“It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision.”***

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant. In dealing with this appeal, I will separately deal with the grounds of appeal stated herein above.

### **1. Denial of services of counsel**

10. The right to a fair hearing including the right to be represented by counsel. Article 50 of the Constitution provides as follows

***(2) Every accused person has the right to a fair trial, which includes the right—***

***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***

11. The court record bears witness that the appellant was throughout the trial represented by Kiraido advocate. Consequently, I find that the appellant’s right to legal representation was realized.

### **2. Language used in the proceedings**

12. The court record indicates that the proceedings of the court were interpreted from English to Kiswahili. The appellant was represented by an advocate who would have informed the court if the appellant did not understand Kiswahili. Besides, the appellant gave his defence in Kiswahili language meaning he understood Kiswahili. I therefore reject the appellants assertion that the proceedings were conducted in a language that he did not understand.

### **3. Doubtful medical report**

14. PW2 Ignatius Okumu, a clinical officer upon examining the complainant on 21.6.12 which was 3 days after the alleged offence was committed found her hymen open and he concluded that there was evidence of sexual assault. From the foregoing, I am convinced that the P3 form **PEXH. 2** corroborates the complainant’s evidence that she was indeed defiled.

### **4. Contradictions in the prosecution case**

14. There is evidence that the complainant reported the incident to her grandmother and it matters not when the report was made. Similarly, there is no dispute that complainant was taken to hospital and treated and whether she was taken by her mother or her uncle is in my humble view a non-issue.

15. The only contradiction I have noted is whether the appellant was properly identified by the complainant who was a sole witness. Complainant testified that the appellant was unknown to her before the material. She conceded that his name Meshack was given to her by her brother B after the incident. PW3 CM, the complainant’s mother and PW4 MLM, the complainant’s grandmother who informed the police that it was the appellant that defiled the complainant did not explain from where they got that information from.

16. Further to the foregoing, the complainant in her statement told police that the person who defiled her attacked her from the rear raising a doubt regarding the appellant’s identification.

17. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in ***Anjononi and Others vs The Republic [1980] KLR***;

***“.....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant***

*is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)”*

18. In the case of Maitanyi –vs- Republic (1986) KLR 198, the Court of Appeal Court held,

*“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight.....”*

19. Although the incident occurred in broad day light, it was necessary for the trial court to test the reliability of such identification considering that appellant was a stranger to the complainant.

20. The court record shows that the learned trial Magistrate did not at all evaluate the evidence of identification to test the reliability of the evidence of identification of the appellant.

21. In light of the foregoing, I am convinced that the circumstances appertaining to the incident the subject of this case were unfavourable for positive identification. I similarly hold that in such unfavourable circumstances, PW2 was not in a position to identify the appellant and her evidence that it was the appellant that defiled her ought to have been rejected.

**Disposition**

22. Having considered the evidence in its totality, the appeal succeeds. Accordingly, the conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that appellant shall be released and set free forthwith.

23. It is so ordered.

**DELIVERED AND SIGNED AT BUNGOMA THIS 9TH DAY OF NOVEMBER 2018**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Ribba & Diannah**  
**Appellant - Present in person**  
**For the State - Mr. Oimbo**