



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL APPEAL NO. 90 OF 2013.**

**LESIT, J.**

**J K N.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal From The chief Magistrates court at Kiambu Criminal Case No. 414 of 2011 from the judgment and sentence of C. Oluoch (Mrs) PM delivered on the 6th June 2013).*

**JUDGMENT.**

1. The Appellant **J K N** was charged with one count of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars are:

**“On the 12" day of March 2011 at [Particulars Withheld] Village in Kiambu District, committed an act which caused penetration of his male genital organ into the female genital organ of M W N a girl child aged 7 years.”**

2. In the alternative he was charged with indecent assault contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.

**The particulars are that on the 12" day of March, 2011 at [Particulars Withheld] Village in Kiambu District within Central Province, he indecently assaulted M W N a girl aged 7 years by touching her private parts namely vagina.**

3. The appellant pleaded not guilty to both the main and the alternative counts. The prosecution called a total of four witnesses. Upon conclusion of trial, the appellant was convicted of the main count of defilement and sentenced to life imprisonment.

4. Being aggrieved by the conviction and sentence he filed this appeal in which he has raised the following grounds of appeal:

1. ***That the learned trial magistrate failed to note that the Prosecution failed to prove the age of the complainant hence her age remained doubtful.***
2. ***That the learned principal magistrate erred in law by not lawfully and properly conducting a voire dire examination.***

3. *That the learned Principal Magistrate erred in both law by not complying with the provisions of the Sexual Offences Act relating to evidence of vulnerable witnesses.*
4. *That the trial magistrate made an error in law and in fact in failing to observe that the appellant was a patient of Mathari Mental Hospital and there was a need for a psychiatrist assessment report before entering a conviction and sentence.*
5. *That the entire case for the prosecution was not proved beyond reasonable doubt as required in law.*

5. It was the prosecution's case that on 12<sup>th</sup> March, 2011 at about 6.00pm N W PW1 the complainant herein, a child aged 7 years and in class 1 was in her friend's (M 's) home. While there, her friend went to take a bath and left her outside. It was then that the appellant, who is her cousin because their fathers are brothers, came. The appellant sent her for cigarettes but she refused. The appellant lifted her up and took her to his house where he locked the door. The appellant then took the complainant to his bedroom where he removed her pant and his trousers before inserting his male genital organ in her female genital organ and defiled her.

6. After the ordeal the appellant told the complainant not to tell anyone. He then opened the door and went to the shops while the complainant went back to her friend's home. On reaching there the complainant told her friends, M and M what the appellant had done to her. Her friend in turn passed the information to one, Mama Caro who also informed one Ciru. Ciru then informed PW1's elder sister, PW2.

7. PW3 was the father of the complainant and PW2. PW3 testified that he found a crowd of people at his home at 5pm who informed him that his daughter had been defiled by the appellant. Together with PW2 and others PW3 took the child to Kiambu District Hospital where she was examined by the Doctor who confirmed that she had indeed been defiled.

8. At the police station PW3 gave out his daughter's Child Health Card used for immunization of children, P. exh. 1. That card indicated that the complainant was born on 2<sup>nd</sup> June 2002. She was therefore 7 years of age at the time of the incident.

9. PW4, Dr. Wanjiku Njoroge produced the treatment card on the complainant and the P3 Form, under section 77 of the Evidence Act on behalf of Dr. Mutahi a colleague. According to the P3 form, P.exh 2 the child had bruises on the labia minora and the hymen was not intact and was tender. She had no discharge, and the high vaginal swab revealed the presence of pus cells and no spermatozoa. PW4 said that according to the treatment card, P exh. 3 the child was first seen at the hospital on 12<sup>th</sup> March 2011 by a Clinical Officer who wrote that the hymen was intact. PW4 testified that the child was seen by Dr. Mutahi on 15<sup>th</sup> and that it was the day the P3 form was filled.

10. The appellant (DW1) gave a sworn statement of defense and denied committing the offence. The appellant stated that on the 12<sup>th</sup> March, 2011 he was unwell and was in his house sleeping when people came and falsely accused him of defiling the child before they beat him up injuring him in the process.

11. The appellant called his mother J G N as DW2. DW2 testified that she saw PW1 on the day she had allegedly been defiled and did not see anything wrong with her. She took the appellant who had seriously been beaten by the mob to hospital where he was issued with a P3 Form.

12. I am a first appellate court and as such my mandate is to re-evaluate and re-examine the entire evidence that was adduced at the lower court and make my own conclusions, which I have while bearing in mind that I neither saw nor heard the witnesses and I have given due allowance for that. I am guided by the court of appeal case of **OKENO V. REPUBLIC [1972] EA 32**. Where the role of a first appellate court was set out as follows:

**“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”**

13. This appeal is opposed. Miss Aluda learned Prosecution Counsel appeared for the State and urged the appeal on its behalf. The appellant gave oral submissions and also put in written submissions in which the issues raised in his petition of appeal are addressed at length. I will consider each of these grounds and submissions made.

14. The appellant’s first ground in his written submissions was that the learned trial magistrate failed to conduct properly the *voire dire* examination of the complainant. I will consider this issue together with the next one which is that the learned Principal Magistrate erred in both law and fact by not complying with the provisions of the Sexual Offences Act relating to evidence of vulnerable witnesses.

15. The learned Prosecution Counsel did not address the issue of *voire dire* examination. However on the issue of vulnerable witness Ms. Aluda submitted that there was no need for an intermediary in this case.

16. I have looked at the record of the proceedings and confirm that a *voire dire* examination of the child complainant was conducted. The record shows that the actual answers the child gave were recorded and a short ruling made in which the magistrate gave the reasons why he was convinced that he should receive the complainant’s evidence by affirmation. The purpose of the examination has been the subject of discussion in several cases. In the celebrated case of **JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445, Madan, Porter JJ & Chesoni Ag. JA** held:

- 1. “Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.**
- 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.**
- 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.**
- 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.**
- 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.”**

17. The examination is important to aid the court determine whether the child is possessed of sufficient knowledge to testify, whether the child understands the duty to tell the truth and whether the child understands the meaning and solemnity of an oath. In this case the magistrate found that the child was possessed of sufficient knowledge to testify and understood the difference between truth and falsehood, and affirmed to tell the truth. The learned magistrate decided to have the complainant affirmed rather than

to be sworn because she had informed the court that she did not know the meaning of an oath.

18. Under the Sexual Offences Act, the court hearing a case of a child complainant in a sexual offence has an additional and critical duty and role to play. In the case of a child complainant especially, the court has the extra duty to determine whether the child is a vulnerable witness, and if so the specific action(s) the court should take are set out under the SOA. That process of assessing whether the child complainant is vulnerable and whether there will be a need for an intermediary can only reasonably be carried out at a pre-trial conference. I say so because it would be too late to conduct the inquiry on the date set for the trial. This is because once a witness is declared a vulnerable witness needing an intermediary the court must make an order for an intermediary to be sought for. The intermediary should then be available on the date set for the hearing. Section 31 of the SOA provides as follows:

**“31. (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -**

- a. **the alleged victim in the proceedings pending before the court;**
- b. **(b) a child; or...**

**(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -**

**(a) allowing such witness to give evidence under the protective cover of a witness protection box;**

**(b) directing that the witness shall give evidence through an intermediary;...**

6. **Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary...”**

The process of determining whether a witness is vulnerable and therefore whether they need to testify through an intermediary has a bearing on the *voire dire* examination. In more advanced jurisdictions like South Africa there has been debate whether the child should even be subjected to oaths and affirmations, or even whether they should be required to testify in open court. Such was one of the issues the Constitutional Court there grappled with in the case of **DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL versus MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS, CONSTITUTIONAL COURT OF SOUTH AFRICA Case CCT 36/08 [2009] ZACC 8**. The Constitutional Court considering, inter alia, the question of constitutional rights of the child complainant in sexual offences in their Bill of Rights observed:

**“NGCOBO J:**

### ***Introduction***

**[1] Until recently, the law did not pay much attention to the stress that child complainants in sexual offence cases suffer when they testify in courts.<sup>1</sup> Child complainants in sexual offence cases were required to relive the horror of the crime in open court. The circumstances under which they gave evidence and the mental stress or suffering they went through while giving evidence did not appear to be the concern of the law. And, at times, they were subjected to the most brutal and humiliating treatment by being asked to relate the sordid details of the traumatic experiences that they had gone through. Regrettably, although there were welcome**

exceptions, the plight of child complainants was seldom the concern of those who required them to testify or those before whom they testified.

[2] The advent of our constitutional democracy must change all of that. Our constitutional democracy seeks to transform our legal system. Its foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms, introduce a new ethos that should permeate our legal system. Consistently with these values, section 28(2) of the Constitution requires that in all matters concerning a child, the child's best interests must be of paramount importance. Recently, the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Sexual Offences Amendment Act) introduced certain amendments to the Criminal Procedure Act<sup>4</sup> (the CPA). The amendments that are relevant to these proceedings are those that concern the protection to be given to child complainants when giving evidence in criminal proceedings involving sexual offences.

[3] The central question presented in these consolidated cases is whether the provisions of the CPA that concern the protection to be given to child complainants in criminal proceedings involving sexual offences provide protection consistently with section 28(2) of the Constitution. In particular, the question presented is whether the provisions of sections 153(3) and (5) (proceedings *in camera*), 158(5), (the duty to give reasons for refusing to allow a child to give evidence by means of closed circuit television), 164(1) (testifying without taking an oath or the affirmation), 170A(1) (testifying through an intermediary) and (7) (the duty to give reasons for refusing to appoint an intermediary) of the CPA are consistent with section 28(2) of the Constitution.

[4]...

[5] But, as the judgment of the High Court and the submissions made by the parties in these cases amply demonstrate, behind these legal questions lies the core issue concerning the administration of justice. Specifically, two questions arise in this regard. First, whether the provisions of the CPA that were enacted to protect child complainants from the mental stress and anguish associated with testifying in criminal proceedings are being interpreted and implemented consistently with the Constitution. Second, the duty of all superior courts including this Court (as the upper guardian of all minors) – if any – to investigate any failure to implement these provisions which deny child complainants the protection they constitutionally deserve, once any failure to do so is brought to the Court's attention. These cases are therefore fundamentally about the administration of justice in those courts in which child complainants of sexual offences appear to testify...

[74] Courts are now obliged to give consideration to the effect that their decisions will have on the rights and interests of the child. The legal and judicial process must always be child sensitive. As we held in *S v M*, statutes “must be interpreted . . . in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights.” Courts are bound to give effect to the provisions of section 28(2) in matters that come before them and which involve children. Indeed, section 8(1) of the Constitution makes it plain that the Bill of Rights “binds the legislature, the executive, the judiciary and all organs of state.”

20. The cited case is included in this judgment to demonstrate that as a country we are a far cry from effecting measures in our administration of justice system which place the best interest of the child in their proper perspective and position. While our laws [Constitution, CPC Children Act Witness Protection Act, Victim Protection Act and SOA among many] have provided for various measures for the protection

of witnesses generally and have recognized the importance of identifying which could be classified as vulnerable witnesses for specific protective measures as set out in each of these legislations.

21. Provision of Intermediaries among a host of other beautiful provisions meant to arm the courts with the power of protecting vulnerable witnesses, child victims of sexual offences and the like in various ways enumerated therein, remain unimplemented as no steps have been made to make their implementation a reality.

22. Some examples of our lack of preparedness can be given. For instance the whole question of vulnerable witnesses is new area. For the courts, and even State Prosecutors to effectively manage these provisions and therefore implement, they need to understand them. There is an urgent need for training. This takes administrative intervention to execute.

23. Another simple example is the lack of witness protection boxes for use by child/vulnerable witnesses. This is yet another administrative measure which should have sent the administration on a frenzy to equip every court in the country with them. When shall we ever hope to give real protection to our children especially the victims of sexual offences?

24. In the cited case, **DPP, Transvaal**, supra, the law has gone a further step of critically looking at the whole question of *voire dire* examination of child witnesses. Provision has been made in the SA law which makes it unnecessary for child witnesses to ever appear in court to testify, even in camera, and thus making the need for the *voire dire* examination and the taking of oaths and affirmations superfluous.

25. The operation of section 31 of the SOA seems to form an exception to the application of section 124 of the Evidence Act, where the evidence of a child victim of a sexual offence is received through an intermediary. Section 124 of the evidence act regarding the evidence of children provides as follows:

**“S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

26. In the instant case, the complainant gave her evidence by way of affirmation. Hers was not the only evidence relied upon to convict the appellant. From the test carried out by the learned trial magistrate and the conclusion she arrived at, I agree that the complainant in this case did not need an intermediary.

27. Getting back to this appeal the appellant has not shown how the failure, if any of invoking the provisions of the SOA regarding vulnerable witnesses affected him. The failure to invoke the said provisions does not affect the appellant’s rights or interests in any way. If anyone stood to lose, it was the child victim, not the appellant. I find that nothing turns on this point.

28. The other ground raised is that the learned trial magistrate failed to note that the Prosecution failed to prove the age of the complainant hence her age remained doubtful. Ms. Aluda for the State submitted that the prosecution had adduced a clinical card to prove that the complainant was 7 years old at the time.

29. The learned trial magistrate addressed the issue of evidence to support the age of PW1 and observed as follows:

**“Starting with the issue of age, counsel for the defence said there was a contradiction as while the charge sheet states she was 7 years old, PW2 said she was born in 2002. From**

**the evidence it is PW3 and not PW2 who talked of 2002. PW3's version is that she was born in 2004. In my view this is a mistake as PW3 gave the year of birth while identifying a Child Health Card which shows she was born on 12<sup>th</sup> July, 2004. This is a trivial contradiction which has been cleared by the Clinic Card and the evidence of PW3. I am satisfied that the child was 7 years old as stated in the charge sheet."**

30. I find that the Child Health Card for PW1 indicating her date of birth and which was used for her immunization as a child was sufficient proof of PW1's age. I am satisfied that she was indeed 7 years at the time of this offence. The learned trial magistrate's conclusion on this point was correct. I find nothing turns on this point.

31. The learned trial magistrate considered the issues of the P3 form and apparent contradictions in the form and the earlier documents filled by a Clinical Officer. She was satisfied from the explanation by Dr. Njoroge that the Clinical Officer was not qualified to comment on finer details of the complainant's genitals. I agree with the learned trial magistrate's finding that the evidence of the doctor and the explanation given by her carried greater weight than that of the Clinical Officer.

32. The appellant next raised issue with the conduct of the case stating that the learned trial magistrate made an error in law and in fact in failing to observe that the appellant was a patient of Mathari Mental Hospital and that there was a need for a psychiatrist assessment report before entering a conviction and sentence.

33. Regarding the defence of insanity Under S.11 of the Penal Code a person is presumed to be of sound mind unless proved otherwise. That section provides as follows:

**"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."**

34. On the other hand S.12 of the Penal Code regarding criminal responsibility in case of insanity states as follows:

**"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."**

35. In the Court of Appeal case of MARII V REP [1985] KLR 710, NYARANGI JA, PLATT AND GACHUHI Ag. JJA held:

**"1. Where an accused person raises the defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown.**

**2. The burden on the accused to prove insanity is not as heavy as the one of the prosecution. The burden is discharged by proving on a balance of probabilities that it seemed more likely that due to mental disease, the accused did not know what he was doing at the material time, or that what he was doing was wrong, and so he could not have formed the intent to kill the deceased.**

**3. Whether the defence has proved the case of insanity is a matter of fact for the judge and assessors. Where it is found that the accused was insane, a special finding may be entered; if he is found to have been sane, the finding may be murder or manslaughter; and in the case of manslaughter, that would be due to the fact that**

**although sane, by reason of illness, the accused did not appreciate the full consequence of his act.”**

36. The record of the proceedings is very clear that the appellant did not raise the defence of insanity at any stage of the proceedings. Furthermore the record of proceedings does not raise any doubts as to the appellant's state of mind. The law is clear that a person is presumed to be sane unless the opposite is proved, the burden of proof lies on the person claiming insanity and the standard of proof is on a balance of probabilities. I think that the defence of insanity the appellant has raised at this stage is an afterthought and does not lie. Nothing turns on this point.

37. The last ground raised by the appellant is that the entire case for the prosecution was not proved beyond reasonable doubt as required in law. Ms. Aluda in her submissions has urged that the prosecution adduced sufficient evidence to support the charge. Counsel has set out the summary of the evidence adduced and I have considered it.

38. I find that the evidence adduced against the appellant was overwhelming. The child complainant knew the appellant very well being her neighbor and also a first cousin. Identification was not an issue. The doctors confirmed that she had been defiled and the age of the injuries consistent with the day of the incident. I find that the learned trial magistrate weighed the evidence before her with the care and caution required of such a case and came to the correct conclusion. I find no fault in the analysis, evaluation and the conclusions drawn in this judgment.

39. The appellant was convicted of defilement contrary to section 8(1) as read with 8(2) of the SOA. A person convicted under this section is liable to imprisonment for life. The appellant was imprisoned for life. The sentence was lawful and also proper.

40. In the result I find no merit in the appellant's appeal and I dismiss it in its entirety.

**DATED AT NAIROBI THIS 4<sup>th</sup> DAY OF JUNE, 2014**

**LESIIT, J.**

**JUDGE.**