



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 439 OF 2010**

**JESSE MANTUA KARUMA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From Original Conviction and Sentence in Criminal Case No. 3381 of 2008 of the Chief Magistrate's Court at Mombasa – Hon. Mutende - SPM)**

**JUDGMENT**

The appellant above mentioned was Convicted and Sentenced to ten (10) years imprisonment for the offence of Sexual assault contrary to section 5(1) (a) (1) of the Sexual Offences Act No. 3 of 2006.

The particulars being that:-

***“On the 2nd day of November, 2008 at about 6:30 p.m. in Mombasa County he unlawfully caused his finger to touch the vagina and to penetrate the anus of A A I a girl aged eleven (11) years”.***

The prosecution called six (6) Witnesses in support of their case.

The Accused gave a sworn statement in his defence. Initially the appellant was charged with defilement which charge was later substituted with that of indecent assault.

Its the duty of the first appellate Court (which this Court is) to consider and re-evaluate the evidence on record, so as to arrive at its own conclusions but bearing in mind, that it did not have the opportunity of observing the demeanor of the Witnesses. **Okeno -Vs- Republic 1972 EALR page 32.**

The appellant was an employee of otter swimming club working as an assistant training coach.

This club is based at Nairobi Members of the club including the Complainant had travelled to Mombasa [Particulars withheld] Beach Hotel for a swimming competition on 2nd November, 2008.

After the competition, some of the children went to swim in the sea near the beach, while in the company of the Appellant.

At page 11 paragraph 2 of the record of proceedings this is what the complainant told the Court,

***“I went back to the Hotel. Other members had not come. I therefore went to swim at 6:00 pm. I went***

***with my friend P. She was also competing. We were at the beach. I asked P to carry me on her back for she is taller than me. I could not stand. My other friend G had already requested her to carry her. Mantua offered to carry me. He is the Accused herein, he was with us at the sea. There were other people. He then started touching me in the private parts, I had accepted to be carried. He carried me on his waist with my legs apart. He then started touching me. He also touched me from the outside. I called out for my friend K but he did not hear. I then managed to swim off towards K”.***

Dr.Zephania Kamau police surgeon Nairobi testified to have examined the Complainant on 10th November, 2008. She had no obvious injuries on her vagina or vulva. The vulva was however hypersenic (more red). The hymen was intact. There was no bleeding or injuries on her private parts. She had been seen at Nairobi Hospital.

Under cross examination by Counsel for the Accused, the Doctor opined that the vulva was more red than normal which could have been caused by some trauma or irritation by urine.

It was upon receiving of this evidence by the Doctor that the prosecution decided to have the charge substituted from that of defilement to that of Sexual assault contrary to section (5) (1) (a) )1) of the Sexual offences Act No. 3 of 2006.

In his defence the Accused stated to have taken the children for a swim in the sea.

They were eleven (11) of them or thereabouts. One of the girls by the name G asked him to carry her for she did not want to step on the sea weeds. The Complainant also requested to be carried. He did carry her and later asked her to step down. He asked G to step down. She did not. He handed her over to Joshua who was a swimmer. They left the Waters. After a short while S PW 2 called the Complainant and they had a chat. Later he was asked to take the children to the swimming pool. They changed and had dinner. At about 9:00 pm police arrived and instructed him to proceed with them to Bamburi police station which he did. The Accused contention is that he carried the complainant and another girl but he did not touch the private parts of any of them and none complained.

As earlier noted, the first charge framed against the Accused was that of defilement contrary to section 8(3) of the Sexual offences Act.

The particulars being that:-

***“On the 2nd day of November, 2008 at about 6:30 pm at [Particulars withheld] Beach Hotel sea shore the Accused unlawfully and intentionally, caused his penis to penetrate the vagina of A A a girl aged about eleven (11) years”.***

This is the charge that was substituted with that of Sexual assault contrary to section 5(1) (a) (b) of the Sexual act which now alluded to a finger having been used to touch the vagina of the complainant.

Section 5(1) (a) of the Sexual offences Act provides,

***“Any person who unlawfully (a) penetrates the genital organs of another person with -***

***1.Any part of the body of another or that person is guilty of an offence termed Sexual assault”***

The Complainant in this case was aged twelve (12) years at the time of the alleged incident. Her age does not seem to have been an issue in the lower Court and in the present appeal. The learned trial magistrate was satisfied (after conducting a voire dire examination) that she was intelligent and understood the nature of an oath.

In the Court of Appeal case of ***Johnson Muiruri -Vs- Republic 1983 KLR page 445*** the Judges 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 the Court is not so satisfied, his unsworn 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 later 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 wrongly decided.*
3. *Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if the child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to Convict unless there was corroboration.*
4. ....
5. ....
6. *The Judge is a duty a record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so as fatal to the Conviction.*
7. *The failure by the Judge to direct himself and the assessors on the danger of relying on uncorroborated evidence of a child of tender years and the reliability of such evidence was a fatal error and Conviction could not stand”.*

In the present case the Accused/appellant was charged with the offence of Sexual assault. Section 124 of the evidence Act provides for corroboration in criminal cases but includes a proviso which reads,

*“Provided that where in a criminal case involving a sexual offence, the only evidences 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”.*

*I have perused the lower Court and I am satisfied the learned trial magistrate after receiving the evidence of the child did indicate that she was satisfied that the child was telling the truth”.*

She did not warn herself of the danger of relying on un corroborated evidence.

In her evidence in chief the Complainant told the Court that the Accused carried her on his waist with her legs apart. Under cross examination by Counsel for the Accused, she told the Court that there were ten(10) people near her. The nearest boy A was 2 meters away from her. Another boy called D was 5 meters away from her. There was another person meters away from her. The Accused carried her from the sides, later on his back, then he turned her to his side. She told the Court that she was wearing a full costume.

PW 2 S M was the head coach of otter swimming club. She testified of how she went looking for children who had gone swimming under the watch of the Accused.

She met the Accused carrying one of the children. She reprimanded him as it was not usual for a coach to carry the girls. There were other children swimming in the pool. One K I a sister of the Complainant reported to PW 2 that her sister was crying. Upon interrogation she said that the Accused had tried to put his fingers on her costume. She had tried to stop him but he persisted but she managed to swim off.

None of the other swimmers who were present with the Complainant testified in this case. The time of the alleged incident was 6:30 pm which was not very late. Some of the swimmers were at a distance of 2 meters away. The Complainant alleges to have screamed for help.

At such close distance the other swimmers ought to have heard her.

Further, she was not the only one the Accused carried that evening. When PW 2 met him he was

carrying another girl. In his testimony the Accused told the Court that he was carrying G before complainant requested to be carried. That he carried both girls before he ordered the two to step down. The complainant agreed but G refused and he had to hand her over to one J.

Upon a careful evaluation of the evidence on record, I do find that the alleged incident took place at a beach front where there were more than ten swimmers who were compatriots of the complainant.

They were not swimming far from each other as it was a group (thing) event. It was not substantially dark at the time. It is said to have been around 6:30 pm. The Complainant alleges to have screamed for help but nobody went to her rescue. If she did scream as alleged her compatriots would have heard her and responded to her distress call.

None of her colleagues testified in this case which is rather strange. Initially the Accused was charged with defilement. To sustain a charge of defilement the prosecution had to prove that there was penetration by the Accused male genital organ into the female genital organ of the complainant, yet, the complainant herself in her evidence did not allege to such penetration, only alluding to the Accused having touched her genital organs. It is noted that the substitution of the charge was done after the Doctor testified that he did not find any significant injuries or at all on the complainants genital organs.

It is further noted that the Complainant was not examined on the night of the report of defilement at Mombasa but the examination was done in Nairobi.

In the particulars of the charge it is alleged that the Accused inserted his fingers into the Complainants anus. The Doctor who examined the Complainant did not refer to having been requested to examine her on the anal region and neither is therefore such finding.

This Court is not satisfied that the prosecution proved its case beyond reasonable doubt. I find that the Conviction was not safe. The Conviction is quashed and Sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered, dated and signed this **8th** day of **October, 2015**.

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**M. MUYA**

**JUDGE**

**8TH OCTOBER, 2015**

**In open Court in the presence of:-**

Learned Counsel for the prosecution Mr. Masila

The defence Mr. Maundu

Court Assistant Musundi

**M. MUYA – JUDGE**