REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 29 OF 2010

John Wanjohi Kabau……………………………….……………………….Appellant

Versus

Republic……………………………………...………………..…………Respondent

(Appeal against Judgement, sentence and conviction imposed in Criminal Case Number 22 of 2009, Republic versus John Wanjohi Kabau at Nyeri, delivered by M. Nyakundi, S.R.M. on 27.7.2010).

JUDGEMENT

John Wanjohi Kabau (hereinafter referred to as the appellant) seeks to quash the conviction and sentence passed against him by the Learned Senior Resident Magistrate, Nyeri in criminal case number **22 of 2009, Republic vs. John Wanjohi Kabau** delivered on 27.7.2010. In the said case the appellant was convicted of the offence of defilement contrary to Section **8 (1)** as read with Section **8 (2)** of the Sexual Offences Act No. **3** of 2006.

The particulars of the offence were that on the 24th day of June 2009 in Nyeri District within Central Province, intentionally and unlawfully did an act which caused penetration to **A W N** a child aged 6 years (hereinafter referred to as the **Minor**).

The appellant faced an alternative count of indecent act with a child contrary to Section **11 (1)** of the Sexual Offences Act, 2006. It was alleged that on 24th June 2009 in Nyeri District within Central Province, he intentionally and unlawfully committed an indecent act with **A W N** by causing his genital organ to touch her sexual organ.

The prosecution called a total of four **(4)** witnesses whose evidence is summarized below. In determining this appeal, this court fully understands its duty. The question what is the duty of a court of first appeal was answered in the case of **Okeno v. R**[1] where the court of appeal for East Africa stated the duty of an appellate court on first appeal as follows:-

> *"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination*[2] *and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.*[3]*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 courts 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.*[4]*"*

In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions.[5] It is the function of this court as a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, if should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses**.**[6]

I now turn to the evidence adduced before the trial court:-

PW1, W N was the complainant; a minor then aged 6 years at the time of giving evidence. The record shows that to commence conducting the **voire dire** examination, the learned Magistrate wrote:-

"Court tests the credibility of the minor by posing questions to her in Kikuyu."

Then the learned Magistrate proceeded to ask the minor some questions and made a ruling as follows:-

> *"I have tested the credibility of the minor she understands the questions. She can give the unsworn statement." (Emphasis added)*

From the above statements made by the court, it's quite clear that the learned Magistrate did not capture the real purposes of a *voir dire* examination. I will later in the judgement re-visit this issue in detail.

PW 1's evidence proceeded as follows:-

> *"……. I am called W N. I am six years old. I go to school at [particulars withhels] Primary in class one. I do not know the accused person. I had seen him on the road at home. When I went to the road the accused got hold of my hand and took me to his house near home. It was in the evening. We reached there he opened the door and carried me to bed he stood on the bed and removed my clothes he laid on me when he removed his clothes. He the defiled Me. (minor is shy). He inserted his penis in my vagina. He told me not to tell anybody because if I tell anybody he would kill me. I felt pain in my vagina….. In the morning he chased me away. I went home and told my mother she took me to hospital. I was injected. I was again removed blood from hand. Mt stomach was having worms. P3 form marked as exhibit. That is all"*

Upon cross-examination by the appellant, the minor answered that her mother told her to come to court and say what the appellant did to her and that she wanted him to be taken to jail.

PW2 E N N, mother to **PW1** stated that the minor was in class one and that on the 24.6.09 at around 6.00pm the child was playing with other children outside. She was in the house preparing supper; she went to look for her but the other children said they did not know where she had gone. They looked for her in vain, and upon returning at around 1.00pm she found her outside their home. She noted that the child had difficulties walking and suspected something was wrong. She removed her pants and noted that her vagina had sperms. She notified her aunt who confirmed. The minor told her that she was at *"Peter's"* house. The appellant was employed by a neighbour called *"Gunju"* and had worked there for about seven months. They reported to the chief who gave them a letter and they went to Nyeri Police Station.They took the minor the Provincial General Hospital and also recorded statements with the Police and the appellant was arrested. She identified the P3 form and confirmed that the pant the child was wearing was washed.

PW3 Dr. Dindi Keith, a Doctor working at Nyeri Provincial General Hospital confirmed that he was not the doctor who saw the victim, but he only filled the P3 form. She had a history of defilement by a person known to her. He summarized general findings on examination as follows:- *Multiple lacerations on the vagina wall, the hymen was broken. No discharge noted. He prepared the P3 form.*

PW4 Esther Kingori was the investigating officer. She stated that the complaint was reported on 25.6.09 by PW2, she recorded the report in the OB and issued them with a P3 form and also escorted them to Nyeri Provincial General Hospital. She later in the company of a one Sgt Mutiso arrested the suspect.

At the close of the prosecution case, after evaluating the evidence, the trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence and complied with the provisions of Section **211** of the Criminal Procedure Code.[7] The accused elected to give unsworn evidence and called one witness who is his wife. He stated that on the fateful day he was at home for the whole day. He was with his wife, **DW2.** He claimed that he was arrested on a Monday morning, and at the time of arrest he asked why they were arresting him and he was told he will know later. He was held in the cells for three days before he was charged in court.

DW2 Margaret Wairimu Joel the appellants' wife testified she had gone home to visit their children on 24.6.09, and that he had travelled the previous day. The appellant came home on 28.6.09, but left for his place of work. She accompanied him but left the next day, that is 29.6.09 and learnt of his arrest later. She was not in a position to tell what transpired on 24.6.09, but got an explanation from his employer.

The learned magistrate in his judgement analysed the evidence of all the prosecution witnesses and the above defence and concluded that "*On that basis and on the above reasons I find the accused person is guilty as charged on the two counts (2) contrary to the sexual offences Act No. 3 of 2006.*" I have underlined the foregoing statement because the learned magistrate convicted the appellant on both the main count and the alternative count. I will revert to this issue later in the judgement. After hearing the accused in mitigation the learned magistrate proceeded to sentence the appellant to **life imprisonment.**

Aggrieved by the said verdict, the appellant appealed to this court seeking to quash the conviction and sentence. The appeal was filed by the appellant in person but at the hearing here of he was resented by **Mr. Andrew Kariuki** Advocate who filed written submissions. From the appeal filed by the appellant I have identified the following grounds of appeal, namely; **(i)** there was no proper identification; **(ii)** there was no sufficient evidence to prove the case beyond doubt; **(iii)** lack of medical evidence; **(iv)** lack of corroboration and or crucial witnesses were not called.

Learned State Counsel **Miss. Maundu** urged the court to uphold the conviction and submitted that there was overwhelming evidence to support both the conviction and sentence. In response to defence counsel's submissions that the appellant was held at the police station longer than the law permits, learned state counsel referred to the date of arrest as per the charge sheet and submitted that the appellant was taken to court within the required constitutional period. I have no reason to doubt the date of arrest as per the charge sheet; hence I am in agreement with the sate counsel

I have carefully considered grounds of appeal and the submissions made by learned counsel for the appellant and the state counsel. I have also analysed and reviewed the evidence on record and the relevant law. Section **8 (1) & (2)** of the Sexual Offences Act No. **3** of 2006 provides that:-

> ***8(1)*** *A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> ***8(2)*** *A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

Before I discuss the ingredients of the offence of defilement, I propose at this point to address the issue of the manner in which the learned Magistrate conducted the *voir dire* examination. As observed earlier, Learned Magistrate wrote:-"*Court tests the credibility of the minor by posing questions to her in Kikuyu.*" After asking the minor some questions, the learned Magistrate wrote:- "*I have tested the credibility of the minor she understands the questions. She can give the unsworn statement.*"*(Sic)*

The question that I propose to address at this stage is '*what is the purpose of voir dire* examination? To my mind, a *voir dire* examination is conducted not to test the credibility of a minor witness but to enable the court to satisfy itself as to whether the minor understands the nature of an oath. After the court is satisfied whether the minor understands the nature of an oath or does not understand, the court ought to put it on record and in particular state that the court is satisfied that the child has sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth, which is involved in an

oath, over and above the duty to tell the truth which is and ordinary duty of social conduct. After being satisfied as aforesaid, the court allows the child to give either sworn or unsworn evidence. I find that the Learned Magistrate conducted a *voir dire* examination but for the wrong purpose outside the known principles of law.

The court of Appeal gave its guidance on the issue of *voir dire* examination in **Johnson Muiruri vs Republic**[8] as follows:-

> *"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In* ***Peter Kariga Kiume***[9] *we said "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 voir dire examination, whether the child understands the nature of an oath in which 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 latter event an accused person shall not be liable to be convicted on such evidence unless it is collaborated by material evidence in support thereof implicating him (Section 19, Oaths and Statutory Declarations Act, cap 15 Laws of Kenya. The Evidence Act, Section 124, cap 80, Laws of Kenya) (Emphasis added).*
>
> *It is important to set out questions and answers when deciding whether a child of tender years understands the nature of oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions"*
>
> *A similar opinion was expressed by the Court of Appeal in England in* ***Regina vs Campell***[10]
>
> *"If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.*
>
> *Dealing with the question of the girl taking oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of nature of solemnity of an oath, the Court of Appeal in* ***R vs Lal Khan***[11] *made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen…. (Emphasis added).*
>
> *There Lord Justice Bridge said:*
>
> *"The important consideration…..when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct"(Emphasis added)*
>
> *There were therefore two aspects when considering whether a child should be sworn: first that the child had sufficient appreciation of the particular nature of the case and, secondly a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life"*
>
> *It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive court of appeal……………..In* ***Gabriel Maholi vs R***,[12] *again our former Court of Appeal said that even in the absence of express statutory provisions it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood. (emphasis added).*

*In **Kibangeny vs Republic**[13] the Court of Appeal stated that:-'The investigation (voir dire examination) should precede the swearing and the evidence, and should be directed to the particular questions whether the child understands the nature of an oath rather than to the question of his general intelligence. Since the evidence of the two boys was of so vital a nature we cannot say that the learned trial judge's failure to comply with the requirements of section 19(1) was one which can have occasioned no miscarriage of justice, and upon this ground alone the appeal must be allowed' (Emphasis added)*

In **Kivevo Mboloi vs Republic**[14], the court held that failure to conduct a *voir dire* rendered the entire evidence of the complainant of no use to the court. In the case of **Musyoka Mwasya vs Republic**,[15] the court held that failure to conduct *voir dire* examination in a situation where it is necessary renders the evidence of the particular witness of no use.

In **Gamaldene Abdi Abdirahman & Another vs Republic**[16] after considering with approval the decision in **Kibngeny arap Kolil vs Republic**[17] stated as follows:-

"Does the definition of a child of tender year" by the Children Act, 2001 oust the jurisprudence that has been developed in criminal trials? The first thing to note is that in passing the Children Act, Parliament was trying to address issues touching on the welfare of children. We do not think parliament was concerned about the rights of accused persons as relates to the testimony of child witnesses. As already stated there are specific reasons why voir dire examination is necessary before the evidence of a child of tender years can be accepted by the courts……………..In our view, the jurisprudence established over a long period of time is still good jurisprudence despite the definition provided by the Children Act. In saying so, we are guided by the fact that a child's development both physically and intellectually is governed by the social, cultural and economic environment under which the particular child is brought up…………………Having reached the above conclusion, it follows that the acceptance of the complainant by the trial magistrate without conducting a voir dire examination on the witness was fatal to the prosecution case….."

The above position was explained more clearly in the case of **Nyasani s/o Bichana vs Republic**[18]where the court held that failure to conduct a *voir dire* examination is fatal to the prosecution case where there is no other evidence sufficient enough to sustain a conviction. I take the view that this is good jurisprudence. The court needs to exclude the evidence of the minor and put to test the remaining evidence. A similar position was held in the case of **Hussein Ali Genga vs Republic**.[19]

In my view any witness' basic task is to give an accurate report of an accurate perception of some past event. Perceptual accuracy is meaningless unless the witness speaks truthfully. However, a commitment to tell the truth is meaningless unless the witness can form a perception of the observed event accurately. Historically, the law has used the oath ceremony and *voir dire*, or preliminary examination, to test both cognitive skills and truthfulness of a proposed witness.

The essential components are that the witness must demonstrate a capacity for observation, for recollection and for communication. Communication capacity, in turn, is composed of two elements: an ability to understand and respond intelligently to questions, and a sense of 'moral responsibility,' defined as a 'consciousness of duty to speak the truth and appreciate the nature of an oath'

McGough in an article entitled **"Asking the Right Questions: Reviving the Voir Dire For Child Witnesses"[20]** has authoritatively observed:-

"Both common and civil law regarded child witnesses as suspect, only a short step removed from the perceived unreliability of imbeciles and lunatics. Reasons underlying this scepticism were not clearly differentiated. However, because of the spiritual immaturity of a child, his ability to appreciate an oath taken before God eclipsed all other possible concerns. Most children were precluded from testifying 'because of their supposed inability to understand the significance of the oath' in a religious sense. The foregoing perception was due to the child's susceptibility to adult

> *influence and the child's inability to distinguish truth from fantasy. However, the test of competency for a child witness has changed. Children can been heard provided they possess sufficient knowledge and nature and consequence of an oath, and where it is demonstrated they do not understand the nature and consequence of an oath, then they give unsworn testimony."*

Thus, in my view, any preliminary inquiry by the court by way of *voir dire* requires a specific purpose. A limited purpose of *voir dire* examination is to ensure that the child understands his duty to report accurately and the child's propensity for truth telling. In **Commonwealth vs Tatisos**,[21] the child appeared *"bright and intelligent,"* and her answers were direct. However in response to questions about oath, she responded only that it was wrong to tell lies and if she did, whipping would follow. Thereupon, the court adjourned the *voir dire* until the girl could take religious instructions so that she could learn to appreciate the significance of the oath. However, courts have substantial, even unbridled, discretion to question the witnesses beliefs and moral principles.

I find that the learned Magistrate did not possibly appreciate the purpose of *voir dire* examination and even the questions put to the minor were not geared to ascertain the minor's ability to appreciate telling the truth and the nature of an oath. However, where a voir dire examination is not conducted at all, the trial is a nullity. But where is conducted though not in the manner suggested in the authorities cited above, and evidence is tendered as in the present case, then such evidence can be allowed to stand provided is it sufficiently corroborated by the remaining evidence.

Guided by the numerous authorities cited above, I arrive at the conclusion that the evidence of **PW1** cannot be allowed to stand on its own without sufficient corroboration. My view in this regard is fortified by the fact that the minor even answered that she was not aware why she was in court, raising doubts as to whether she was in a position to give a true account of the events in question. Further, the minor is on record stating that her own mother had told her what to come and say in court raising the possibility of adult influence in her testimony. Next I pose the question, does the remaining evidence in this case establish a case against the appellant. Since I have already reproduced the evidence earlier in this judgement, it will suffice for me to refer to it briefly, bearing in mind that at all materials time when there is a doubt in the prosecution case, the benefit of the doubt is always given to the accused.

As I recall the evidence of **PW2**, I propose to deal with the issue of identification. I am alive to the fact that it is necessary to test the evidence respecting to identification, and take great care and caution to ascertain whether surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the complainant or witnesses may positively identify. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution.

In the case of **Charles O. Maitanyi vs Republic**[22], it was held *inter alia* that as follows:-

> *"……..There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his assailants, to those who come to the complainant's aid, or to the police…if the witness received a very strong impression of the features of an assailant; the witness will be able to give some description.."*

In **Kariuki Njiru & 7 others vs Republic**[23]**,** the court held *inter alia* that the *"law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, <u>and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."</u>*

In the case of **Wamunga vs Republic**,[24] the court of appeal held as follows:-

> *"……..Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn*

itself of the special need for caution before convicting the defendant in reliance on the correctness of identification."

In the above cited case of **Maitanyi vs Republic** the court held *that "it is required that before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently."* Failure to undertake such inquiries is an error of law and fatal to the prosecution.

In the present case, other than the minor mentioning she was at ***"Peters"*** house, the record does not show any clear evidence to link the appellant with that name. Guided by the above authorities, I sadly find that such identification is not free from error. It was necessary for **PW2,** the mother of the child to give a more positive description of the appellant to collaborate the evidence of the minor. There is no evidence that the police ever visited the alleged house where the child is alleged to have been defiled to relate it with the evidence of the minor and confirm that indeed the appellant was the sole occupant of the said house. In my view, investigators in cases of this nature ought to do more and ensure that they assemble all the necessary evidence linking an accused person with the offence. In fact in my view, other than arresting the appellant, it appears that there were no other investigations, hence the sketchy evidence adduced in court.

I have examined the record and I am of the view that the evidence on identification cannot be said to be free from error. As correctly held in the above cited cases, I strongly hold the view that evidence based on identification in criminal cases can bring about miscarriage of justice and that it is of vital importance that such evidence is examined carefully to minimize this danger. The court must warn itself of the special need for caution before convicting the defendant.

From the charge sheet the appellant faced the main count as outlined earlier in this judgement and an alternative count of indecent act. At page **J7** of the judgement, the learned Magistrate convicted the appellant on both the main count and the alternative count which was erroneous as was held I the case of **Peter Mutua vs Republic[25]**.

In my view when charges are framed in the main and alternative, the accused has an election to either plead guilty to the main count or alternative count. He can plead not guilty to both counts as the appellant did in this case, and **be found not guilty** on both the main count and the alternative **BUT** he may **not be found guilty on both counts**. Thus, where charges are preferred against an accused person in the alternative, a conviction should be entered on one only and that no finding should be entered on the alternative count. In **Republic vs Nasa Ginners Ltd**,[26] the magistrate convicted the accused on one count and acquitted him on the alternative. It was held that a more proper course would have been to make no finding on the alternative count. In my view, conviction on both the main count and the alternative count exposes an accused person to being convicted twice in the same case for the same offence.

I turn to the remaining evidence to determine whether the key ingredients of the offence were proved and if the conviction can stand.

Section **8 (1)** cited above provides the key elements of the offence of defilement. These are **"Penetration,"** and **"Child".** The act defines **"penetration"** as partial or complete insertion of the genital organs of a person into the genital organs of another person while **"child"** has the meaning assigned thereto in the Children's Act. Before I exit the definitions it is extremely important that we bear in mind the category of persons defined in Section **2** of the act as **'vulnerable person'** which *means a child, a person with mental disabilities or an elderly person and 'vulnerable witness'* shall be construed accordingly. I find no difficulty in concluding that the minor in this case was a vulnerable person.

Section **8 (1)** defies the offence of defilement and therefore before section **8 (2)** comes into play, the prosecution must prove the offence of defilement was committed. As stated above, an important element of defilement is penetration. From **PW2** testified that she examined the minor and found sperms on her

vagina and saw it had sperms while **PW3,** stated that there were multiple lacerations on the vagina wall and her hymen was broken. The conclusion is that the girl was defiled, but the evidence adduced does not meet the required standard to positively link the appellant with the said defilement.

Counsel submitted that a DNA test was necessary in this case. In my view, even without considering the presence or otherwise of medical evidence either for the appellant or the complainant, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. My position in this regard is fortified by the holding of the court of appeal in **Martin Nyongesa Wanyonyi vs Republic**[27] citing **Kassim Ali vs Republic**[28] where the court stated:-

> *"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"*

With regard to the defence raised by the appellant, I refer to the case of **Uganda vs. Sebyala & Others**, [29] where the learned Judge citing relevant precedents had this to say:-

> *"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts"*

In his defence, the appellant insisted he was at his home the whole day on 24th June 2009. Though the defence was brief, the key doubt that remains unresolved is whether the appellant was positively identified and linked with the offence. A close examination of the evidence of PW2 and PW4 reveals a crucial gap in this area of identification. In my view it was necessary to call the alleged employer of the appellant, it was important for the investigators to visit the alleged house and confirm that indeed the appellant spend the night there on the material and also it was important to call the other children who were playing with the minor. In **Moi Mutiso Nguyi vs Republic[30]** the court blamed failure to call key prosecution witnesses on police laxity and allowed the appeal.

In **Peter Sambaya Kitinga vs Republic**[31] it was held that failure to call crucial witnesses created a big gap in the prosecution case and that failure to call crucial witnesses without any explanation entitles the court to draw an inference that the evidence would not support the prosecution case. This position was well enunciated in the case of **Bukenya vs Uganda.**[32] In the present case, I conclude that there was extreme laxity on the part of the prosecution which was detrimental to their case. Alternatively, I conclude that failure to call crucial witnesses leads to the conclusion that it may have been adverse to the prosecution case.

Having re-evaluated the evidence on record, I come to the conclusion that the conviction of the appellant was not safe. It is not sustainable. Consequently, I allow the appeal, quash the conviction and set aside the sentence imposed. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated at **Nyeri** this **1st** day of **October** 2015

John M. Mativo

Judge