



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NUMBER 136 OF 2014**

**ALEX WAMBANI JOSEPH .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case Number 2170 of 2013 at the Chief Magistrate's Court at Kiambu delivered on 5/9/14 by D.K. Mochache P.M)*

**JUDGMENT**

The Appellant was charged with defilement of a boy contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 7<sup>th</sup> day of September, 2013 and 8<sup>th</sup> day of September, 2013 at *[particulars withheld]* Village in Kiambu County, unlawfully and intentionally caused his penis to penetrate the anus of D K W a boy aged 7 years. He was charged in the alternative with committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006**; the particulars being that on the 7<sup>th</sup> day of September, 2013 and 8<sup>th</sup> September, 2013 at *[particulars withheld]* Village in Kiambu County unlawfully and intentionally touched the anus of D K W a boy aged 7 years, with his penis.

He was convicted in the main charge and sentenced accordingly. He preferred to appeal. His grounds of appeal were that; the substance of the charge was not read and explained to him; that he did not take plea before commencement of the trial hence violating **Article 50(4) of the Constitution** and that the prosecution did not prove its case beyond reasonable doubt.

He relied on his written submissions in which he stated that there was a change of plea but the charge was not read to him afresh as required by **Section 207(1) of the Criminal Procedure Code**. According to him after the complainant testified following a *voire dire* examination, the court failed to call him to take plea afresh. Therefore, the evidence taken was inadmissible. He submitted that there was contradiction in the evidence of PW1 and PW2 and that there was an essential witness who was not called to testify. He prayed that the court allows the appeal.

The appeal was opposed by M/s Atina who represented the Respondent. She submitted that the trial court explained the substance of the charge to the Appellant and hence a proper plea was taken. She submitted that the calling of witnesses was proper since the Appellant had denied the charges; as such his constitutional right to a fair trial was not violated. On proof of penetration, she referred to the evidence of PW1 who found himself naked in the Appellant's bed after spending a night in his house. In the morning, he experienced pain in his anus and could not walk properly. He also passed stool on his clothes while at school. She referred to the evidence of PW4, the Clinical Officer who observed that PW1 had lacerations on the orifice and that it was slightly dilated. The evidence of PW2 together with that of PW1, 3 and 4

was not challenged by the Appellant. She submitted that the age of PW1 was proved to be 7 years through his Clinical Card which showed he was born on 13/8/2006. She submitted that the identification of the Appellant was by recognition. She urged the court to dismiss the appeal.

It is now the duty of this court to re-evaluate the evidence and come up with its own independent conclusion. See the case of **PANDYA Vs REPUBLIC [1957] EA at 336.**

The prosecution called four witnesses. **PW1**, D K was the complainant. His testimony was that he knew the Appellant as he was his mother's worker. He recalled that on 7<sup>th</sup> September, 2013 he was given food to take to the Appellant. The Appellant asked him to wait with him for his mother and grandmother who had gone to work. The Appellant put him to sleep in his bed. In the morning he found himself and the Appellant naked in the Appellant's bed. He left the Appellant's room in the morning. He was feeling pain in his anus and could not walk properly. He reported to his mother when she returned from work at round 4:00p.m. His mother called the police from Ndenderu Police Post who found the Appellant in his house and arrested him. PW1 was taken to Ndenderu Police Post the following day and was interrogated. Thereafter, he was taken to Gachie Health Centre where he was examined and treated. He was also examined at Kiambu District Hospital and Karuri Health Centre. It was also his testimony that he told his brother and grandmother about the incident. He also testified that on the 9<sup>th</sup> September, 2013 after the defilement while at school he passed stool on his clothes. He told his teacher that "*kuna mtu amenifanya kitu*" meaning that "somebody had done something to him"

**PW2**, S W W was PW1's mother. She testified that she knew the Appellant as he was her shamba boy. She recalled that on 9<sup>th</sup> September, 2013 PW1 was sent away from school. He asked her to accompany him back to school which happened on the following day. She met his teacher by the names of Mrs. M who informed her that more than once, she heard children say "*D amejipupulia.*" meaning, "D had passed stool on himself." Later that evening, PW2 realized that PW1 had diarrhea in his pants. She took him to Gachie Sub District Hospital on the 11<sup>th</sup> September, 2013 where after examination was informed that PW1 had been defiled. It was PW2's further testimony that while at the hospital PW1 mentioned that it was the Appellant who had defiled him but had not reported to her because the Appellant had threatened to beat him if he told her. She obtained a letter from Kihara Police Post and also made a formal report at Ndenderu Police Post where she was given a P3form.

**PW3**, PC Moses Tinkoi attached to Karuri Police Station testified that on 11/9/13 he received a report from PW2 that PW1 had been defiled and that the Appellant was the suspect. He issued PW1 with a P3form and referred him to Karuri Health Centre. In the company of PW1, he went to the Appellant's house where he arrested him and charged him accordingly.

**PW4**, Richard Munene a Clinical Officer attached to Karuri Sub District Hospital presented PW1's P3 form, his outpatient card from Kihara Sub District Hospital, another from Karuri Health Centre and a Post Rape Form. His evidence was that PW1 reported to him that he had been defiled by a person known to him. He reported four days after the incident. He examined PW1 on 12/9/13 at 2:00p.m and found that the nature of the offence was defilement. He found that the probable weapon used was a blunt penetrating object and that PW1's anus had lacerations around the orifice and was slightly dilated and tender. He testified that a diagnosis was done and it showed evidence of penetration. He signed the P3 form and the Post Rape Care form on 12/9/13.

When the Appellant was put on his defence, he preferred to give an unsworn evidence. His defence was that PW1's grandmother had conned him of Ksh.12,000/= . She promised to pay him Ksh.2000/= but on the day she was to pay the money, people entered his house and started beating him. He was arrested and taken to Ndenderu Police Post and later to Karuri Sub District Hospital. He stated that PW1's mother had at one point requested to have an affair with him but when he refused she threatened to do something bad to him which is what precipitated the charges against him.

From the evidence on record it is undoubted that PW1, the complainant was defiled. PW4 presented medical evidence which included a P3 form, treatment card from Kihara Sub District Hospital and a Post Rape Care form. The P3 form indicated that there was evidence of penetration. The treatment card from

Kihara Sub District Hospital indicted that there were lacerations around PW1's anal region while the Post Rape Care form indicated his anus was slightly dilated.

The Appellant was properly identified. The identification was by recognition. PW1 knew him as his mother's shamba boy. He lived in their compound and would even take him food. He was consistent in his evidence. This then negates the ground relied on by the Appellant that essential witnesses were not called. After all it is trite that there is no law requiring the prosecution to call a particular number of witnesses. What is important is they call such number of witnesses as is sufficient to prove their case.

The Appellant also submitted that the charge was not read to him afresh. His argument was that if after pleading guilty to a charge, and later on an accused decides for any reason to change his plea, the charge should be read to him afresh whereupon his new plea should be recorded. According to the record, on 13/9/13 before Hon. C. Oluoch, the substance of the charges as required under **Section 207 (1) of the Criminal Procedure Code** was read to him at the commencement of the trial. He pleaded not guilty to both the main and alternative charge. A plea of not guilty was entered and the hearing of the case began. On 20/12/13 the matter was before Hon. S. K. Arome. The Appellant requested that the charge be read to him afresh. The charges were read to him in Kiswahili, to which he replied, "true". A plea of guilty was entered after which the court called for an age assessment report. Several mention dates were issued up to 10/1/2014, when the matter was before Hon. A.K. Mwachigi. On this date, the Appellant addressed the court in the following words.

***"Accused: I deny the charges as framed. I wish to proceed with the case. I pray for a hearing date."***

At this point the trial magistrate ought to have noted that previously the Appellant had pleaded guilty and the court was awaiting an age assessment report after which the facts of the case would have been read to the Appellant. The mere indication by the Appellant that he had at that point denied the charges ought to have provoked the magistrate to read out the charges to the Appellant who would have pleaded afresh. This was not done. I then grapple with the question of whether the error prejudiced the Appellant.

It is important to note that up to the point that the Appellant stated the he denied the charge on 10/10/2014, the charges had been read to him twice; first on 13/10/2013 when he pleaded not guilty and again on 20/12/2013 when he pleaded guilty. He thus knew what charges he was facing as in any case, they were read to him in a language he understood, being Kiswahili. Furthermore, when he stated that he denied the charges, he also informed the court that he would proceed with the hearing. That is what transpired as witnesses thereafter adduced evidence. Again, when the plea was first taken on 13/9/2013, the proper procedure of taking a plea as provided under **Section 207 (1) and (2) of the Criminal Procedure Code** was followed. The same provide as follows.

***"207 (1) the substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.***

***(2) If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:***

***Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge was founded.***

The same case applied on 20/13/2013 when a plea of not guilty was taken. It accorded with **Section 208(1) of the Criminal Procedure Code** which provides thus;

***"If the accused person does not admit the truth of the charge, the court shall proceed to hear the complaint and his witnesses or other evidence (if any).***

In that respect, it is my view that the Appellant was not prejudiced in any way and the trial was not vitiated by the mere fact of the charge not being read to him again on 10/1/2014. Furthermore, as opposed to his submissions, the charges had not been amended on this date. He thus was well versed with the charges facing him.

That having been said, I have also observed that there is a slight contradiction in the evidence of PW1 and that of PW2, his mother. In his evidence, PW1 stated that he spent the night at the Appellant's house and found himself naked in his bed the following morning. In the evening, he reported to his mother about the incident. According to PW2, she did not know about the defilement until the day when she heard PW1 tell the doctor that he was defiled by the Appellant.

In my view, this is not a material contradiction as it does not go to the issues for determination. After all, it must be understood that PW1 was very young, aged only 7 years and having been warned by the Appellant not to tell PW2 what had happened may have drawn him back from narrating the ordeal to his mother. The contradiction does not negate the fact that PW1 properly identified the Appellant and that indeed it is the Appellant who defiled him. It was not prejudicial to the prosecution's case.

On the age of PW1, the same was adequately proved by the production of the Clinic Card by PW4. It showed that PW1 was born on 13/8/2006 placing his age at 7 years as at the time of defilement.

The Appellant's defence that he was fabricated by PW1's grandmother and mother was a second thought. It was not substantiated and did not also dislodge the strong evidence against him. It had no merit.

On the whole, I find that the prosecution proved its case beyond all doubts. This appeal has no merit and the same is dismissed.

**DATED and DELIVERED at NAIROBI this 5th Day of November, 2015.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. The Appellant in person.
2. Mr. Murithi, for the respondent.