



REPUBLIC OF KENYA



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**Mwai v Republic (Criminal Appeal 125 of 2017)
[2023] KECA 1648 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KECA 1648 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 125 OF 2017
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JULY 21, 2023**

BETWEEN

JAMES KARIUKI MWAI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at Kerugoya (L. W. Gitari, J.) dated 28th July 2017 in Criminal Appeal No. 31 of 2014)

JUDGMENT

1. The appellant, James Kariuki Mwai, was on 20th June 2014 convicted by the Acting Senior Resident Magistrate at Baricho of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) (No. 3 of 2006) whose particulars were that, on the 1st and 2nd day of January 2013, at Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of S.W.W. who was aged 7 years. He was sentenced to life imprisonment. He was aggrieved by the conviction and sentence, and appealed to the High Court. The High Court (L.W. Gitari, J.) heard the appeal and dismissed it on 28th July 2017.
2. This is the appellant’s second appeal, which he has preferred to this Court. His grounds of appeal were as follows:
 - “ a. That the Judge erred in law by upholding his conviction on the weight of an improperly conducted *voire dire* inquiry which was contrary to provisions of section 19(1) of the [Oaths and Statutory Declarations Act](#);
 - b. That the Judge erred in law by not observing that there was no corroboration of P.W.1’s evidence especially from PW2 and PW7 and knowing very well



that corroboration was a necessity in situations where minor witnesses give unsworn evidence and this was contrary to section 124 of the *Evidence Act*;

- c. That the Judge erred in law in failing to note that the medical evidence tabled was not and did not attain the required criminal standard and the P3 Form lacked in very crucial aspects;
 - d. That the Judge erred in law by upholding his conviction on the weight of PW7's evidence who did not follow the right procedure before giving his expert opinion and findings;
 - e. That the Judge erred in law in not appreciating that the crucial witness was summoned which is a necessity in a situation like this where the prosecution called evidence which was barely adequate; and
 - f. That the first appellate court failed in its legal mandate to fully re-analyze, re-assess and re-interrogate evidence on record and come to its own conclusions, or otherwise did so in a perfunctory manner.”
3. Under Section 361 of the Criminal Procedure Code, this being a second appeal, the jurisdiction of this Court is limited to the consideration of matters of law. In *Karani V. R* [2010] eKLR 73, this Court explained the jurisdiction in the following terms:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

4. The record shows that the prosecution's evidence was that on 1st January 2013 three children visited the appellant's house during the day. They were two girls, the complainant S.W.W. and one P., and a boy C.M.
- S.W.W. was a class three pupil aged seven years and seven months according to the birth certificate, and C.M. was in class one and was slightly younger than S.W.W. The appellant's room appears to have been one roomed, but had a curtain drawn to separate the sitting area from the bed area. The evidence of S.W.W. and C.M. was that the appellant had toys in the sitting area. He gave C.M. two red toy cars to play with and took S.W.W. and P. to the bed area. S.W.W. had her clothes removed by the appellant who pulled down his trouser. He removed his penis and made S.W.W. to lie on the bed and he penetrated her vagina using his penis. When he was through, he did the same to P. He gave S.W.W. 20/-, gave 17/- to P. and gave C.M. 4/-. The girls returned the money to the appellant. In the course of defiling S.W.W., C.M. had opened the curtain to find them in the act with S.W.W.'s clothes removed and appellant's trousers removed. The appellant had rebuked him to go back to the sitting area.
5. The children returned home in time for lunch. The incident was not reported until the following day. What happened was that, on this day (2nd January, 2013), S.W.W.'s mother, A.W.M., returned home at about 3pm from the shamba. She was with her mother and sister L.N.M. who is C.M.'s mother. They found S.W.W, C.M. and three other younger boys at home. The boys were E., D. and A. C.M., E. and D. had poured water on A. L.N.M. (mother of E.) took a stick and beat E. and D. S.W.W started to laugh at those being punished. E. felt bad and decided to reveal what C.M. had told him about the previous



day's incident in which S.W.W. and had been defiled by the appellant. L.N. asked S.W.W. about the incident. At first she denied, but subsequently admitted that the appellant had defiled her, not only on that day but also on previous occasions. Her mother A.W.M checked her private parts. The girl's anus was wet and wide open. C.M. was found with 4/- . S.W.W. was taken to Sagana Police Station and to Kerugoya Hospital. When she was examined by Clinical Officer J.M., it was found that her hymen was broken but not fresh and her anal sphincter was loose and mucosal had eroded. S.W.W. told the court that the appellant had defiled her on several previous occasions, but she had not told her mother because of the fear that she would beat her.

6. According to all the prosecution witnesses, the appellant was their neighbour and well known to them. Police officer P.K. of Sagana Police Station recovered two red toy cars in the appellant's house in his presence.
7. The appellant gave unsworn testimony and denied the allegations. He stated that on 31st December, 2012, he had had night prayers in Karatina. The following day at noon he went to watch a movie in Karatina town. He returned home at 6 pm on 2nd January, 2014 and slept. At 9pm on 3rd January, 2013, he was arrested while at his home. He did not call any witnesses.
8. It is material that S.W.W and C.M. both gave unsworn testimony, following voire dire examination.
9. This is the evidence that the trial court considered. The court accepted the prosecution version and found that the guilt of the appellant had been proved beyond reasonable doubt. The first appellate court re- evaluated and re-considered the evidence and returned the verdict that the conviction was based on cogent, consistent and overwhelming evidence and was therefore safe, and that the sentence was lawful.
10. We consider that before the first appellate court, the appellant had raised the following grounds:
 - a. the trial Magistrate had erred in both law and fact by not conducting a proper and complete voire dire inquiry before admitting the evidence of the minor witnesses or required by the law;
 - b. The trial Magistrate erred in both law and fact by failing to observe and consider that a crucial witness was not called to testify;
 - c. The trial Magistrate erred in both law and fact by admitting the evidence of the alleged Clinical Officer who was not the author of the P3 form and who did not prove to the court that he was qualified in the field; and
 - d. The trial Magistrate erred both law and fact by not according him a fair hearing as required by Articles 48 and 50 of *the Constitution*.

11. We have anxiously considered the judgment by the first appellate court.

It is evident that the court re-evaluated all the evidence tendered before the trial court. The court appreciated that the two children (S.W.W and C.M.) were of tender years and that their testimony was taken after voire dire inquiry as was required by Section 19 of the *Oaths and Statutory Declarations Act*. Further, the court was alive to the provisions of Section 124 of the *Evidence Act* which are that the evidence of S.W.W did not require corroboration if the trial court believed that she had told the truth. The learned Judge found that the trial court had correctly believed the evidence of the two children,



and had gone ahead to find that the evidence had been corroborated by the medical evidence and the two red toy cars found in the appellant's house. This is what the trial court stated:

“I find that the complainant PW1 and C.M. PW11 were able to place the accused at the scene of the alleged crime. They stated in a clear and consistent manner of how they visited the accused on the material day.

The two witnesses stated that the accused welcomed them. That while in the house, the accused gave C.M. PW11 two red toy cars. The toy cars were produced in court as prosecution Exhibit 2a and 2b. The Investigating Officer P.C K. PW14 stated that he recovered the same from the accused's house in his presence...

PW11 C.M. stated that he saw the accused on top of the complainant..... .

The Clinical Officer concluded that there was penetration of both the vagina and anus ”

12. The learned Judge stated that she did not find any reasons why the trial court would not believe the complainant. In any case, she observed, the prosecution evidence had confirmed the defilement.
13. On the challenge against the Clinical Officer and the P3, the learned Judge, correctly in our view, found that the witness had clearly indicated that the witness was a Clinical Officer at Karatina District Hospital where S.W.W. had been taken for examination. He had examined the child and completed the P3 which he produced in evidence. There was therefore no basis for the complaint. Lastly, the learned Judge found that on the evidence, the claim that the appellant had not been supplied with witness statements was not true. The record had shown that the statements had been supplied. Therefore, the claim that the trial had been unfair had not been substantiated.
14. We have considered the amended grounds of appeal, the appellant's submissions thereon and the submissions in response by Mr. Naulikha for the State. Essentially, the appellant is raising the same grounds that he raised on first appeal. These grounds found sufficient consideration by the appellate court as shown earlier in this judgment. It is clear to us that, there was *voire dire* inquiry by the trial court before evidence was taken from S.W.W. and C.M. In respect of each child, the court found that it could only take unsworn testimony. This meant that both children did not understand the nature of oath but that they possessed sufficient intelligence to justify the reception of the evidence, and understood the duty of speaking the truth.
15. We observe that, the first appellate court correctly found that under section 124 of the *Evidence Act*, once the trial court found that the children were truthful witnesses, there was no need for their evidence to be corroborated. This position was reiterated by this Court in *Stephen Nguli Mulili V. R. [2014] eKLR* in which it was held that:

“.....Section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful.”
16. Nonetheless, both the trial court and the first appellate court found that there was corroboration. The claims that the Clinical Officer's evidence did not attain the required medical evidence or that it was not sufficient expert evidence were dismissed by the first appellate court. In our view, nothing new has been raised to persuade us to disagree with the finding.
17. In conclusion, we find no merit in the appeal. We confirm that the appellant was convicted on overwhelming evidence and that the sentence meted out was lawful. The appeal is dismissed.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JULY, 2023.



JAMILA MOHAMMED

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JUDGE OF APPEAL

K. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true Copy of the original

Signed

DEPUTY REGISTRAR

