



REPUBLIC OF KENYA



KENYA LAW
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**Nyalwanga v Republic (Criminal Appeal E051 of 2023)
[2024] KEHC 2257 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E051 OF 2023
A. ONG'INJO, J
FEBRUARY 29, 2024**

BETWEEN

JARED OCHIENG NYALWANGA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of Hon. R. Orora (Ms) Senior Resident Magistrate, delivered on 23rd February 2023 in Mombasa Chief Magistrate's Court Sexual Offences Case No. 113 of 2019)

JUDGMENT

1. The Appellant Jared Ochieng Nyalwanga was convicted and sentenced to serve life imprisonment in Mombasa Chief Magistrate's Court Sexual Offence Case No. 113 of 2019 with the offence of defilement contrary to Section 8(1) as read with Sections 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that the Appellant on diverse dates between 7th July 2017 and 9th November 2019 at BQ area in Likoni Sub-county within the Mombasa County unlawfully and intentionally forced his penis to penetrate vagina of AAJ aged 5 years.
3. Being dissatisfied with the conviction and sentence, the Appellant through his Advocate Chacha Mwita filed Amended grounds of Appeal on 18th January 2024 as follows: -
 - i. The learned trial Magistrate erred in law and fact in failing to notified the Appellant that he had a right to legal representation and thereby prejudicing the Appellant and denying the right to a fair hearing hence resulting to mistrial.
 - ii. The learned trial Magistrate erred in law and fact in finding that the Prosecution proved its case beyond reasonable doubt while to the contrary material witnesses evidence were not called nor proved and the prosecution evidence remained inconsistent contradictory and lack corroborative evidence.



- iii. The learned trial Magistrate erred in law and fact by unjustifiable shifting the burden of prove to the Appellant and dismissing the early by defence tendered by the Appellant.
- iv. He learned trial Magistrate erred in law and fact by imposing harsh and excessive sentence.
4. The Appellant prayed that the appeal be found to be merited, that the conviction be quashed and sentence set aside.
5. The brief facts of the case are that the appellant, the father of the complainant, severally defiled the 5-year-old girl child on diverse dates between 7th July 2017 and 9th November 2019 while residing with her and her brother PW2 within Likoni Sub-county. PW1 and PW2 testified that their mother remained back in their rural home together with their younger sibling while they stayed with the Appellant in Mombasa. The Appellant was arrested when PW2 who suffered serious injuries reported to Inuka Police Station and he was referred to Village elders, PW4 and PW5. When he reported that the Appellant had assaulted him, he also reported that the Appellant had repeatedly defiled his sister, the Complainant. The Appellant was arrested and complainant taken to hospital where PW3, Steven Kalai, the Clinical Officer examined her and found that her hymen was broken with an old scar and there was healing superficial laceration at 12'Oclock on the anus.
6. This Appeal was canvassed by a way of written submissions. However, the major issue that arises for determination is whether the Appellant was given a fair trial. The Appellant's Advocate has argued that the Appellant rights to legal representation was not brought to his attention as required by Article 50 (2) (g) of Constitution of Kenya 2010.

Analysis and Determination

7. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic (2010) eKLR* where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
8. After considering the grounds of appeal, records of the trial court and submissions, the main issue for determination is whether the appellant was given a fair trial.
9. This court has perused the records of the trial Court and confirm that indeed the trial Magistrate at the time of taking plea did not inform the Appellant of his right under Article 50(2)(g).
10. Article 25 provides that the right to fair trial is one of fundamental rights and freedoms that may not be limited. The trial Magistrate having failed to comply with the provisions of Article 25(c) and 50(2) (g) this court finds that there was a mistrial on the part of the trial court and therefore the proceedings herein are a nullity. The conviction is therefore quashed and sentenced set aside.
11. In consideration of the seriousness of the offence allegedly committed by the Appellant and in consideration of the age of the complainant, this court hereby refers this matter back to the Chief Magistrate Court at Mombasa for a re-trial. The Chief Magistrate to assign the matter to any of the



Magistrates in the Criminal Division. The Appellant to be produced in the Chief Magistrate Court on 14th March 2024 for directions by the Chief Magistrate.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF FEBRUARY 2024

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia – Court Assistant

Mr. Ngiri for the State

Mr. Chacha Mwita Advocate for Appellant

No appearance for Appellant - Held at Naivasha Prison

