Case Number:	Criminal Appeal 330 & 340 of 1976
Date Delivered:	15 Sep 1976
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Harold Grant Platt, Alister Arthur Kneller
Citation:	John Mwangi Macharia & another v Republic [1976] eKLR
Advocates:	CM Githinji State Counsel for the Republic.
Case Summary:	**John Mwangi Macharia & another *v* The Republic** High Court, Appellate Side, Nairobi 15th September 1976 Kneller & Platt JJ ***Criminal law*** *– evidence – witness – witness under age of fourteen years – examination as to competence as witness, etc – examination before evidence given.* ***Criminal law*** *– evidence – sworn statement by defendant – statement differing in material respect from prosecution case – duty of prosecutor and Court* Although a magistrate should hold an examination of a potential witness under the age of fourteen years to see whether he or she is competent to give evidence and whether he or she should be sworn or should make an affirmation before the witness is allowed to give evidence, a finding on these points after the witness has given evidence is not No cases were referred to in the judgments necessarily a ground for quashing the conviction

	of the defendant in the proceedings. If a defendant elects to make a statement on oath and this differs in a material respect from the case for the prosecution, the prosecutor should cross-examine the defendant on his statement and, if the prosecutor does not cross-examine the defendant in such circumstances, the Court should invite the prosecutor to do so. The failure to cross-examine in these circumstances, however, is not necessarily fatal to the conviction. No cases cited in the judgment. **Appeals** The appeals of John Mwangi Macharia (Criminal Appeal No 330 of 1976) and James Ikuza (Criminal Appeal No 340 of 1976) against conviction and sentence before the Resident Magistrate's Court (ML Wanniappa Esq) in Criminal Case No 562 of 1976 were consolidated and heard together. The facts are set out in the judgment of the court. The appellants did not appear and were not represented. *CM Githinji* State Counsel for the Republic.
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeals against convictions dismissed. Appeals against sentences allowed in part.
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 330 & 340 OF 1976

JOHN MWANGI MACHARIA

JAMES IKUZA ……..……APPELLANTS

VERSUS

THE REPUBLIC……...……...RESPONDENT

JUDGMENT

The appeals against conviction must be dismissed. The magistrate wrote after recording their testimony that he was satisfied that the two complainants under the age of fourteen years understood the nature of the oath before they gave evidence; but for another of the same age he said,

“I am satisfied that she understands the nature of the oath”, which leaves us in some doubt whether there was a *voir dire* at all, or a proper one. It must be a preliminary examination of a witness by the magistrate in which the witness is required “to speak the truth” with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (eg she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth). A finding on these points after the person of tender years has testified will not do.

The irregularity is not fatal. These girls were aged thirteen and twelve years, attending a primary school and in standard VII. Their answers to questions were coherent and revealed that they were intelligent. They were competent.

Assuming that their evidence was unsworn and not affirmed, then, there was the evidence of the doctor, an analyst, policemen and their mothers who heard their reports to a corroborate and support their allegations of defilement by each appellant and refute the appellants’ testimony that the girls fabricated their evidence because they were interrogated by policemen setting off for a party in Nairobi South B estate at 3 pm on Sunday, 15th February 1976. The magistrate looked for corroboration, found it and drew the same conclusion we have done later when summarising all the evidence.

Neither of these girls, or the appellants, had any injuries on them or on their private parts; but this is not material for defilement. Stains in their underwear and slides from the vaginas of the girls reveal sexual intercourse took place between them and, as the girls were under fourteen years of age, this was defilement because the appellants did not raise the statutory defence that they had reasonable cause to believe, and did in fact believe, that the girls were of or above the age of fourteen years or were their wives: see section 145 of the Penal Code.

Neither of the appellants’ statements on oath was tested in crossexamination which means that the Republic did not challenge it. The magistrate did not touch on this. He did not accept it as true or have

any reasonable doubt that it was untrue.

We are satisfied the prosecutor before the magistrate forgot, or did not know, that if the defendant elects to make a statement on oath in his defence he is to be cross-examined on it if it is different from the case for the prosecution and the Court may believe the defence or declare that it raises reasonable doubt if it is not so challenged. The unchallenged evidence of each appellant was, however, in the circumstances, clearly untrue and could not raise any doubt about the truth of the girls' stories in view of all the evidence as a whole, including that of the policeman who caught them all in twos in two separate coaches in a railway siding, the reports by the doctor and the analyst, and that of the mothers of the two girls.

The failure of the prosecutor to cross-examine and challenge the appellants' denials on oath in this case is not fatal to the conviction. We hope, in future, that magistrates will ask a prosecutor who does not cross-examine a defendant on his sworn defence statement, if it is different in any material respect from the prosecution case, whether or not the prosecutor's instructions are that the defence is, or might be, true and exculpatory; and if the prosecutor says they are not so, the magistrate should advise him to cross-examine and challenge it. The defendant has selected this way of making his defence knowing that he might be challenged with searching questions from the prosecutor designed to reveal to the Court whether or not the defence is true or results in the prosecution's failure to prove beyond reasonable doubt the defendant guilty of the offence charged or any other one open to it on the relevant facts adduced and the law.

[His lordship then considered the appeals against sentence. He found that the sentences imposed by the magistrate were manifestly excessive and substituted a sentence of two years' imprisonment with hard labour and six strokes corporal punishment on each appellant.]

Appeals agaisnt convictions dismissed.

Appeals against sentences allowed in part.

Dated at Nairobi this 15th day of September 1976

A.A. KNELLER

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JUDGE

H.G.PLATT

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JUDGE

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