



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NO. 33 OF 2020**

**PATRICK WASIKE KUYUDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgement and sentence of Hon. M.A. Nanzushi,*

*Acting SRM, dated 29<sup>th</sup> September, 2014 in the Principal Magistrate's Court*

*at Kimilili, in Criminal No.1445 of 2013, Republic vs Patrick Wasike Kuyudi).*

**JUDGEMENT**

The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.

In this court the appellant has raised six (6) grounds of appeal in his petition of appeal.

Those grounds in his own lay man's language are as follows.

Ground 1- That the trial court failed to observe my rights to fair trial as provided for in article 50 (1) (2) (q) as read with Article 163 (3) (a) (b) of Constitution.

Ground 2- That the trial court failed to observe that the prosecution did not comply with article 50 (2) (j) hence I was unable to prepare adequate for my defence.

Ground 3- That the trial failed to observe the prosecution did not prove the alleged age of the victim beyond reasonable doubt.

Ground 4- That the trial erred in law by sentencing me to serve an unconstitutional, given its mandatory nature.

Ground 5- That the trial magistrate erred in law and facts by dismissing my defence evidence which was cogent enough to award me an acquittal.

Ground 6- That, I be served with the trial court records, to enable me erect more grounds.

I have perused the record of the proceedings of the lower court in view of the above grounds of appeal in particular ground 2. Additionally, I have also perused the written submissions of the appellant. The appellant has submitted in part that he was not given enough time to present his defence in view of the fact that he had informed the trial court that he was to call two witnesses for his defence. He has therefore submitted that the trial court did not offer assistance to him in issuing witness summonses to his witnesses. Finally, he has submitted that the prosecution that was mounted was in violation of his fair trial rights and it was therefore a nullity.

In view of the foregoing I find that the main ground of the appellant's appeal is ground 2 which is in relation as to whether he was accorded a fair trial as required by article 50 (2) of the 2010 Constitution.

The answer to the foregoing issue requires that I examine the record of the proceedings. In this regard, I find that when the appellant was put

on his defence in terms of section 211 of the Criminal Procedure Code (Cap 75) Laws of Kenya, he informed the court in Kibukusi language that he was going to give sworn evidence in addition to calling two witnesses for his defence. This was on 22/07/2014.

During the resumed hearing of the appellant's case on 4/8/2014 the appellant informed the court that he was feeling unwell and that his witnesses were not present. The trial court then adjourned the hearing to 18/08/2014. On this date the appellant informed the court that: "I not have been able to contact my witnesses."

The court without any further enquiry fixed the case for judgement on 19/09/2014.

In view of the immediate foregoing I find that the applicable law is article 50 (2) (c) of the 2010 Constitution which guarantees to an accused, amongst other fair trial rights, the right to:

*"to have adequate time and facilities to prepare a defence;..."*

The appellant is similarly guaranteed the right to challenge the prosecution evidence by being accorded the opportunity to call defence witnesses in terms of article 50 (2) (k) of the Constitution which reads as follows:

*"to adduce and challenge evidence."*

*This court (Bwonwong'a, J) in Amos Kipkorir Kurui v Republic in Criminal Appeal NO 22 OF 2020, in the High Court of Kenya at Kabarnet considered a similar matter and proceeded to rule that:*

*"In the instant appeal it is clear that the appellant was not represented by counsel during his trial. The appellant may not have known that the court had the power to summon Collins to attend court as a defence witness for he was not a lawyer. It was therefore the duty of the trial court as a guardian of the constitution; to have ensured that the compulsive machinery of the court should have been used to ensure that Collins (the defence witness) attended court as a defence witness. In other words the trial court should have been proactive in the matter."*

In the current appeal, it was the constitutional duty of the trial court to enquire whether the appellant wanted more time to enable him to call his witnesses or for the court to assist him in compelling their appearance in court to testify. In this regard, the trial court failed in its duty to conduct the enquiry; for an unrepresented accused may not know that the court may be requested to summon defence witnesses to court. It is common knowledge that the court does issue witness summons to potential prosecution witnesses upon the application of the prosecutor. The same assistance should be extended to potential defence witnesses in a similar manner.

It therefore follows that the appellant's trial was fatally defective. In other words, this was a mistrial.

In the circumstances, I agree with the appellant that he was not accorded full facilities and time to adduce evidence in his defence.

In the premises, I find that the appeal of the appellant succeeds with the result that it is hereby allowed. The conviction and sentence of the appellant hereby quashed.

In view of the foregoing, I find that it is moot or academic to consider the remaining grounds of appeal and I therefore decline to do so.

The only issue that falls for consideration is whether I should order for a re-trial of the appellant before another court of competent jurisdiction pursuant to the powers vested in this court by section 354 (3) (a) (i) of the Criminal Procedure Code.

This court has to consider the period the appellant has been in custody and the seriousness of the offence as reflected by the penalty that is provided for. This court has also to consider whether the potentially admissible evidence might lead to a conviction of the offence charged.

I find that the appellant has been in both pre-trial and post judgement and sentence period of about seven years and seven months. The penalty provided for is life imprisonment.

post sentence custody for a period of slightly over seven and a half years.

I have also perused the medical report (the p3 form) which shows that the complainant suffered no injury to labia major and labia minor. Her hymen was partially separated and had no discharge from her private parts.

I further find that the complainant was aged over ten years old. Furthermore, I find that the potentially admissible evidence Pw 1, Pw 2, Pw 3 and Pw 5 if believed might result in the conviction of the appellant: See *Braganza v Regina (1957) EA 152*.

After considering all of the foregoing matters I find that the offence with which the appellant was charged and convicted was serious. I further find that the potentially admissible evidence if believed might result in the conviction of the appellant on a charge of defilement.

Furthermore, I find that the appellant has been in custody for slightly over seven and a half years.

I further find that the complainant suffered relatively minor injuries with no resulting infections following the defilement.

In the premises, I find that it is not in the interests of justice to order a re-trial of the appellant with the result that the appellant is hereby ordered set free unless he is held on other lawful warrants.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE AT NAIROBI THIS 28<sup>TH</sup> DAY OF JANUARY 2022.**

**J M BWONWONG'A**

**JUDGE**

In the presence of

Mr. Kinyua court assistant

The appellant – present in person

Mr Ayiekha for the respondent