



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 76 OF 2020**

**SIMON MUTENYO MARUTI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgement and sentence of Hon. I.G. Ruhu, RM, dated 13<sup>th</sup> March, 2020 in the PM's Court at Kimilili, in Criminal No.93 of 2018, Republic vs Simon Mutenyo Maruti)*

**JUDGEMENT**

The appellant has appealed against his conviction and sentence of fifteen (15) years imprisonment in respect of the offence of attempted defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006.

In this court the appellant has raised five (5) grounds of appeal in his petition of appeal.

In ground 1 the appellant has stated that he did not plead guilty to the charges. In ground 2 the appellant has faulted the learned resident magistrate in failing to consider the circumstantial evidence. In ground 3 the appellant has faulted the learned resident magistrate in convicting him without proper inquiry and investigation. In ground 4 the appellant has faulted the learned resident magistrate both in law and fact in failing to observe forensic investigations. In ground 5 the appellant has faulted the learned resident magistrate for grossly erring in law and fact in applying the wrong principles in convicting him.

The Respondent prosecution has supported the conviction and sentence.

This is a first appeal and I am required to re-evaluate the entire evidence and make my own independent findings while bearing in mind that I did not see and hear the witnesses testify.

After doing so, I find that the prosecution failed in its disclosure obligations, by failing to supply the unrepresented appellant with some crucial statements to enable him mount an effective defence. This is clear from the record of the proceedings of the court dated 25/10/2019. On that date the appellant complained to the court that: *"I have never been supplied with the statements of the police. The court made an order setting the case for mention on 28/10/2019 for directions."*

On 28/10/2019 the appellant complained that he had not been supplied with the police officer statements. In response the court ordered the prosecution to supply the appellant with the statement and proceeded to set down the case for trial on 07/11/2019.

Furthermore, on 29/11/2019 the prosecutor informed the court that he was ready to close their case. The appellant then informed the court that he was not ready to proceed with his case, since he was not supplied with the statements of the Investigating Police Officer. The prosecutor undertook to supply the Investigating Police Officer's statements.

The court then adjourned the case to enable the prosecution supply the appellant with the Investigating Officer's statements. After another adjournment the investigating officer testified and the prosecution closed their case.

I find that article 50 (2) (j) 2010 Constitution of Kenya obliges the prosecution to supply well in advance of the trial the evidence they intend to rely upon in their case against the accused.

It is clear that the appellant who was unrepresented conducted his defence without the statements of the investigation police officer. I find that this hindered him from conducting an effective cross examination; which is among the fair trial rights that is guaranteed to an accused by the Constitution in article 50 (2) (k) which reads as follows: *"to adduce and challenge evidence."*

In addition to the foregoing I find that the appellant has been in both pre-trial and post judgement custody for a period of about three years

and two months.

In the premises, I find that the appellant's rights to a fair trial were infringed. The trial was therefore fatally defective.

In the premises, I hereby quash both the conviction and sentence imposed upon the appellant.

The only issue left for consideration is whether I should order a re-trial of the appellant.

One of the main issues to take into account as to whether a re-trial should be ordered is whether the available evidence if believed might led to a conviction. See *Braganza v R* (1957) EA 152. It is not the only consideration. Others include the period the appellant has been in custody and the circumstances of the case.

The appellant has been in both pre-trial and post judgement custody of about three years and two months. I further find that the prosecution did not comply with the time lines as ordered by the court within which to supply the appellant with the statements of the Investigating Police Officer. The prosecution was in breach of the court orders. The prosecution is to blame for the failure of the right to a fair trial of the appellant.

After taking into account the period the appellant has been in custody and the circumstances of the case, I find that an order for a re-trial will not serve the interests of justice. I decline to do so.

In the premises, the appellant's appeal succeeds 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 AT NAIROBI THROUGH VIDEO CONFERENCE THIS 28TH DAY OF JANUARY 2022.**

**J M BWONWONG'A**

**JUDGE**

In the presence of:-

Mr. Kinyua: Court Assistant

The appellant – present in person

Mr. Ayekha for the Respondent