



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 140 OF 2019**

**DAVID WANGILA MUKEYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the judgement and sentence of***

***Hon. I.G. Ruhu, RM, dated 30<sup>th</sup> August, 2019 in the PM's Court***

***at Kimilili, in Criminal No.36 of 2017, Republic vs David Wangila Mukeya)***

**JUDGEMENT**

In his petition of appeal which bears the court registry stamp of 29<sup>th</sup> September 2019, and the supplementary petition of appeal the appellant has appealed against his conviction and sentence of twenty (20) years imprisonment in respect of the offence of defilement contrary to section 8 (1) (3) 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 and ten (10) grounds in his supplementary grounds of appeal.

I have perused the appellant's grounds of appeal in the main petition and in the supplementary petition of appeal. I find that the grounds in the supplementary grounds of appeal raise weighty issues of law. I will therefore start with some of those grounds.

In will start with ground 6 in which the appellant has stated in his words that:

*“THAT the evidence of pw 1 is inadmissible under section 124 cap 80, she was mentally sick.”*

In view of the foregoing the appellant in his written submissions has submitted that the complainant's grandmother namely JAW (Pw 2) testified as follows:

*“...The girl has epilepsy and keeps on forgetting at times. She had the problem when I took her it's now 6 years. Her mental ability is not quite good. I have taken her to Webuye hospital.”* In this regard, the prosecutor told the court on 15/2/18 that he wished to have the matter adjourned; since the complainant was suffering from a mental condition. The prosecutor then applied for a fresh mental assessment to be conducted at Kakamega. The court then granted an adjournment and ordered the complainant who was a minor to undergo mental assessment at Kakamega Referral hospital.

During the resumed hearing on 19/4/2018 the prosecutor again told the court that the complainant was still suffering from a mental disability and complained that the accused whose lawyer was not in court was always finding excuses to adjourn the case. The court then ordered the hearing to proceed.

The court then noted that:

*“Court: I note that the minor per the report from Kakamega is said to be unfit to take plea. In my analysis and from the previous conduct of this case I conclude that even though she might be mentally unstable, might be is fit enough to testify and shall proceed to testify.”*

It is clear from the foregoing that the complainant (Pw 1) was not mentally unfit to testify in view of the medical evidence tendered before

the trial court. I find that Pw 1 was a patient in respect of which a medical certificate from the doctor was necessary to certify that she was fit to testify.

I further find as credible the evidence of Pw 2 that the complainant was suffering from epilepsy and kept on forgetting at times. The evidence of Pw 2 taken together with the medical evidence should have persuaded the trial court to adjourn the proceedings until the complainant was certified fit to give evidence.

It is also to be borne in mind that the complainant was to rely on her memory in recollecting the events of the circumstances under which she was defiled.

In the premises, I find this ground of appeal succeeds on the basis of the mental condition of the complainant; but not on the ground that her evidence was inadmissible as stated by the appellant.

In ground 5 of the supplementary grounds of appeal the appellant has faulted the trial court in failing to ensure that the prosecution complied with their duty of disclosure of the evidence they intended to rely upon at the earliest opportunity as required by article 50 (2) (j) of the 2010 Constitution of Kenya; which the appellant submits violated his fair trial rights. I find as persuasive the decision of the Court of Appeal in *Cholmondely v Republic* (2008) KLR 190 in which that court observed that the prosecution has to disclose in advance the materials in their possession that they intend to rely upon in the trial

In view of the immediate foregoing, the record of the proceedings of 9/10/17 shows that the complainant testified in evidence in chief and the appellant was given the opportunity to cross examine her. In response the appellant told the court that he did not have the statements of the witnesses. The court then proceeded to order that the appellant be supplied with witness statements before the matter proceeded further.

Furthermore, the court also noted at that time that the issue of statements was the basis for ordering a re-trial of the appellant in Bungoma High Court Criminal Appeal No. 69 of 2014, *David Wangila Mukeya v Republic*. In that appeal this court (S. Githinji, J), allowed the instant appellant's appeal, amongst other reasons, because the prosecution had failed to supply the appellant with witness statements; which that court found contravened the fair trial right of the appellant.

As a result of the order for a re-trial the appellant was tried, convicted and sentenced to 20 years imprisonment; which is the current subject matter of the instant appeal.

I also find that the right to a fair trial of the appellant was infringed in that the prosecution failed to supply the appellant well in advance of the trial the witness statements to him.

In the premises I find that the trial of the appellant was fatally defective.

I therefore find that the submission of the appellant that the re-trial violated the prohibited double jeopardy rule under article 50 (2) (o) of the Constitution is without basis; since the re-trial followed the finding that the trial was fatally defective and was for that reason declared a mistrial.

The only issue for consideration is whether I should order for a second re-trial of the appellant before another magistrate. I find that the appellant had served three years imprisonment following the first magisterial trial. I further find that the appellant has been in the courts since 2012 to date, which translates to a period of about 20 years. A prosecution should not be a persecution.

I have considered all of the foregoing circumstances, and I find that it is not fair to order a re-trial of the appellant as he is not the one who has brought about the position in which he now finds himself. The failure clearly lies upon the prosecution who failed for a second time to supply the witness statements to the appellant well in advance of the trial.

In the premises, I allow the appellant's appeal with the result that his conviction and sentence are hereby quashed.

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 25<sup>TH</sup> DAY OF JANUARY 2022.**

**J M BWONWONG'A**

**JUDGE**

In the presence of:-

Mr. Kinyua: Court Assistant

The appellant absent

Ms Mukangu for the Respondent