



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 038 OF 2021**

**DENIS ORWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**DENIS ORWA**, the appellant, was convicted by the SPM Migori Court for the offence of defilement contrary to Section 8 (1) as read with section 8 (2) of the Sexual Offences Act.

The particulars of the charge were that on 9/2/2020 at [particulars withheld] Village, within Migori County, intentionally caused his penis to penetrate the vagina of NG a girl aged 8 years.

Upon conviction, he was sentenced to serve 20 years imprisonment.

The appellant is aggrieved by the said conviction and sentence and preferred this appeal relying on three grounds :-

- 1) That the court failed to comply with Article 50 (2) (g) of the Constitution;**
- 2) That the offence as charged was not proved to the required standard;**
- 3) That the sentence was excessive.**

Directions were given that the appeal proceed by way of written submissions. The parties complied with the directions. The appellant filed his submissions on 20/11/2021 while Mr. Kimanthi, prosecution counsel, filed his on 2/11/2021.

In his submissions, the appellant reiterated his grounds and added that PW1, the complainant merely said that the appellant did bad manners to her which did not prove the offence of defilement; that the medical evidence did not connect him to the offence; that his alibi was not considered.

**Mr. Kimanthi** on his part opposed the appeal. He urged that PW1 said that Tobias Mboya was known to her; that the appellant was caught in the act, was chased and arrested; PW2 inspected PW1 soon thereafter, found her pants wet and blood stained; that PW4 who also examined PW1 confirmed that she had been defiled; that the offence took place in broad daylight and the appellant was known to the complainant and was properly identified. Counsel found the appellant's defence to be a mere denial.

As regards Article 50 (2) (g) of the Constitution, counsel conceded that it is evident from the court record that the court did not inform the appellant of his right to counsel which is a gross violation to his right to fair hearing; that bearing in mind the seriousness of the offence, the court should order for a retrial.

This is a first appeal and it behoves this court to review all the evidence tendered before the trial court, analyse it and arrive at its own findings. Of cause the court has always to bear in mind that it neither saw nor heard the witness testify and make allowance for that fact. **See Okeno =vs= Republic (1972) EA 32.**

The prosecution called a total of four (4) witnesses. **PW1 N.G. J** a child of tender age gave unsworn evidence and recalled that on 9/2/2020 she was with Junior at hom; that , Deno went there promised to be going to give her money, pulled her to the maize and got hold of her neck, slept on her after removing his pant, that he did "**tabia mbaya**" to her before he ran away and that her father chased him and put him on a motor cycle. PW1 knew Deno, the appellant, before this incident.

**PW2 Caren Atieno George** recalled 9/2/2020, when coming from the shop she heard screams and recognized the voice was that of Cynthia's; that Cynthia came home running and informed her that Adeno took NG to the maize plantation and defiled her and that he had run away. They looked for the appellant whom PW2 referred to as Adeno, but did not get him. She took PW1 to her hospital. PW2 also knew the appellant for over 5 (five) years.

**PW3 PC Risper Boyani** is the investigating officer in this matter. Upon seeing the report of the offence on 9/2/2020, she recorded witnesses' statements, sent the complainant to the hospital and on 10/2/2020, she rearrested the appellant from PW1's father who had taken him to the station.

**PW4 Doctor Victor Awuonda** of Migori Hospital examined the complaint on 9/2/2020, found the complainant bleeding from the vagina and hymen was bruised and was missing.

When called upon to defend himself, the appellant denied that any such incident occurred on 9/2/2020 save that on 10/2/2020, he was picked up from his place of work. He denied knowing the complainant and that he was not home on 9/2/2020 as he had gone to church.

Having considered all the evidence on record in its totality, I am satisfied that an offence of defilement was committed. Although PW1 only told the court that Deno did bad manners to her, she explained that he took out her pant and lay on her. PW1 said that one Cynthia found the appellant in the act before he fled, she reported the same to PW2. Upon examination, PW 4 confirmed that there were injuries to the complainant's genitalia and bleeding which was evidence of penetration. The three ingredients that constitute defilement namely, penetration, age of the complainant being nine (9) years and the identity of the perpetrator were proved beyond reasonable doubt. The offence occurred during the day and the appellant was positively identified by PW1 and one C. The appellant's alibi was a mere afterthought. He did not even say where he was when the offence was allegedly committed.

I found that the prosecution adduced overwhelming evidence that the appellant defiled the complainant.

Whether the appellants right under Article 50 (2) (g) were violated; Article 50 (2) (g) provides as follows; -

**Every accused person has the right to a fair trial, which includes the right-**

**“(g) to choose and be represented by an advocate, and to be informed of this right promptly;**

**(h) to have an advocate assigned to the accused person by the State and at State expenses, if substantial injustice would otherwise result, and to be informed of this right promptly.”**

Article 50 guarantees an accused person's right to fair hearing. The said article read with Article 25, cannot be limited. The court must comply with it. I have perused the trial court's record, and now where did the magistrate inform the appellant of his right to counsel. This information is important as it informs the accused person whether he can get counsel of his own or if not able, if he can seek counsel through the Legal Aid Committee, if possible.

In **Petition No. 33 of 2018 Chacha Mwita =vs= Republic** the Court held that failure to promptly inform the accused person of his right to counsel rendered the proceedings a nullity. The conviction is therefore quashed and the sentence set aside.

The prosecution urged the court to order a retrial. The principles upon which a court will order a retrial were well settled in the case of **Ahmed Sumar =vs= Republic (1964) EALR 483;**

*It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”*

In this case, I have already considered the evidence that was adduced in the trial court and I find that from a consideration of the potentially admissible evidence, a conviction is likely to result. Besides, the appellant was convicted in February 2021 and has only served about 9 months of the 20 years sentence which is not too long. Furthermore, the trial only lasted for only twelve months. The offence which the appellants faced was a very serious one for which if the perpetrator is found guilty should face the full force of the law. I find that the appellants will not suffer any prejudice if a retrial is ordered.

For the foregoing reasons, I order that there be a retrial. The appellant is released to police custody at Migori police station to be presented to the Chief Magistrate's Court for fresh plea and trial. The trial be conducted by any other magistrate other than Hon. Obiero who conducted the earlier trial. Mention before the CM's court Migori on **29<sup>th</sup> March, 2022.**

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 24TH DAY OF MARCH, 2022**

**R. WENDOH**

**JUDGE**

**Judgment delivered in the presence of**

Mr. Maatwa for the Respondent.

Appellant present in person.

**Nyauke** Court Assistant