



REPUBLIC OF KENYA



KENYA LAW
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**Omboko v Republic (Criminal Appeal E002 of 2021)
[2022] KEHC 11244 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E002 OF 2021
FA OCHIENG, J
JULY 28, 2022**

BETWEEN

LAWRENCE OWUOR OMBOKO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Winam by Hon. H. M. Nyaberi (PM) dated 2 nd December 2020 in Criminal Case No. 25 of 2018)

JUDGMENT

1. The Appellant, Lawrence Omboko Owuor was convicted for the offence of Defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. He was then sentenced to 20 Years imprisonment.
2. In his appeal, he has submitted that the trial court did not analyze or scrutinize the evidence which was tendered.
3. He also told the court that his constitutional rights were infringed, as he was not provided with the Witness Statements in advance.
4. It was the understanding of the appellant that pursuant to article 50 (j) of *the Constitution*, an accused person has the right to be provided with Witness Statements in advance, so as to enable him prepare adequately, for his defence. He also added that the Witness Statements should be provided to an accused person at no monetary cost to him.
5. The appellant's other submission was that the prosecution had failed to call other witnesses, who would have added strength to the prosecution case. In particular, the appellant asserted that the prosecution should have called the children who were allegedly present in the same house wherein the offence was committed.



6. He also said that the prosecution should have called, as its witness, the Village Elder, as that would not only have been an independent witness, but also one who might have helped to prove the nexus between the Appellant and the offence.
7. As regards the age of the Complainant, the Appellant pointed out that the evidence tendered was not consistent. Whilst PW2 said that the Complainant was born in the year 2006, PW3 said that the Complainant was born in 2005.
8. Another inconsistency, as pointed out by the appellant was with regard to the identity of the person who first reported the incident to the police. In the appellant's reading of the evidence, there was no clarity as to whether it was Elizabeth or the Village Elder who made the first report to the police.

Medical Evidence__

9. The Appellant described the evidence tendered by PW3, as being incomplete because;
 - i. No laboratory test was done;
 - ii. No spermatozoa noted;
 - iii. No bruises or other injuries on the complainant's labia;
 - iv. Hymen was not freshly broken;
 - v. High vaginal swab yielded nothing positive;
 - vi. No epithelial cells verified and sampled;
 - vii. No injury to the external genitalia.
10. He further noted that the brownish discharge which the Clinical Officer observed was due to the fact that the Complainant was menstruating at the time.

Sentence

11. The appellant submitted that in the light of the Supreme Court's decision in "the *MuruatetuCase*", the mandatory sentence which was imposed upon him, was unconstitutional.
12. Finally, the appellant asked this court give effect to the provisions of section 333 (2) of the *Criminal Procedure Code*, as he was a first offender.
13. Being the first appellate court, I am enjoined by law, to re-evaluate all the evidence on record, and to draw my own conclusions therefrom. However, as I did not have the benefit of observing the witnesses when they were testifying, I have to bear in mind the fact that any conclusions which the trial court pegged upon the demeanour of any particular witness, would be difficult for this court to set aside. Indeed, it is only when a consideration of the totality of the evidence leads to the determination that the conclusion based on an assessment of the demeanour of a witness, was unsustainable, that the appellate court would feel comfortable when upsetting the decision of the trial court.

Witness Statement

14. I have carefully perused the record of the proceedings, with a view to ascertaining if the appellant was required to pay any fees prior to being given Witness Statements.
15. There is absolutely no record of any demand being made by the prosecution or the trial court, that the accused should make payment for Witness Statements.



16. Secondly, I note that the trial commenced on September 11, 2019.
17. The record shows that on July 3, 2019, the trial Court directed the prosecution to furnish the accused with Witness Statements.
18. After the court directed that the statements be provided to the accused, there is no way that the Court could have known that the accused had not yet received them, by the time the trial started.
19. On September 11, 2019, the accused informed the court that he had no objection to the request by the prosecution to have the trial commence.
20. In the light of the said information, the trial court could presume that the accused was “ready” for the case; which would imply that he already had what he required before the commencement of the trial.
21. It was not until February 27, 2020 that the accused told the trial court that he had not yet obtained the Witness Statements.
22. Thereafter, there is no record regarding the issue as to whether or not the accused was furnished with Witness Statements.
23. This is a court of record. Therefore, when the appellant told me that he never received the Witness Statements; and because there is no contrary evidence, I find that the prosecution infringed his constitutional rights;

“ 5 0 (1) (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”
24. Accordingly, the Respondent was right to have conceded the appeal, on that ground.
25. I therefore quash the conviction and set aside the sentence.
26. However, I do find that the evidence on record appears so overwhelming that a fair trial of the Appellant could probably result in a conviction.
27. I do therefore order that the appellant shall be retried. The said retrial will be conducted by a magistrate other than Hon. H. M. Nyaberi.
28. I direct that the retrial shall be accorded priority. And in order to facilitate the process, the Appellant shall appear in Court 1 at the Winam Court, on 3rd August 2022. On that date the Court will give appropriate directions for the hearing of the case.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JULY 2022

FRED A. OCHIENG

JUDGE

