



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 300 OF 2015**

**NORMAN KAMAU THIONG'O ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the Judgment of Honourable L. Gicheha – Senior Principal Magistrate, delivered on 25th November, 2015 in Nakuru Chief Magistrate’s Court Criminal Case No. ACR 6 of 2015)***

**JUDGMENT**

1. The Appellant herein is Norman Kamau Thiong’o. He was arraigned before the Nakuru Chief Magistrate’s Court charged with a single count of defilement contrary to section 5(1)(a)(i) as read together with section 5(2) of the Sexual Offences Act, No. 3 of 2006.

2. The particulars enumerated in the charge sheet were that on “the 27th day of December, 2014 at Teachers Estate within Nakuru County, the Appellant intentionally and unlawfully committed to an act by inserting his fingers into the female genital organ namely vagina of SA, a child aged 7 years which caused penetration.”

3. An alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act was also brought against the Appellant. The specifics as to victim, time and place of the offence are the same as those in the main charge.

4. The Appellant denied the charges and a trial followed. During the trial, the Prosecution called four witnesses and closed its case. The Learned Trial Magistrate ruled that the Appellant had a case to answer. The Appellant elected to give a sworn statement and did not call any witness. The Learned Trial Magistrate returned a verdict of guilty and sentenced the Appellant to fifteen years imprisonment.

5. The Appellant is dissatisfied with both the conviction and sentence and has appealed to this Court as a matter of right. His Petition of Appeal, reproduced verbatim, are as follows:

*1) That the trial magistrate erred in law and fact in failing to note that the prosecution case did not attain the required legal threshold of being proved beyond reasonable doubts and as a result reached at a conviction that was manifestly unsafe.*

*2) That the learned trial magistrate erred in law and fact in convicting the Appellant on the evidence of the complainant that was not corroborated.*

3) *That the pundit trial magistrate erred in law and fact in failing to note that the alleged sexual assault was hinged on framed evidence.*

4) *That the trial magistrate erred in law and facts in failing to evaluate the prosecution case alongside the defence case and thus treated the prosecution case in isolation of the defence case.*

5) *That the trial magistrate erred in law and fact in dismissing the Appellant's defence yet failed to advance a cogent reason.*

6. In the Court below, the following evidence emerged.

7. The Complainant testified as PW1. She gave an unsworn statement after the Learned Trial Magistrate conducted *voir dire* and concluded that she did not understand the meaning of oath. She told the Court that she was five years old and a student in T C. She said that on 27/02/2014, the Appellant sent her to buy tomatoes but that when she brought the tomatoes, the Appellant kissed her and inserted his fingers in her vagina. She recalled that she was wearing a pair of black trousers but that the Appellant did not remove either her or his clothes. She said that she screamed in pain and her aunty, Mama F came to her aid.

8. The Complainant further told the Court that after she was rescued by Mama F she went home and informed her mother when she came home. Her mother took her to the Police then to the hospital for examination. There is no indication that the Complainant was cross-examined.

9. The Complainant's mother, KAO, testified as PW2. She testified that on 27/12/2014, she left the Complainant at home when she went to work. She said that she went back home at 9:00pm and the Complainant told her that the Appellant had kissed her and touched her private parts. She said that the Appellant is her neighbour and that they share a landlord. She told the Court that she informed the landlord who called the Appellant. The Appellant denied the allegations. KAO testified that she then went and reported to the Police, recorded a statement, and was referred to Nakuru PGH for medical examination.

10. In cross-examination, KAO denied that she had any grudges with the Appellant. She also denied that she did not know of any "aunty" and therefore denied that she knew of Mama F whom the Complainant had talked about in her statement to the Court. KAO also denied that she was in a relationship with any man who had threatened the Appellant.

11. Dr. Thomas Matara testified as PW3. He testified on behalf of Dr. Nandi of Nakuru PGH who examined the Complainant. He produced the P3 Form filled out by Dr. Nandi as evidence. The P3 Form reported that the Complainant was estimated to be 7 years old and had a freshly lacerated hymen with tear at 9 O'clock. The P3

Form also reported that the Complainant had a bruised vestibule.

12. The final witness was PC Gedion Mugwiga, the Investigating Officer. He testified that he was assigned the case on 27/12/2014 after the case was reported by the Complainant's mother. He gave them a P3 Form and referred them to the hospital. He then recorded the statements of the minor and the mother. He concluded that an offence had been committed and recommended that the Appellant be charged with the offence of sexual assault.

13. In cross-examination, PC Mugwiga admitted that he did not visit the scene to interrogate the neighbours and admitted that he knew the Appellant before the incident. He, however, denied the suggestion by the Appellant that the Complainant's mother had a relationship with a Police Officer at the Teachers Police Post where PC Mugwiga also serves. However, he admitted that the mother of the Complainant had informed him that he wanted to withdraw the case upon being paid some money but did not know how much she had demanded to do so.

14. The Appellant testified that on 27/12/2004 he was on night duty and went to the garage in the morning. He then received a call from his landlord to go to the plot. When he went, he says that the landlord told him that he was suspected of defiling the Complainant.

He said that he denied and the Complainant's mother suggested that they settle the matter out of court by him paying some money or she would report to the Police. When he declined, the Appellant says that the Complainant's mother reported to the Police and that he was arrested on 02/01/2015. The mother of the Complainant, he said, demanded Kshs. 15,000/- to drop the charges but he did not have the money so the charges were pressed.

15. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see *Okeno v Republic* [1972] EA 32).

16. When the appeal came up for hearing, the Prosecutor, Mr. Jamsumbah indicated that the State wished to concede the appeal. He raised the following grounds for the concession:

1) First, that the Complainant was not cross-examined as required by law and practice.

2) Second, that from the evidence that emerged from trial, it seemed that an essential witness was not called. This was, Mr. Jamsumbah submitted, one Mama F, who allegedly went to the house of the Appellant when the Complainant screamed in pain.

3) Third, Mr. Jamsumbah also pointed out that the Appellant seemed to have raised a plausible defence capable of raising a reasonable doubt in the form of the theory that he was being framed by the Complainant's mother in concert with a Police Officer who was in a relationship with her.

17. Looking at the evidence that emerged at the trial, Mr. Jamsumbah is correct in conceding the appeal. Each of the three issues he raised are fatal to the integrity of the guilty verdict on its own right. The failure to allow the cross-examination of the Complainant was fatal as our jurisprudence has now established. Even in cases where a minor witness is not sworn, it is a constitutional imperative that an Accused Person is given an opportunity to confront the minor in cross-examination. See, for example, *Paul Kinyanjui Kimauku vs Republic* [2016] eKLR.

18. The trial record also shows that the "aunty", Mama F, was an essential witness. The Complainant said that when the Appellant assaulted her, she screamed and Mama F came to her aid. Yet, this Mama F was not called as a witness. Indeed, the Investigating Officer conceded that he did not even question her.

Further, the Complainant's mother denied that there is any such Mama F in existence. The failure to call this witness was fatal because a Court should make adverse inferences where the Prosecution fails to call an essential witness. See, for example, *Bukenya & Others V Uganda* [1972] EA 549.

19. Mr. Jamsumbah is also right that the defence of the Appellant also suggested a plausible defence which raises a reasonable doubt. This was not pursued by the Court and no reason was given for this. The Appellant had a consistent line of defence traced from his cross-examination of the witnesses to his sworn statement. He insisted all along that there was a conspiracy between the Complainant's mother and a man she was in a relationship with who was a Police Officer to set him up with a view to demanding money from him to drop the charges. The Investigating Officer confirmed that the Complainant's mother had indicated that she was willing to drop the charges if paid by the Appellant. This increased the plausibility of the defence.

**20. The upshot is that the appeal against conviction succeeds. In the circumstances, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody.**

21. Orders accordingly.

**Dated and delivered at Nakuru this 22<sup>nd</sup> April, 2021**

**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.