



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 92 OF 2019**

**BETWEEN**

**ELIUD MURIUKI MBIRITHI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(Being an appeal against judgment, conviction and sentence in Tigania Principal Magistrate's Court

Criminal Number 6 of 2017 by Hon. **Sogom O.G (SRM)** on 30<sup>h</sup> November, 2017)

**JUDGMENT**

**Background**

1. **Eliud Muriuki Mbirithi (Appellant)** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed on 2<sup>nd</sup> February, 2017 against **RG** a child aged 13 years.

2. The prosecution called 5 (five) witnesses in support of the charges. **PW1 RG**, the complainant stated that she was 13 years. She recalled that on 2<sup>nd</sup> February, 2017, she was at home with her sister **JM** when, Muriuki (Appellant herein), a neighbour visited their home armed with a machete. It was her evidence that he closed the door to the kitchen where they were and threatened to harm them if they screamed. That he then pulled down her black tights, removed his trouser and defiled her in the presence of her sister. She reported the matter to her mother **PW4 DK** the same day and was escorted to the police station where the matter was reported and thereafter to hospital for examination. **PW2 JM**, complainant's sister identified the Appellant as the one that defiled the complainant in her presence after threatening to harm them with a machine if they raised any alarm.

3. Complainant was examined on 02.02.2017 by **PW3 GEOFFREY MUTHOMI MURITHI** a clinical officer who P3 form as **PEXH. 1** found that she her hymen was torn and on that basis formed an opinion that complainant had been defiled. Appellant was subsequently arrested by **PW5 CPL SALOME ODUOR** who caused him to be charged.

4. In his sworn defence, the Appellant denied going to complainant's parents' home or defiling her.

5. In a judgment dated 30.11.2017, *the* Appellant was convicted and sentenced to serve 30 years' imprisonment.

**Appeal**

6. Dissatisfied with the sentence, the Appellant lodged the instant Appeal mainly on the grounds that:

1. There was no evidence of penile penetration
2. He was not given a fair hearing

3. Prosecution case was not proved
4. Sentence was harsh and manifestly excessive
5. Period spent in custody was not considered

7. The state submitted that the prosecution case was proved, and the sentence lawful and urged that the appeal be dismissed.

#### **Analysis and Determination**

8. The duty of an appellate court is to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR).

**9. have considered the evidence on record, the appeal and submissions filed on behalf of both parties.**

#### **Analysis and Determination**

10. The duty of an appellate court is to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR).

**11. Before I delve into the evaluation of the evidence, I shall first deal with ground number 2 which raises the issue of violation of Appellant's right under Article 50 of the Constitution.**

12. Article 50 of the Constitution underscores the right to a fair hearing and provides that:

(2) Every accused person has the right to a fair trial, which includes the right—

(k) to adduce and challenge evidence

13. In the case of Nicholas Mutula Wambua V. Republic, Mombasa Criminal Appeal No. 373 of 2006, It was held: -

“..... There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.....It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is obvious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.” That thinking is expressed in Section 208 of the CPC which govern hearing of Criminal proceedings in the Magistrate's courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The Trial Courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission.” (Emphasis added).

14. The court record reveals that the complainant and her sister who were minors and the main witnesses against the Appellant were not cross-examined.

15. Concerning the issue of their cross-examination, the trial magistrate stated as follows: “**Having given unsworn statement, PW1 is not a subject of examination**”.

16. On the basis of the foregoing finding by the trial court, PW2 was similarly not subjected to cross-examination.

17. The fact that the complainant and her sister gave unsworn evidence did not take away the Appellant's constitutional right to challenge evidence presented against him.

18. From the foregoing, I do not find it difficult to find that the procedure blunder on the part of the learned trial magistrate violated the Appellant's right under Article 50 (2) (k) and fundamentally prejudiced the entire case as against him.

19. Failure cross examine witnesses is however not an automatic licence to acquittal. Appellant is facing a serious charge of defilement of a child who was of a tender age at the time and an acquittal would not be in the best interest of the child.

20. In considering whether to remit the case for retrial, I have considered the factors for consideration as outlined in the case of Muiruri Vs Republic [2003] KLR 552 where the court stated:

**Generally, whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include, illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistake leading to the quashing of the conviction was entirely the prosecution making or not.**

21. In the case of **John Njeru Vs Republic [1980] eKLR** the Court of Appeal held:

**“In general, a retrial should be ordered only when the original trial was illegal or defective, as otherwise an order for retrial would give the prosecution an opportunity of filling gaps in its case”.**

22. The trial court record demonstrates that the Appellant was arraigned in court on the 06<sup>th</sup> February, 2017 and was convicted on 30<sup>th</sup> November, 2017 having spent 9 months in remand custody. He has been in continuous confinement for the last 4 years and 5 months which period is not inordinately long considering the sentence prescribed for the offence he was charged with.

23. From the foregoing, I am persuaded that the trial of the Appellant was a mistrial. The main witnesses are a mother and her two daughters who are likely to be traced for retrial.

24. Consequently, it is hereby ordered:

**1. Appellant’s appeal is allowed, the conviction quashed and the sentence set aside**

**2. The file shall be remitted back to Tigania Magistrate’s Court for retrial before any other magistrate other than Hon. Sogomo G.**

**3. Mention 05.08. 2021 at Tigania Magistrate’s Court for directions as to the retrial**

**DELIVERED AT MERU THIS 29<sup>TH</sup> DAY OF JULY, 2021**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

**Court Assistant - Kinoti**

**Appellant - Present**

**For the State - Ms. Mwaniki**