



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 69 OF 2019

ELIJAH MAKAU MUTIUAPPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An Appeal from the judgment of Hon. A.C. Mayamba on 31st May 2018 in Kilungu SRM Criminal Case No. 19 of 2018)

JUDGMENT

1. Elijah Makau Mutiu the Appellant was charged with the offence of defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 24th day of April 2018 at Makueni county intentionally caused his penis to penetrate the vagina of **SW** a child aged 9 years. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars relate to the same child.

2. After a full hearing, he was found guilty, convicted of the lesser charge of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006. He was sentenced to ten (10) years imprisonment.

3. Being dissatisfied with the judgment he filed this appeal raising several grounds among them violation of his right to a fair trial as envisioned under Article 50(2) of the constitution.

4. The grounds of appeal raised are as follows:

a. That the learned trial Magistrate erred in both law and fact by convicting the Appellant on evidence which was below the required standard of proof.

b. That the learned trial Magistrate failed to observe and appreciate that the Appellant had money issues with the complainant's grandmother owing to work that the Appellant had done to her but had not been paid which could have resulted in the case being made up against the Appellant.

c. That the learned trial Magistrate erred in both law and fact by going against the general principle in law by shifting the burden of prove to the Appellant.

d. That the trial court did not adequately consider the Appellant's defence.

e. That the Appellant's right to a fair trial as envisioned under Article 50(2) of the constitution was grossly violated.

5. I have carefully perused the record and read through the submissions. It is my considered view that I deal with the ground in respect to violation of Article 50(2) of the constitution as it will dispose of this appeal. I will therefore not analyse the evidence. Article 50(2) provides:

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

(c) to have adequate time and facilities to prepare a defence,

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

6. These provisions basically deal with an accused person's preparation of his defence. There must be disclosure by the prosecution of the evidence they intend to adduce against the accused, before the case starts. This enables an accused person to prepare for his/ her defence.

7. The record herein shows that the Appellant was first arraigned in court on 25th April, 2018. He pleaded not guilty and the case was fixed for hearing on 16th May, 2018 with a mention for 7th May, 2018. On the 7th May, 2018 he was not produced in court but was availed on 16th May, 2018 for the hearing, when two key witnesses testified.

8. There is nothing to show that the prosecution gave the Appellant any witness statements. The court did not also take up its role as the manager to ensure that Article 50(2)(c) and(j) was complied with before the hearing. When the Appellant was not produced on 7th May, 2018 the court did not issue a production order for him in order to address the issue of the witness statements.

9. It follows that when the case started the Appellant had not been given adequate time and facilities to prepare for his defence. This led to a mistrial. I therefore set aside the conviction.

10. The next issue is whether to order for a retrial or acquit the Appellant. When it comes to such an issue each case is considered based its own circumstances.

11. I note that the case was finalized within a very short period and judgment delivered on 31st May, 2018. The Appellant has been in prison since then which is period of 1 year and 8 months. This is not too long time compared to the sentence imposed. Relying on the case of **Bernard Lolimo Ekimat –vs- R (2005) eKLR**, I find this to be a suitable case for a retrial.

12. I therefore allow the appeal, set aside the conviction and sentence. I substitute them with an order for a retrial which should be heard and determined within six (6) months. The matter should be heard by a competent court at Kilungu besides Hon. C.A Mayamba.

13. The Appellant to be arraigned before Kilungu Senior Principal Magistrate's court on 2nd March 2020 for plea, and further directions. Article 50(2)(c) and (j) of the constitution MUST be complied with.

14. In the event of a conviction the sentence already served must be taken into account during sentencing.

Orders accordingly.

Delivered, signed & dated this 27th day of February, 2020 in open court at Makueni.

.....

H. I. Ong'udi

Judge