



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 24 OF 2018

ANTONY BONDO MUTISO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. J.N Mwaniki (SPM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 606 of 2016 delivered on 25th June 2018)

JUDGMENT

1. **Antony Bondo Mutiso** the Appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 6th day of October 2016 at Ukia location intentionally and unlawfully caused his penis to penetrate the vagina of **MM** a child aged 15 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 as in the main count.

2. After a full trial the Appellant was found guilty, convicted and sentenced to fifteen (15) years imprisonment.

3. Being aggrieved by the judgment, he filed this appeal citing the following grounds:

a. **That** the trial Magistrate erred in law and fact by failing to find that the elements of the offence (penetration) were not conclusively proved to warrant a conviction.

b. **That** the learned trial Magistrate erred in law and fact by conducting the case in violation of the Appellant's rights to have an advocate.

c. **That** the learned trial Magistrate erred in law and fact by failing to find that vital witnesses necessary to prove basic facts did not testify.

d. **That** the prosecution's case fell below the required standard of prove beyond reasonable doubt.

4. A summary of the evidence is that Pw2 the complainant aged 15 years was a househelp of the Appellant and his wife. On the material night Pw2 was home with the Appellant and their child. The Appellant's wife appears not to have been around. Pw2 was defiled by the Appellant who asked her to take a bath after the ordeal. Her parents were notified and she was taken for treatment and the matter reported.

5. The Appellant denied the charge saying Pw2 had become bad and was even a thief. They had wanted her to go to school.

6. Both parties filed submissions in support of and in opposition to the grounds. This being a first appeal, this court has a duty to reconsider the evidence on record and arrive at its own conclusion. It has also to bear in mind that it did not see nor hear the witnesses. See **Okeno –vs- R 1972 E.A 32, Kiilu & Anor –vs- R (2005) IKLR 174, Simiyu & Anor –vs- R (2005) IKLR 192.**

7. I have carefully considered the evidence on record, the grounds of appeal, the submissions and the authorities cited. I choose to first deal with ground no. 2 of the appeal as it is most likely going to dispose of the appeal. It states:-

“That, the learned trial Magistrate erred in law and fact by conducting the case in violation of the Appellant rights to have an advocate.”

8. The record shows that plea was taken on 17th October, 2016 and the matter came for mention on 27th October, 2016 when it was fixed for hearing on 10th January, 2017. On the said hearing date, the Appellant informed the court that his advocate Mr. Mulei was not able to attend court as he was engaged at Machakos law courts. He therefore sought for an adjournment. The prosecution was not given an opportunity to respond.

9. This is what the court stated at page 3 lines 14-21.

“Court: I have seen the advocate’s letter dated 10/01/2017. I also take note that even though the lawyer through his letter seeks adjournment, there is evidence that there is difficulty in getting the witnesses who are already before this court today.

Consequently, I order that this matter shall proceed. The advocate shall have the benefit of recalling the witnesses if need be for cross examination. Matter to proceed at 11:30 am.”

C.O NYAWIRI, SRM

10. What followed next was the evidence of Pw1 and Pw2 being recorded. Thereafter, the prosecution requested for an adjournment. Pw1 and Pw2 were the key witnesses in this case. Two more witnesses testified later but the Appellant’s counsel never appeared.

11. It is clear that Mr. Mulei advocate did not only send his client (Appellant) to court. As acknowledged by the learned trial Magistrate he did write a letter to the court expressing his unavailability. This was the first time the case was coming for hearing. The court could not therefore claim that there was difficulty in getting the witnesses.

12. Moreover, Mukuyuni where these witnesses came from is within Makueni county and they would not have suffered any hardship if the case was adjourned.

13. Article 50(2)(g) of the constitution provides: -

(2) 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;

The Appellant in this case exercised this right and elected to have an advocate and engaged one. He was not prepared to conduct his defence by himself on 10th January, 2017 but the court forced him to. This was the first time the matter was coming for hearing. From the evidence, Pw1 and Pw2 were the key witnesses in this case. There is no prejudice that would have occurred if the matter had been adjourned to give room for Mr. Mulei to come and defend his client.

14. The charge facing the Appellant was a serious one and he had deemed it fit to engage the services of a lawyer. The order by the learned trial Magistrate forcing him to proceed must have divested him. He was taken off guard and had to cross examine witnesses he had not prepared to.

15. In the case of **Juma & Others –vs- Attorney General 2003 KLR Mbogholi & Kuloba. J.J** held as follows: -

“It is an elementary principle in own system of the administration of justice, that a fair hearing within a reasonable time is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witness and evidence in his favour, a right to cross examine his adversary’s witnesses, a right to be appraised of the adverse view of him for the judgment a right to argue that a decision be made in accordance with the law and evidence.”

16. Justice Nyakundi had an opportunity to deal with the same issue in the case of **Kitsao Katana Yeri –vs- R 2019 eKLR** where he stated that:

“The right to a fair trial and specifically the right to legal representation is jealously protected in terms of article 50 of the constitution.”

17. In the instant case, there was absolutely no basis for the direction that the learned trial Magistrate took in view of the fact that this was a first hearing; the Appellant had explained his counsel’s predicament to the court; and counsel had indeed written to the court expressing his unavailability; to say the least the Appellant or his relatives must have paid the counsel for the legal representation.

18. I find that the proceedings against the Appellant amounted to an unfair trial. They were prejudicial to the Appellant and amounted a mistrial. The proceedings were later taken over by Hon. Mwaniki and the matter proceeded from where the previous Magistrate had stopped. Judgment was finally delivered on 25th June, 2018. The Appellant has now served **1 year and 8 months**.

19. I would have ordered for a retrial but considering what the Appellant went through at the instance of the trial court, I will not order for a retrial, as that would amount to an injustice to the Appellant.

20. I allow the appeal and quash the conviction. The sentence is set aside. The Appellant will be set free unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 26th day of February, 2020, in open court at Makueni.

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H. I. Ong'udi

Judge