



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 12 OF 2019**

**MATHALE MUKELI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence of Hon. C. A. Mayamba (SRM) in Kilungu Senior Resident Magistrate's Court Sexual Case No. 74 of 2018 delivered on 16<sup>th</sup> January, 2019).*

**JUDGMENT**

1. **Mathale Mukeli** the Appellant herein was charged and convicted of the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act and sentenced to life imprisonment. The particulars of the offence were that the Appellant on the 2<sup>nd</sup> December 2018 at Malili location in [particulars withheld] Sub-county County within Makueni County, intentionally caused his penis to penetrate the vagina of **FMN** a child aged 12 years.

2. He filed this appeal citing the following grounds:-

*a) That, the learned trial magistrate erred in law and in fact by convicting and sentencing him without regard to his basic right of disclosure of the prosecution evidence which was intended to be brought against him as laid down in article 50(2) (c) and (j) of the constitution.*

*b) That, the learned trial magistrate erred in law and in fact by convicting him on incurably defective charge sheet.*

*c) That, the learned trial magistrate erred in law and in fact by convicting him while failing to consider that article 50 (1) (2) (a) (c) (g) (h) (j) and (3) of the constitution were not accorded.*

*d) That, the learned trial magistrate erred in law and in fact by convicting him on uncorroborated medical evidence which did not link him with the offence.*

*e) That, his conviction based on the evidence on record was manifestly unsafe.*

3. This being a first appeal, the court has a duty to re-analyse and re-consider the evidence on record and arrive at its own conclusion. See **Okeno –Vs- Republic (1972) EA 32; Kiilu & Anor (2005) I KLR 174.**

4. I have considered the evidence on record, grounds of appeal and submissions. I have decided to first deal with grounds 1 & 3 which have raised issue with violation of Article 50 (2) of the constitution which addresses elements of a fair hearing. I will in particular address Article 50 (2) (c) (j) and (3). It provides as follows: -

*50. (2) 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;*

*50. (3) If this article requires information to be given to a person, the information shall be given in language that the person understands.*

5. The record shows that the Appellant was first arraigned in court on 4<sup>th</sup> December 2018 and pleaded not guilty and the matter fixed for

hearing on 10<sup>th</sup> December 2018. It did not proceed on 10<sup>th</sup> December 2018 as the prosecution was not ready with its witnesses. It was rescheduled to 17<sup>th</sup> December 2018 for hearing and it proceeded.

6. The record is very silent on whether the Appellant was ever served with witness statements for purposes of preparation of his defence. The provisions of Article 50(2) (c) and (j) of the constitution are very clear on this requirement. The Director of public of prosecution's representatives have now and then been reminded of this solemn duty to accused persons. The court on the other hand has the duty to ensure compliance with these provisions. The right to disclosure must be complied with by the prosecution.

7. In this particular case the DPP and the court failed the Appellant. No witness statements were served on the Appellant and so he did not prepare himself for what was to come. This is reflected in the cross examination of the witnesses. I find this to have been a violation of Article 50(2) (c) (j) of the constitution. Inasmuch as I commend the learned trial magistrate for hearing and determining the case in a record period of 1½ months, I wish to call upon him to always ensure that all provisions of the law related to criminal hearings are adhered to.

8. Owing to the seriousness of the offence and the fact that the appellant was convicted just a year ago I find that justice to both parties will be served if a retrial is ordered. See **Lolimo Ekimat –Vs- Republic (2005) eKLR**.

9. I therefore **set aside both conviction and sentence and order for a retrial. The same should be heard and determined within six (6) months before a competent court other than Hon. C. A. Mayamba at Kilungu Law Courts. Mention on 2<sup>nd</sup> March 2020 before the SPM Kilungu for plea and directions. In case of a conviction the sentence served must be considered during sentencing.**

Orders accordingly.

**Delivered, signed & dated this 26<sup>th</sup> day of February, 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**