



**REPUBLIC OF KENYA**

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

**HCCRA NO. 89 OF 2019**

**BENSON KIMILU MUUO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of Hon. E.M. Muiru (SRM) in Kilungu Senior*

*Principal Magistrate's Court Sexual Offence Case No. 79 of 2018 delivered on 8<sup>th</sup> May, 2019).*

**JUDGMENT**

1. **Benson Kimilu Muuo** the Appellant was charged and convicted of the offence of defilement of a child contrary to section 8(1)(3) of Sexual Offences Act No. 3 of 2006. The offence was said to have occurred on 18/12/2018. The victim was aged 15 years. Upon conviction, he was sentenced to twenty (20) years imprisonment.

2. Being aggrieved with the judgment he filed this appeal raising the following grounds: -

- a) **That**, the learned trial Magistrate erred both in law and facts by relying on contradictory and inconsistent evidence to convict him.
- b) **That**, the trial court erred by relying on the doctor's evidence which lacked merit.
- c) **That**, the learned trial Magistrate erred both in law and facts by dismissing his explosive and firm defence contrary to section 169(1) Criminal Procedure Code.

3. The prosecution case was premised on the evidence of four (4) witnesses. Pw1 (FNM) the complainant was born on 29<sup>th</sup> April 2003 and lives with her parents. She testified that on 18<sup>th</sup> December 2018 at 7:00 pm she met with the Appellant on the road. She did not know him prior to this meeting. She had left home because of a disagreement with her mother. Pw1 was five (5) months pregnant then. She shared her predicament with the Appellant and he proposed to take her to his home which she agreed.

4. They went to his home and he proposed to marry her and she agreed. He lived with his parents but he had a separate house. She stayed with the Appellant for three (3) days. She did not have sex with him. Her father came for her. She identified the treatment card (EXB1), P3 form (EXB2) and PRC form (EXB3). Upon cross examination she said she had sex with the Appellant while at his home.

5. Pw2 **MMR** is Pw1's father. He testified that Pw1 left home on 18<sup>th</sup> December 2018 evening (around 7:00 pm) to get milk and she never returned. He started searching for her. He received information of her whereabouts and he went to the place on 22<sup>nd</sup> December 2018 and asked for the Appellant's home. He met his mother who confirmed Pw1's presence there. He learnt of Pw1's pregnancy in December 2018.

6. Pw3 **No. 118979 P.C Susan Ruto** the investigating officer was at the station on 18<sup>th</sup> December 2018 when the Appellant was brought there by the Kalongo location village elder on allegations of defilement. Pw1 and Pw2 were accompanying the Appellant. He recorded statements and took Pw1 to Kilungu sub-county hospital where she was examined and a P3 form filled. She was found to be six months pregnant. She produced Pw1's birth certificate (EXB4).

7. Pw4 **Eric Kasiamani** of Kilungu sub-county hospital is the clinical officer who examined Pw1 and relied on the treatment notes (EXB1) and PRC form (EXB3) to fill the P3 form. Pw1's hymen was broken. He further established that Pw1 was twenty-four (24) weeks pregnant.

8. When placed on his defence the Appellant in his unsworn statement stated that on 18<sup>th</sup> December 2018 at 8:30 pm in Kyumani area he met with a girl. She told him she was six (6) months pregnant and had been chased away by her parents. That the parents did that quite often and she had made reports at Kalongo and Kilome to no avail.

9. She needed help and he took her to her sisters so that they could assist her get help from women organizations or huduma centres. He thereafter made a report to the village elder who looked for Pw2. He also informed him when Pw2 came they would go to Kalongo A.P post. Indeed, when Pw2 came they went to the AP post and the girl said he did not do anything to her. It is Pw2 who insisted that the matter be referred to Kilome police station. At the said station she maintained he had done nothing to her. He was never taken to hospital for examination.

10. The appeal was canvassed by way of written submissions. The Appellant submits that the ingredient of penile penetration was not established. That Pw1 said the Appellant had not done anything to her. That she was pregnant before she went with him. Relying on the case of **PLW –vs- Republic (2012) eKLR** he submits that a broken hymen was not sufficient proof of penetration.

11. While citing the South African case of **James Azwindini Nedzamba and the State Case No. 911 of 2012** the Appellant submits that the courts should embrace better placed mechanisms for positive identification.

12. The Appellant in citing the case of **JAO –vs- Republic Cr. Appeal No. 176 of 2010**, section 166 (1) of the Penal Code; Section 7(1) and section 7(2) Criminal Procedure Code, and section 221 Criminal Procedure Code submits that the trial court did not have jurisdiction to punish him for the offence. She should have referred him to an appropriate court for sentencing.

13. Learned counsel for the Respondent Mrs. Monica Owenga concedes the appeal. She submits that there was a violation of the Appellant's right under Article 50(2)(j) of the constitution. He was not informed in advance of the evidence the prosecution intended to rely on and also have reasonable access to it.

14. She has observed that this issue was not adequately addressed by the trial court. She prays for an order for a retrial. On the sentence she submits that since the conviction was not properly arrived at, then the sentence cannot be said to be lawful.

#### **Analysis and determination**

15. This being a first appeal this court has a duty to re-analyse and re-consider the evidence on record and arrive at its own conclusion bearing in mind that it did not see or hear the witnesses. See **Okeno –vs- Republic 1972 E.A 32; Kiilu & Another –vs- Republic (2005) I KLR 174**.

16. I have considered the evidence on record, grounds of appeal and the submissions by both parties and the law. An issue on the violation of the Appellant's right under Article 50(2)(j) of the constitution has been raised by the Respondent and I wish to deal with it first before considering any other.

17. Article 50(2)(j) provides: -

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

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

18. The record shows that the Appellant was first arraigned in court on 24<sup>th</sup> December 2018 when plea was taken and he was granted a bond of Kshs.300,000/= with a surety in similar sum. There is nothing on record showing that he was ever released on bond. The matter was fixed for hearing on 13<sup>th</sup> February 2019 with a mention set for 14<sup>th</sup> January 2019.

19. The Appellant was not availed on the mention date. When the matter came for hearing on 13<sup>th</sup> February 2019 the Appellant informed the court that he had not been supplied with witness statements. The court adjourned the hearing to 26<sup>th</sup> February 2019 with an order that the statements be supplied at the Appellant's cost.

20. On 26<sup>th</sup> February 2019 the matter came for hearing and this is what transpired:

**Accused: I am yet to be supplied with statements.**

**Court: Accused granted adjournment at last hearing to obtain statements. Hence this court cannot indulge him again, yet witnesses are in court. Matter to proceed.**

21. From the record, it is clear the court was not concerned about the plight of the Appellant but that of the witnesses. The Appellant was in custody and the person who was to supply the statements was the prosecutor. The court never bothered to find out why the prosecution had not supplied witness statements to the Appellant; was it because the Appellant was not able to meet the costs? How was he to access the witness statements while in prison custody?

22. On this first hearing, three (3) crucial witnesses i.e. the victim (Pw1) victim's father (Pw2), the investigating officer (Pw3) were present. It is obvious the Appellant was not prepared to handle the case but had to do it by order of the court. Article 50 (2)(c) of the constitution

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.*

23. Besides being given witness statements an accused person requires time to adequately prepare for his/her defence. The cross examination of Pw2 – Pw4 clearly manifests the unpreparedness by the Appellant. I entirely agree with learned counsel for the Respondent that the trial court erred by failing to establish why the Appellant had not obtained the statements despite having made the order.

24. It would have been prudent for the learned trial Magistrate to establish whether the Appellant was facing any challenges in obtaining the same and assist before giving the direction that the hearing should proceed.

25. In the case of **Thomas Patrick Gilbert Cholmondeley –vs- Republic Nairobi Court of Appeal No. 116 of 2007 (2008) eKLR** the Court of Appeal observed thus:

***“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under ..... Our constitution the prosecution is now under a duty to provide an accused person with and to do so in advance of the trial all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”***

26. Other cases where this issue has been dealt with are: **Joseph Ndungu Kagiri –vs- Republic (2016) eKLR; Joshua Njiiru –vs- Republic; Kajjado high court Criminal Revision No. 11 of 2017 (2017) eKLR.**

27. In the instant case it is clear that the Appellant despite applying for and an order being made was never issued with witness statements. The trial court ought to have taken caution when dealing with the Appellant considering the fact that he was unrepresented and was facing a serious offence carrying a minimum mandatory sentence of 20 years’ imprisonment.

28. My finding is that the omission by the trial court amounted to a violation of the Appellant’s rights as prescribed under Article 50(2)(c)(j) and the conviction is therefore not safe. Having established that the conviction is unsafe, I will not deal with the other grounds of appeal. The issue that comes next is whether to set the Appellant free or a retrial ordered.

29. The general principle in regard to retrials is that a retrial should only be ordered where the justice of the case demands so. In the case of **Muiruri –vs- Republic (2003) KLR 552** the Court of Appeal held thus:

**(3) Generally whether a retrial should be ordered or not must depend on the circumstances of the case.**

**(4) It will only be made where the interest of justice require it and if it is unlikely to cause injustice to 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 mistakes leading to the quashing of the conviction were entirely the prosecution’s making or the court’s.**

**(5) By the time the trial commenced effluxion of time had taken its toll and several material witnesses had died. It would be an act of futility for the court to order a retrial after a period of 15 years.**

30. The Appellant herein was charged with the offence of defilement of a child contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006 and sentenced to twenty (20) years imprisonment on 8<sup>th</sup> May 2019. He went through a full trial, and was in custody during that period. He has only served one (1) year and over two months of the sentence. I have also considered the circumstances of the case and the evidence tendered and find that a retrial will not occasion an injustice to the Appellant. The complainant is a minor and it would be in her interest that the truth of the matter be known.

31. I therefore order for a retrial within six (6) months. The prosecution MUST supply the Appellant with witness statements and any other documents on the date of plea to enable him prepare for his defence. He will be arraigned before the Principal Magistrate’s Court Kilungu on 4<sup>th</sup> August 2020. The case to be heard before any Magistrate besides M/s E. Muiru Senior Resident Magistrate. In case of a conviction the period served must be considered.

Orders accordingly.

**Delivered, signed & dated this 29<sup>th</sup> day of July 2020, in open court at Makueni.**

.....

**H. I. Ong’udi**

**Judge**