REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 13 OF 2019

CHARLES KIMANTHI KIMUYA...............APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Hon. Mayamba C.A dated 24/01/2019 in Kilungu SRM S.O Case No. 5 of 2019.)

JUDGMENT

1. **Charles Kimanthi Kimuya** the Appellant was charged and convicted of the offence of defilement of a child contrary to section 8(1) as read with sub-section 8 (3) of Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant in the month of October 2018 Kilungu sub-county within Makueni county unlawfully and intentionally committed an act which caused penetration of his genital organ to genital organ of **EMM** a child aged 15 years and impregnated her.

2. Upon conviction he was sentenced to serve twenty (20) years imprisonment. He filed this appeal raising the following grounds: -

> a) **That,** the learned trial Magistrate erred in both law and facts and misdirected himself by holding that the case for the prosecution was proved to the required standard whereas on the basis of record, the burden of proof was not discharged and indeed left reasonable doubts that ought to have been resolved in Appellant's favour.
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> b) **That,** the learned trial Magistrate erred in law and fact by convicting him without regard to his basic right of disclosure of the prosecution evidence which was intended to be brought against him by failing to direct that he be supplied with the statements.
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> c) **That,** the learned trial Magistrate erred in law and fact by wholly relying on Pw2's testimony yet in the circumstances of the case ought to have been corroborated by her mother who was never called as a witness by the prosecution.
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> d) **That,** the learned trial Magistrate erred in law and fact by relying on Pw1's untenable testimony relating to an undisclosed infection in connecting him to the offence, which testimony was incapable of passing the test of credibility.
>
> e) **That,** the Honourable Magistrate misdirected himself after failing to cautiously explore statements of Pw3 and Pw4 whereas they had portrayed themselves as unreliable before court due to the fact that their evidence was based on mere hearsays.

3. The prosecution case is that Pw1 (EMM) who was aged 15 years used to be defiled by the Appellant from May 2018. It was later in October 2018 discovered that she was pregnant. The matter was reported and action taken.

4. The Appellant gave a sworn defence denying the charge.

5. The appeal was canvassed by way of written submissions. One of the grounds raised by the Appellant is that failure by the prosecution to disclose to him the nature of its case violated his right to fair trial. Despite identifying it as one of the Appellant's grounds the Respondent did not address it at all in the submissions by learned counsel M/s Eunice Gitau.

Analysis and determination

6. This being a first appeal, this court has the duty to re-analyse and re-consider the evidence on record and arrive at its own conclusion. This is the principle that was set by the Court of Appeal in the case of **Okeno –vs- Republic (1972) E.A 32** where the court said:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive***

examination … and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions … It is not a function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses …"

7. I have considered the evidence on record, grounds of appeal and the submissions by both parties. I have at paragraph **5** of this judgment identified one ground of appeal which I wish to deal with first as it mostly likely going to determine this appeal.

8. Article 50(2) (c) (j) of the Constitution provides as follows:

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;

9. In the case of **Thomas Patrick Gilbert Cholmondeley –vs- Republic (2008) eKLR** (decided before the promulgation of the 2010 constitution) the Court of Appeal stated categorically as follows:

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under ……………… 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."

10. Article 50 (2) (j) correctly interpreted means that an accused person should be furnished with all the witness statements and documents which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross examination and in his defence.

11. This provision must then be read together with Article 50(2) (c) which provides that every accused person has a right to a fair trial which includes the right to have adequate time and facility to prepare a defence. Article 25(c) further provides that the right to a fair trial is one of those rights which cannot be limited.

12. In the instant case, plea was taken on 7th January 2019 and the matter fixed for hearing on 15th January 2019. There was no direction given by the court in respect to witness statements and exhibits. The next appearance in court was on 15th January 2019 when the prosecution indicated they were ready to proceed and so did the Appellant. An order was made for the matter to proceed.

13. The Appellant was not represented and so may never have known the existence of Article 50(2) (c) (j), but the learned trial Magistrate and learned counsel for the DPP are very well aware of this requirement.

14. I find that failure to provide the Appellant with the prosecution witness statements in advance or at all as provided for under Article 50(2) (j) as read with Article 50(2)(c) violated his constitutional right to a fair trial and vitiated the entire trial.

15. The next issue is whether to order for a retrial or discharge the Appellant. In the case of **Muiruri –vs- Republic (2003) KLR 552** the Court of Appeal set out what the court should consider before deciding on whether to do for a retrial or not. It is stated as follows:

(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 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 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 toil 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.

16. The record shows that plea was taken on 7th January 2019, and conviction and sentence passed on 24th January 2019. The accused had been on bond meanwhile. He has served about 1 ½ years of the sentence. As a result of the alleged offence a pregnancy resulted. I find in the interest of justice that a retrial should be ordered.

17. I therefore quash the conviction and set aside the sentence and order for a retrial within twelve (**12**) months. The Appellant to be arraigned, before the Principal Magistrate's Court Kilungu for a fresh plea to be taken on 4th August 2020.

18. The hearing to be undertaken by any other Magistrate besides Hon. C.A Mayamba P.M. Secondly, if he is convicted the court must consider the period he has already served in this case.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge