



IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 134 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

DAVID THURANIRA M'LIBUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.G. Sogomo,

PM dated 2nd May 2019 at the Magistrate's Court at Tigania in Sexual Offence Case No. 10 of 2018)

JUDGMENT

1. The appellant, **DAVID THURANIRA M'LIBUA**, was charged and convicted of a single count of the offence of defilement contrary to **section 8(1)** as read with **section (3)** of the *Sexual Offences Act* ("the Act"). The particulars of the charge were that on diverse dates between 1st November 2017 and 27th January 2018 at (particulars withheld] Village, (particulars withheld] Sub-location, Mumui location on Tigania West Sub-County within Meru County he intentionally and unlawfully caused his penis to penetrate the vagina of AKT, a child aged 14 years.
2. During the hearing of the case the appellant, who had been released on bond, absconded after the close of the prosecution case and after he had been placed on his defence. The accused stated that he would make an unsworn statement. When the case came up for defence hearing on 4th April 2019, the trial magistrate revoked the bond and issued a warrant of arrest. The matter was fixed for mention on 25th April 2019. On the mention date, the appellant was absent. The trial magistrate recorded that, "*Defence case deemed closed. Judgment on 2nd May 2019.*" The judgment was delivered in the absence of the appellant on the date scheduled. The appellant was subsequently arrested and brought to court on 26th June 2019. He was sentenced to 20 years' imprisonment after mitigation on 5th July 2019.
3. From the brief narration I have set out, the trial magistrate fell into error when he proceeded to close the defence case without the accused being present. Although the appellant had absconded, the matter was coming up for mention on the day the defence case was closed. There was no evidence of the efforts being made to locate the appellant on that date hence it cannot be said that the appellant had, "*forfeited his opportunity of being heard in his defence having jumped bail to become a fugitive from justice.*" At that stage it came up, the prosecution ought to have been given a chance to explain the efforts it had made to locate and apprehend the appellant.
4. The appellant was effectively denied the opportunity to put forward his defence. He cannot be said to have had a fair trial. It is for this reason that I have to quash the conviction and sentence.
5. The case is not an old one and the witnesses may be found easily. Further the evidence against the appellant appears overwhelming. A re-trial is suitable in the circumstances.
6. I quash the conviction and sentence. The appellant shall be re-tried by any other magistrate other than Hon. Sogomo, PM. The appellant shall be taken for re-trial before the Magistrates Court at Tigania on **31st August 2020**. In the meantime, the appellant shall remain in custody during the trial given the previous antecedents.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF AUGUST 2020.

A. MABEYA

JUDGE

Appellant in person.

Mr Maina, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.