



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO 87 OF 2017

THOMAS KIMWOLO CHELANGA...APPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal from sentence in Eldoret CMCRC NO. 6 of 2016 by E, Kigen (RM))

JUDGMENT

1. **THOMAS KIMWOLO CHELANGA** (the appellant) was convicted on a charge of defilement contrary to section 8(1) as read with Section 8 (2) of the Sexual Offences Act and sentenced to serve life imprisonment. The particulars of the charge stated that on the night of 29th and 30th December 2015 at [Particulars Withheld] village within **UASIN GISHU** County, he intentionally and unlawfully caused his genital organs, namely penis to penetrate the genital organ (vagina) of **FJ**, a girl aged 6 years. He denied the charge, but after a trial in which 5 prosecution witnesses testified, and the appellant was the only defence witness, he was convicted and sentenced on 16th August 2017.

2. He was aggrieved with the outcome, and appealed against both conviction and sentence based on 8 grounds which are here condensed to:

- a. The allegations being a frame-up stemming from misunderstandings from the family,
- b. The trial court relied on a wrong source to believe the age of the victim,
- c. The medical examiner was untrustworthy.

3. He also filed supplementary grounds of appeal which basically challenges the mandatory nature of the sentence case meted out, in the wake of the emerging jurisprudence propounded by the **Francis Karioko Muruatetu & Anor [2017] eKLR**, to urge that the court reviews his sentence, and take into consideration the period he has already served.

4. **Miss Okok**, on behalf of the DPP concedes the appeal on a ground which was not raised in the grounds of appeal- namely that the trial court which took over the matter failed to comply with the provisions of **Section 200 (3) of the Criminal Procedure Code**, and which constituted a fatal error as it violated the appellant's constitutional right to a fair trial. She however urges this court that in the interest of justice, a re-trial be ordered, pointing out that there was overwhelming evidence.

5. The appellant in a rejoinder informs this court that he had asked for De Novo hearing but the same was rejected, and just wants to be released.

6. I have perused the proceedings and note that at the onset of the trial, the matter was presided over by **T. Olando (RM)**, who heard the evidence of two witnesses. Later on **E. Kigen (RM)** took over the matter 10th October 2016. On 8th November 2016, the honourable magistrate heard the evidence of PW3, but the record does not show compliance with **Section 200 (3)** of the CPC which is to the effect that;

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

7. Needless to say, the trial magistrate heard the evidence of the remaining witnesses, the appellant and subsequently wrote the judgment, without ever explain to the appellant his trial rights. The provision is couched in mandatory terms and was a fatal error, I find that the appeal is properly conceded.

8. I have perused the evidence on record as well as considered the period the appellant has spent in prison vis a vis the nature of the offence and the sentence it attracts. The appeal succeeds, the conviction is quashed and sentence set aside. I am persuaded that justice will be done for both the appellant and the victim by having the matter re-tried before a different court, other than the one which convicted him. I so order.

9. The appellant shall appear before the **Chief Magistrate at Eldoret on 24th November 2020** for plea taking and trial directions

Virtually delivered and dated this 19th day of November 2020 at Eldoret

H. A. OMONDI

JUDGE