

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 114 OF 2018

BETWEEN

MESHACK MURANG'A.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. R.M Oanda– PM dated 31st August 2018 at the Principal Magistrate's Court at Kilgoris in Criminal (Sexual Offences) Case No.47 of 2017)

JUDGMENT

1. The appellant, **MESHACK MURANG'A**, was charged with attempted defilement contrary to **section 9(1)** of the *Sexual Offences Act*. The particulars were that on 20th December 2017 in Narok County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of RK, a girl aged 7 years.

2. Having read the record, it is clear that the appellant was not given an opportunity to cross-examine the child. **Article 50(2)(k)** of the Constitution speaks of the right, "*to adduce and challenge evidence*". It does not matter that the child gave unsworn testimony. The Court of Appeal discussed this issue in *Nicholas Mutuke Wambuke v Republic MSA Criminal Appeal No. 373 of 2006 (UR)* and had this to say;

The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined..... it would appear that misconception arises from a view that because accused persons are not cross examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.

That thinking is expressed in Section 208 of the CPC which governs hearing of criminal proceedings in the Magistrates' courts. It provides that during the hearing, "the accused persons or his advocate may put questions to each witness produced against him." Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in all criminal trials to obviate an otherwise stable case from being lost on that omission.

3. In the circumstances the appellant's right to a fair trial was violated and the resulting conviction cannot be upheld. In the circumstances, I quash the conviction and sentence however as the matter is not too old, I order a retrial. For that purpose, the appellant shall remain in custody and shall be taken to Kilgoris Magistrate's Court to plead afresh on **6th May 2019**. The matter shall be heard by any other magistrate other than Hon. R.M Oanda, PM.

Dated and delivered at Kisii this 30th day of April 2019.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.