



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 99 OF 2018

JOAB WAFULA NALIANYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment of Hon. Wattimah – Resident Magistrate

in the Principal Magistrate’s Court at Sirisia in Criminal Case No. 1 of 2016,

R .vs. JOAB WAFULA NALIANYA)

J U D G M E N T

The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of defilement contrary to **section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006**.

The appellant has raised 5 grounds in his petition of appeal to this court. The most important ground of appeal is ground 3. In that ground the appellant has faulted the trial court for denying him, his fundamental rights and freedom which are enshrined in the bill of rights as per article 25 of the Constitution, and has further stated that he was beaten and tortured during his arrest. The real issue before me is the refusal by the court to allow him to cross – examine PW 1. In his submissions in this court, he submitted that he was not allowed to cross – examine the complainant (PW 1), I.N. – being her initials. The record of the proceedings shows that PW 1 made an unsworn statement after the court found through a **Voire dire** examination that she was unable to understand the nature of the oath. After completing her evidence in chief, the court stated as follows:-

“Court: - Witness did not give sworn evidence thus shall not be cross – examined.”

Section 19 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya allows a child of tender years to make an unsworn statement. Such a witness is subject to cross – examination like any other witness called by the prosecution. The fact that PW 1 made an unsworn statement was not a ground for preventing the appellant from cross – examining her.

The right to cross – examination is a fundamental right which enables an accused person to test the veracity (the truthfulness) of the witness. It is enshrined in **section 151 of the Criminal Procedure Code (Cap 75) Laws of Kenya**. The provisions of that section reads as follows:-

“Every witness in criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.”

Although PW 1 was not sworn in terms of **section 151 of Criminal Procedure Code**, she was subject to be cross – examined by the appellant.

It therefore follows that the trial court erred in law in denying the appellant to cross – examining the complainant. Furthermore, the right to cross – examination is a constitutional right as provided for in **Article 50(2)(k) of the 2010 Constitution of Kenya**, which reads as follows:-

“Every accused person has the right to a fair trial, which includes the right –

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(j)

(k) to adduce and challenge evidence.”

It is moot to consider the other grounds and his further submissions, since the primary duty of the court is to pronounce itself on the real issue in dispute: See **Attorney General .v. Ally Kleist Sykes (1957) EA 257 at page 258, paras F, G.**

Ms Koech for the State conceded the appeal. However, she applied for a re – trial of the appellant.

I have considered the evidence on record and I find that it is potentially admissible and might lead to the conviction of the appellant. I also bear in mind that the appellant has been in custody since 6th August 2016, which translates to about 3 years. However, the offence with which the appellant was charged and convicted was a serious offence which carries a sentence of life imprisonment.

After considering all these matters, I find that this is a fit and proper case to order a re-trial of the appellant, which I hereby do. In the meantime, the appellant will be remanded in custody and be produced in the court of the Chief Magistrate at Bungoma for plea on 13th August, 2019.

Judgment signed, dated and delivered at Bungoma this 9th day of August, 2019 in the presence of the appellant and Ms Nyakibia for the Respondent.

J. M. Bwonwong’a.

J U D G E

9th August, 2019.