



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 64 OF 2017

JOB ETYANG alias WINO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the decision of HON. E. N. MWENDA – SRM, delivered on 16th June, 2017 in Bungoma CMC Criminal Case No. 3456 of 2015).

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(2) of the Sexual Offences Act.**

In this court Mr Kraidio has raised three (3) grounds in his petition of appeal. I have considered the grounds of appeal. Ground three (3) merits to be considered first, followed by the other grounds.

In ground 3 the appellant has faulted the trial court for depriving him of his right to be represented by an advocate during the defence hearing. Additionally, the appellant has faulted the trial court for failing to assign another advocate to him for his defence. He has also faulted the trial court for denying him adequate time to prepare for his defence.

In this regard, the record of the proceedings shows that after the prosecution closed their case, the prosecution informed the court they were going to rely on the evidence they had adduced. Counsel for the defence (Mr Otsiula) applied to the court for a date for delivery of a ruling on no case to answer. As a result, the court fixed 22nd May 2017 as the date on which a ruling was to be made. The ruling was not ready on the indicated date, but was subsequently delivered on 23rd May 2017. On that date the trial court found that the appellant had a case to answer. His rights to defend himself under **Section 211 of Criminal Procedure Code** were explained.

After his rights were explained the appellant elected to remain silent. The trial court then fixed the case for judgment on 25th May 2017. On 25th May 2017 **MR OTSIULA** for the appellant informed the court that the case was for defence hearing. In response thereto, the court informed the defence counsel that the case was for judgment. The court then delivered judgment and convicted the appellant and sentenced him to life imprisonment.

I find from the foregoing that the trial court should have accorded the Appellant an opportunity either to engage another advocate or to continue with Mr Otsiula. In the circumstances, I find that an adjournment should have been granted to the appellant to prepare for his defence. It should also be borne in mind that the appellant was in custody and therefore his chances of engaging another counsel or proceeding with **Mr Otsiula** were limited.

In the light of foregoing, I find that trial court erred in law in failing to inform the appellant of his right to counsel for his defence. It also erred by proceeding with fixing a date for judgment without according the Appellant an adjournment to prepare for his defence hearing.

The right to counsel is a fundamental right of an accused person. It is for that reason that it is provided for in **Article 50(2) (g) of the 2010 Constitution of Kenya.**

Furthermore the appellant should have been accorded adequate time and facilities to prepare for his defence as provided for in **Article 50(2) (c) of the Constitution.**

The upshot of the foregoing is that the appellant's appeal succeeds. I, therefore, allow the appeal against both conviction and sentence. The conviction and sentence are hereby quashed.

In the light of the foregoing, I find it unnecessary to consider the other remaining grounds of appeal. It is moot to do so because the primary

duty of the Court is to consider the real issues in dispute between the appellant and the Republic. See **Attorney General –vs- Ally Kleist Sykes (1957) EA 257 at page 258, paras.F, G.**

Another point that deserves serious consideration is whether the trial of the appellant was defective or not. I find as a fact that the trial of the appellant was defective in substance. The only issue for consideration is whether or not I should order for a re-trial. In doing so, I find that the appellant has been in custody since 2nd October 2015, which translates to a period of three (3) years and nine (9) months. I have also taken into account that the victim of the crime was a child of tender years aged 2½ years. I have borne in mind that the offence carries a maximum term of life imprisonment.

Furthermore, I find from the evidence of the mother (LJE) of the victim, which is supported by that of Issac Ogaro Okanyi (PW 2) that there is potential evidence if admitted might result in the conviction of the appellant.

After taking into account the totality of all these matters, I find that this is a fit case for ordering a re-trial which I hereby do before another Magistrate other than the one who convicted and sentenced him.

The appellant will be produced in the court of the Chief Magistrate for plea on 13/8/2019. In the meantime he will be remanded in custody.

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.