



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA. (S.O) NO. 6 OF 2019

WAMBUA MWANZIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. J. Mwaniki (SPM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 284 of 2017 delivered on 17/7/2018)

JUDGMENT

1. **Wambua Mwanzia** the Appellant was charged with the offence of defilement of a child contrary to Section 8(1) as read with sub Section 8(2) of the Sexual Offences Act No.3 of 2006. The particulars being that on 2nd day of June 2017, the Appellant in Malunda sub-location Makinya location in Mbooni east sub county within Makueni county did cause his penis to penetrate the vagina of **FKK** a child aged 6 years.
2. He faced an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006. Particulars being that the Appellant on 2nd June 2017 at [particulars withheld] village, Malunda sub-location, Makinya location is Mbooni east sub county within Makueni county did indecent act by touching private parts (vagina) of **FKK** a girl aged 6 years.
3. He pleaded not guilty and after a full trial the learned trial magistrate convicted him on the main charge and sentenced him to life imprisonment.
4. Aggrieved by that decision, he filed 6 amended grounds of appeal and stated that the learned trial magistrate erred in law and facts by:
 - a) *Failing to note that the charge sheet was defective for non-conformity with the evidence adduced.*
 - b) *Failing to find that penetration was not proved by the evidence on record.*
 - c) *Failing to find that the medical report relied on did not comply with the statutory safeguard under Section 77 of the Evidence Act.*
 - d) *Failing to realize that the material contradictious not only went to the root of the case but also displaced the credibility of the witness.*
 - e) *Failing to find that essential witnesses were not availed to prove the prosecution's case thereby violating Article 50(2) (c) and (j) of the Constitution.*
 - f) *Rejecting the cogent defence which exonerated the Appellant from any wrong doing.*
5. The Appellant canvassed the appeal through written submissions and the learned prosecution counsel Mrs. Owenga relied on the evidence on record.
6. As the first appellate court, this court has a duty to scrutinize and re-evaluate the evidence on record to make its own finding and arrive at its own conclusion. Not having heard or seen the witnesses, it has to give an allowance for that. **See Okeno –v- 1972 E.A 32.**
7. Having gone through the grounds of appeal and the proceedings, I would wish to first of all tackle ground (c) of the amended grounds of appeal.

Ground C: Failing to find that the medical report relied on did not comply with the statutory safeguard under Section 77 of the Evidence Act.

8. The prosecution called two witnesses i.e. the complainant (Pw1) and her mother (Pw2) only. These two witnesses testified on 3rd October 2017. The matter was fixed for hearing severally with the matter not proceeding for one reason or another. On **20th March 2018**, the record shows the following to have transpired.

Coram

Before Hon. Mwaniki, - SPM

Prosecutor – Mr. Kihara

Court assistant - Mwengi

Accused present

DPP: I have no witnesses in court. I do pray under Section 77 of the Evidence Act to have the P3 form put in if no objection by the accused.

Accused: No objection.

P3 form – P- exhibit 2.

DPP: Close of the prosecution case.

9. Section 77 of the Evidence Act provides:

(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist as the case may be, and examine him as to the subject matter thereof.

10. The prosecutor did not give any reason why the maker of the document could not come to produce it. Production of a document under Section 77 Evidence Act is not automatic. The prosecution has a duty to explain why the document should be produced under that section since such admission denies the accused person an opportunity to cross examine the maker. A basis for such production must be laid down by the prosecution.

11. The prosecutor could not be cross examined on the same by the Appellant. Did the Appellant understand the meaning of production under Section 77 Evidence Act? The record is silent on that. The document (P3 form) is at the centre of the charge of defilement. It is a crucial document.

12. I find that the procedure adopted to produce it was irregular and caused an injustice to the Appellant. For that reason, I will not analyze the rest of the evidence. I have considered that the incident is said to have been committed on 2nd June 2017 which is only two years ago and the complainant was aged six (6) years then.

13. I therefore allow the appeal and set aside both the conviction and sentence and order for a retrial. The retrial shall be before any magistrate with jurisdiction at Makueni law courts besides Hon. J.N Mwaniki SPM. The trial should be heard and determined on priority basis.

14. Mention on **14/8/2019** for fixing a hearing date by the SPM's court.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 8TH DAY OF AUGUST, 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE