



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 83 OF 2017**

**RAPHAEL MAZE MWAKIDEU.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 432 of 2014 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon G. M. Gitonga (RM) on 27<sup>th</sup> May 2016)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Raphael Maze Mwakideu was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. The particulars of the main charge were as that on diverse dates between 24<sup>th</sup> August 2014 and 20<sup>th</sup> September 2014 in Wundanyi Location within Taita Taveta County, he intentionally and unlawfully caused his penis to penetrate the vagina of P S (hereinafter referred to as PW 1”), a child aged thirteen (13) years.
2. He had also been charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said Sexual Offences Act. The particulars of this charge were that on the aforesaid dates and place, he intentionally touched PW 1’s vagina , a child aged thirteen (13) years, with his penis.
3. The Learned Trial Magistrate, Hon G.M. Gitonga, Resident Magistrate convicted him on the main charge and sentenced him to twenty (20) years’ imprisonment.
4. Being dissatisfied with the judgment therein, on 9<sup>th</sup> October 2017, the Appellant filed a Notice of Motion application to be allowed to file an appeal out of time, which application was allowed and his Appeal deemed as having been duly filed and served. He relied on four (4) Grounds of Appeal.
5. Subsequently, on 14<sup>th</sup> November 2017, he filed his Written Submissions and Amended Grounds of Appeal both dated 10<sup>th</sup> November 2017. This time he relied on seven (7) Amended Grounds of Appeal. The State filed its Written Submissions dated 11<sup>th</sup> December 2017 on 13<sup>th</sup> December 2017.
6. When the matter came up on 13<sup>th</sup> December 2017, both the Appellant and counsel for the State requested this court to render its decision based on their respective Written Submissions which they were not highlighting but relying upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

## **LEGAL ANALYSIS**

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

8. It did appear to this court that the issues that had been placed before it for determination were really:-

**a. Whether the Appellant’s right to fair trial was infringed upon;**

**b. Whether or not the Prosecution had proved its case beyond reasonable doubt;**

9. The court therefore dealt with the said issues under the separate heads shown hereunder.

### **I. THE APPELLANT’S RIGHT TO FAIR TRIAL**

10. Amended Ground of Appeal No (6) was dealt with under this head as it was a preliminary issue that went into the root of the Appellant’s case.

11. He submitted that there was grave infringement of his constitutional right enshrined in Article 50(2)(j) of the Constitution of Kenya, 2010 as he was never informed in advance of the evidence the Prosecution intended to rely on in its case.

12. He stated that despite having taken his plea on 22<sup>nd</sup> September 2014, the court did not order that he be furnished with the witness statements more so because of the weight of the charges if he was to be found guilty. He argued that the Learned Trial Magistrate erred when he did not protect his constitutional right.

13. He pointed out that he was a layman in law and because he did not have legal representation, he was not aware that he was entitled to the said right. He relied on the cases of **Rattiram vs State of M.P. (2012) 2 SCC 516** and **Thomas Patrick Cholmondeley vs Republic [2008] eKLR** where the common thread was that an accused person ought to be accorded an impartial trial by being furnished with all evidence the prosecution intends to rely upon.

14. On its part, the State argued that his rights were not prejudiced because at all given times when the matter came for mention or for hearing, he never raised any issue relating to the witness statements, which was an indication that he was comfortable with the proceedings.

15. Having carefully considered the arguments of both the Appellant and the State in this regard, this court was not persuaded at all by the State’s assertions that since the Appellant did not raise the issue during the proceedings, then he must have been comfortable with the same.

16. He was a layman and it was expected that he might not have known that he was entitled to the said witness statements. As the Appellant was a layman in matters of law, the Learned Trial Magistrate had a greater duty to have informed him of the requirement of the said witness statements. Article 50 (2) (j) of the Constitution of Kenya is a basic fundamental constitutional right and is couched in mandatory terms. It provides as follows:-

**“Every accused person has a right to be informed in advance of the evidence the prosecution intends to rely and to have reasonable access to that evidence.”**

17. Indeed, courts must not only look at the victim only. They must also take into account the rights of

such accused person as the sword of justice cuts both ways.

18. It was clear to this court that the omission was not occasioned by the Prosecution. Rather, it was occasioned by the Learned Trial Magistrate. Where an omission and/or commission during trial is attributed to the trial court, then a re-trial is a good option to cure such irregularities. However, a re-trial is not ordered as a matter of course. It depends on the particular circumstances of a case.

19. The omission by the Learned Trial Magistrate to order that the Appellant be furnished with the proceedings was not a technicality that could be excused by the provisions of Article 159(2)(d) of the Constitution mandates courts to administer justice without undue regard to technicalities. It was a fundamental issue that went to the root of the Prosecution's case as the Appellant was never informed in advance what evidence it was relying upon to enable him prepare his defence.

20. In this regard, this court fully associated itself with the holdings in the cases of **Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481** and re-stated in **Fatehaji Manji vs Republic [1966] E.A. 343** that Mutende and Thurani Jaden JJ cited in the case of **Jackson Mutunga Matheka vs Republic [2015] eKLR** where it was stated as follows:-

**“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”**

21. In this particular case, the Prosecution adduced evidence that the Learned Trial Magistrate deemed sufficient to convict the Appellant herein. It would therefore be necessary to have the matter heard afresh to given the Appellant an opportunity to defend himself against PW 1's assertions.

22. In this regard, it was the view of this court that Amended Ground of Appeal No (6) was merited and the same is hereby allowed.

## **CONCLUSION**

23. As this court found that a re-trial would be in the interest of justice in the case herein, it did not therefore address its mind to the remaining Amended Grounds of Appeal to give an opportunity to the new trial court to hear and determine the charges that were levelled against the Appellant on merit.

## **DISPOSITION**

24. The upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 9<sup>th</sup> October 2017 was successful. It would therefore be unsafe to allow his conviction to stand. The same is hereby quashed. Consequently, the sentence is also hereby set aside.

25. However, in view of the fact that an offence was alleged to have been committed, it is hereby directed and ordered that there shall be a Re-trial of the Appellant herein so that the matter can be heard on its own merits. The Appellant shall be arraigned afresh before a different magistrate at the Wundanyi Law Courts to hear and determine this matter.

26. In this regard, it is hereby directed and ordered that the Appellant remain in custody for production before the Senior Principal Magistrate Wundanyi Law Courts on 6<sup>th</sup> March 2018 for purposes of taking a plea and further hearing of this matter. It is the expectation of this court that the new trial court will proceed to hear and determine this matter expeditiously in view of the fact that the Appellant has been in custody since 27<sup>th</sup> May 2016.

27. It is so ordered.

**DATED** and **DELIVERED** at **VOI** this **27<sup>th</sup>** day of **February** 2018

**J. KAMAU**

**JUDGE**

In the presence of:-

Raphael Maze Mwakideu - Appellant

Miss Anyumba - for State

Susan Sarikoki- Court Clerk