



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 66 OF 2016

TITUS MANZI KITHEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original conviction and sentence in Kyuso Principal Magistrate's Court Criminal Case No. 581 of 2014 of by E. M. Mutunga R M on 09/03/16)

J U D G M E N T

1. The Appellant, **Titus Manzi Kitheka**, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **28th** day of **December, 2014** at **[particulars withheld]** **Location in Kyuso Sub-County** within **Kitui County**, intentionally caused his penis to penetrate the vagina of **RMM**, a child aged **8 years**.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **28th** day of **December, 2014** at **[particulars withheld]** **Location in Kyuso Sub-County** within **Kitui County**, intentionally touched the vagina of **RMM**, a child aged **8 years** with his penis.

3. Facts of the case were that on the **28th** day of **December, 2014**, PW1 – **MR** was at home with her father, PW3 **MK** and sister, PW2 **MM** when their neighbour the Appellant herein went and requested the Complainant to go to his house for a present. The Complainant had assisted him by taking to him water therefore alleged that he wanted to reward her. PW3 who was unsuspecting allowed the Complainant to go. On arrival he offered her 'Muthokoi' and vegetables. Thereafter he violated her sexually and told her not to tell anyone. She took the food to her siblings but on arrival PW3 noted that she was in tears such that she could not eat the food. She informed her parents what had befallen her. She was taken to Kyuso District Hospital for treatment. PW5 **Francis Saku** a Clinical Officer subsequently examined her. She had an inflamed vagina opening with a tear posteriorly. He opined that the blunt object used was done with force such that she sustained tears. He concluded that the girl was defiled as her urine had pus and blood stains.

4. When put on his defence the Appellant denied having defiled the child. He stated that the Complainant's parents assaulted her and told her to lie.

5. The learned trial Magistrate considered evidence adduced and found that the case was proved beyond reasonable doubt. She convicted the Appellant and sentenced him to serve **life imprisonment**.

6. Aggrieved by the conviction and sentence the Appellant appealed on grounds that:

- The P3 did not indicate who defiled the Complainant.
- Evidence adduced was of a single witness therefore lies.
- He was denied witness statements.
- There was enmity between him and the Complainant's family therefore the case was trumped up.
- The alibi defence put up was rejected without any reason.

7. This is a first Appellate Court that is duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (**See Okeno vs. Republic (1973) EA 32**).

8. This being a case of defilement the Prosecution was duty bound to prove:

- The age of the Complainant.
- The fact of penetration.
- The perpetrator of the act of penetration.

9. Prior to I addressing issues alluded to I must consider whether the Appellant's rights to fair trial were violated? The Appellant has alleged that he was denied his right to statements. **Article 50(2)(c)(j)** provides thus:

“(2) Every accused person has the right to a fair trial, which includes the right—

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;”

10. The State through the Prosecution was duty bound to provide the Appellant with the Prosecution witness statements to enable him prepare for his case. The trial Magistrate was obligated to ensure the law in that regard was complied with prior to proceeding with the hearing of the case. Prosecution statements from witnesses is evidence of what is being alleged against an Accused. He has a right of knowing what the allegation is all about. I had an opportunity of seeing the Appellant who is fairly elderly and was unrepresented. He may have not been conversant with the law therefore the trial Magistrate was expected to ensure that the law was upheld and this should have been reflected on record. I have perused the record of the Lower Court, there is no indication of the Appellant having been provided with copies of the Prosecution witness statements.

11. In the case of **Juma vs. Republic (2007) EA 461** the Constitutional Court stated that:

“We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence.....”

12. In the case of **Simon Githaka Malombe vs. Republic (2015) eKLR** the Court of Appeal stated that:

“The denial of witness statements in the present case reduced the trial to a farcical sham. The Appellant finding himself incapacitated without the witness statements.....”

13. Following my observation aforesaid it is obvious that the trial was vitiated. Therefore the question to be posed is whether a retrial should be ordered?

14. In the case of **Makupe vs. Republic (1984) KLR 523** Court of Appeal at Mombasa stated that:

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

This is a case where it was not in dispute that the Complainant was a minor aged between **7 – 8 years**. There was evidence of penetration as she sustained tears of the posterior side of her vagina. There was evidence to confirm the fact that the Appellant left with her going to his home prior to her returning home having been sexually violated.

15. The Appellant was sentenced to **life imprisonment**. He has been in incarcerated for a duration of two (2) years. It is a case that calls for a retrial as it will not be prejudicial to the Appellant.

16. In the premises, I allow the Appeal by quashing the conviction and setting aside the sentence imposed. The Appellant shall be re-tried by a Court of competent jurisdiction not presided over by **Hon. E. M. Mutunga**. He will be produced before Kyuso Principal Magistrate's Court on the **21st February, 2018** for retrial.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 15th day of February, 2018.

L. N. MUTENDE

JUDGE