



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CRIMINAL APPEAL NO. 9 OF 2011**

**BETWEEN**

**JACKSON OYOKO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. E. M. Makori, PM dated 21<sup>st</sup> January 2011 in Criminal Case No. 547 of 2009 at Senior Principal Magistrate's Court at Mumias)*

**JUDGMENT**

1. The appellant **JACKSON OYOKO** appeals against a conviction and sentence of life imprisonment imposed after he was found guilty of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that on the 19<sup>th</sup> October 2007 [*particulars withheld*] in Butere District, he unlawfully and intentionally caused penetration of his genital organ namely penis into the genital organ namely the vagina of SA, a girl aged 6 years.

2. The prosecution case was that the SA (PW 1) was going home from school with other children, when the appellant lured her into a bush and proceeded to sexually assault her. When the other children reached home and informed her grandmother (PW 2) that she had been left behind, PW 2 went looking for her and found her in a bush where she had been sexually assaulted. As she was there with other people, the accused was seen running away and was arrested by members of the public.

3. There is no doubt the prosecution proved penetration as confirmed by the testimony of PW 1. Her testimony was corroborated by the testimony of PW 2 who saw her in a state of distress so soon after the incident. This was also confirmed by the medical evidence presented by PW 6 who examined her and found tears on the labia minora and vaginal opening and also noted that the hymen was broken. What is in issue is whether the appellant was identified as the person who sexually assaulted the accused.

4. In examining the proceedings, I noted that after PW 1 testified under oath before she could conclude and be cross-examined, the trial magistrate broke off to attend to other business. PW 1 was never recalled nor the appellant accorded an opportunity to cross-examine her although she had implicated him. This was an error and a violation of **Article 50(2)(k)** of the Constitution which protects the right of every accused person to challenge evidence against him. An accused should always be given an opportunity to put forth his questions.

5. This violation was particularly acute as the issue of identification was contested as it is not clear from the proceedings whether the child knew the appellant or whether he was a stranger and whether she named him to those she reported to at first instance. Questions put to her in cross-examination would illuminate these issues and give the trial court the opportunity to assess her demeanour and determine whether she was telling the truth. I have no option but to quash the conviction.

6. I now turn to whether I should order a retrial. The principles governing whether the court should order a retrial were stated in ***Fatehali Manji v Republic* [1966] EA 343** East Africa Court of Appeal as follows;

*In general, a retrial will be ordered only 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 purposes of enabling the prosecution to 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 its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.*

7. I cannot say the evidence against the appellant was overwhelming and given the time that has elapsed since his arrest and trial, a fair trial may not be possible. I do not think that in the circumstances a retrial would be in the interests of justice.

8. The appeal is allowed. The conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at KAKAMEGA this 31<sup>st</sup> day of August 2017.**

**D. S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Ng'etich, Senior Prosecutions Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.