



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 293 OF 2011

JULIUS CHERUIYOT KORIR.....ACCUSED

VERSUS

REPUBLIC.....STATE

(Appeal from the Judgment delivered by the Honourable B. Kituyi,

Resident Magistrate on 17th day of November, 2011 in Nakuru

Chief Magistrate's Court Criminal Case No.204 of 2010)

JUDGEMENT

The appellant **JULIUS CHERUIYOT KORIR** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts. The appellant had been charged with the offence of **DEFILEMENT CONTRARY TO SECTION 8(1)(2) OF THE SEXUAL OFFENCES ACT, 2006.**

The particulars of the charge were that

“On the 8th day of August, 2010 at [particulars withheld] Market in the Njoro District of the Rift Valley Province unlawfully and intentionally committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of BC a child aged 6 years old which caused penetration”.

In the alternative the appellant faced a charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 8(1) OF THE SEXUAL OFFENCES ACT, 2006.**

The appeal was opposed by the learned State Counsel.

Before I delve into the merits or otherwise of the appeal proper upon my perusal of the record I noted a glaring anomaly in the evidence. The complainant who was said to be a 6 year old child was taken through a *voire dire* examination after which the learned trial magistrate stated

“COURT – Child doesn't understand meaning of an oath. She will give unsworn statement”

The child proceeded to give her evidence in chief. Thereafter at page 13 line 13 the court stated thus

“COURT – Accused not to cross-examine on the unsworn statement of the child”

In so saying the court declined to allow the appellant an opportunity to cross-examine the child on her evidence.

It is a cardinal principle in law that one must be allowed to ‘**face**’ his accused. In a criminal case the manner in which an accused would ‘**face**’ his/her accuser is by cross-examining the accuser. To deny an accused the right to test the evidence of the complainant by way of cross-examination means that the appellant was denied one of the cardinal tenets of a fair trial.

The trial magistrate appeared to be laboring under the misapprehension that where a child gives unsworn evidence then the accused is not entitled to cross-examine that child.

I have keenly perused the provisions of Section 17(1) of the **Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya** which provides for the manner in which the evidence of a child of tender years is to be recorded. Nowhere in that provision of law is it provided that where a child of tender years is found to be incapable of giving evidence on oath then, the accused shall not be entitled to cross-examine such a child.

I therefore find that the learned trial magistrate erred in denying the appellant the opportunity to cross-examine the child who was the complainant in this case. This denial resulted in a mistrial.

I have considered the nature of the charges which the appellant faced. I have considered the young age of the complainant. However the appellant having been sentenced in November 2011 has already served six (6) years imprisonment due to a sentence arising from an illegal trial – one in which the appellant was denied one of the basic tenets of fair trial – the right to face his accuser. In the circumstances this court cannot allow this trial to stand. This miscarriage of justice arose not due to any fault on the part of the appellant or of the prosecution – it arose solely due to an error of process on the part of the trial magistrate.

For this reason alone I do allow the present appeal. I quash the appellant's conviction and set aside his sentence of life imprisonment. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 17th day of November, 2017.

Appellant in person

Mr. Chigiti

MAUREEN A. ODERO

JUDGE