DMF alias L v Republic (Criminal Appeal 37 of 2015) [2016] KEHC 1938 (KLR) (21 July 2016) (Judgment)

Dennis Mwaniki Fredrick v Republic [20116] eKLR

Neutral citation: [2016] KEHC 1938 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL 37 OF 2015

A MABEYA, J

JULY 21, 2016

BETWEEN

DMF ALIAS L .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from the Judgment and conviction of C.K. OBARA – S.R.M made on 28/4/2015 in Chuka Principal Magistrate's Court in Criminal Case No. 1343 of 2011)

Failure by a trial court to assign an advocate to represent a child during trial violated the child's right to a fair trial

The appeal dealt with the rights of a child offender during trial. The court reprimanded the trial court for denying the child offender (the appellant) the services of an advocate on the basis that he was not undergoing a murder trial. It further held that the appellant had to be accorded legal representation during trial, especially where substantial injustice would result to a child. Additionally, the court found the appellant was held in an adult prison with adults contrary to the provisions of the Children Act. Accordingly, due to the irregularities in the trial of the appellant, there was a miscarriage of justice and the sentence imposed unlawful and in breach of the Children Act.

Reported by Moses Rotich

Constitutional Law *- Bill of Rights - rights of a child - right to a fair trial - where the appellant, being a minor, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act - where it was alleged that the trial court declined the appellant's request to be assigned an advocate to represent him during the court proceedings - where the appellant failed to cross-examine the prosecution witnesses because he was unable to defend himself-whether failure by the trial court to assign an advocate to represent the appellant during trial, violated the appellant's right to a fair trial - Constitution of Kenya 2010, article 50 1 (1) and 50 (2) (h); Children Act, 2001 section 186 (b).*

Constitutional Law *- Bill of Rights - rights of a child - the right of a child to be held separate from adults - where the appellant was remanded in an adults prison - where the appellant was convicted of the offence of defilement and sentenced to life imprisonment - where the appellant was detained in a maximum prison together with adults- whether the sentence of life imprisonment meted on the appellant by the trial court was unlawful and breached section 190 (1) of the Children Act-Constitution of Kenya 2010, article 53 (1) (f); Children Act, 2001 section 190 (1).*

Brief facts

The appellant (a minor) 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 (Sexual Offences Act). After trial, the appellant was convicted of the offence of defilement and sentenced to life imprisonment.

Aggrieved by the judgment of the trial court, the appellant appealed against both conviction and sentence. It was the appellant's case that the trial court erred in denying him his right to summon the prosecution witnesses contrary to section 200(3) of the Criminal Procedure Code, Cap 75 Laws of Kenya (Criminal Procedure Code).

The appellant contended that the trial was marred with irregularities including the failure by the trial court to allow him to be represented by an advocate. Further, the appellant argued that the sentence of life imprisonment imposed on him by the trial court was contrary to section 8(7) of the Sexual Offences Act.

Issues

i. Whether the trial court denied the appellant his right to recall prosecution witnesses as set out under section 200 (3) of the Criminal Procedure Code.

ii. Whether in failing to assign an advocate to represent the appellant who was a minor during trial, the trial court violated the appellant's constitutional right to a fair trial.

iii. Whether the sentence of life imprisonment meted on the appellant by the trial court was unlawful and in breach of section 191 of the Children Act, 2001.

Held

1. On December 2, 2013, after the appellant insisted that he wanted the complainant to be recalled, the trial court ordered for the case to start *de novo.* It was after that that the complainant and PW2 were recalled and testified afresh. That being the case, there was no basis on the complaint by the appellant that the trial court denied him the right to recall prosecution witnesses.
2. It was a constitutional right for an accused person to be assigned an advocate where substantial injustice would result, the nature of the offence notwithstanding. The only criterion was if substantial injustice would otherwise result. Substantial injustice could include a severe sentence, for instance long incarceration like 20 years' imprisonment, life imprisonment or death sentence. It would also include instances where *prima facie*, an accused person was seen either not to comprehend the proceedings or in one way or another the accused could not represent himself properly. It was therefore erroneous for the trial court to have denied the appellant the services of an advocate on the basis that what was before it was not a murder trial. The trial court misdirected itself on that point.
3. It was clear from the record that even after the appellant raised the issue of his age, the trial court failed to deal with it. The record was clear that the appellant was not only unable to cross-examine the prosecution witnesses, forcing the trial court to have him thumbprint the court proceedings to show that he did not have questions for the complainant as he did not have an identity card, but that on March 16, 2015 the appellant was recorded telling the court that he was not ready to proceed because he did not know how to defend himself. Ultimately, the appellant did not offer any defence and was convicted and sentenced to life imprisonment.

4. Once the appellant indicated that he was a minor and he needed legal counsel, the trial court ought to have activated section 186 (b) of the Children Act, 2001, (Children Act) and have the government assist the appellant in the preparation of his defence. That need came out forcefully when the appellant was later on unable or failed to cross-examine the complainant on August 20, 2014 forcing the trial court to have him thumbprint the proceedings as evidence of his failing to ask any questions. The need was further buttressed when the other 2 prosecution witnesses testified and there was no cross-examination whatsoever that was forthcoming from the appellant. It was regrettable that the trial court came to realize that mistake at the time of delivery of judgment. It was the court's view that the appellant's trial was marred with serious irregularities which rendered his conviction unsafe.
5. When the police presented the charges against the appellant, they strangely indicated in the charge sheet that he was an adult. The appellant insisted via his application dated October 9, 2013 that he was a minor. The trial of a minor was not to be undertaken like any other trial. A minor was to be remanded not in a prison but in a remand home. On conviction, the use of the words conviction and sentence were prohibited. Once found guilty, a minor was not to be imprisoned in a normal prison but was to be placed in a borstal institution.
6. The law required that where a minor was charged with an offence, the provisions of the Children Act be applied. That was the right of an accused minor. It could not be derogated except on good grounds. The trial court ordered for the appellant's age assessment on April 24, 2015. However, there was nothing to show that there was any report presented in court on April 28, 2015 when the judgment was delivered or whether the trial court considered any age assessment report when sentencing the appellant.
7. During the hearing of the appeal, the court ordered for the appellant to be mentally assessed. The appellant was duly examined and a report dated June 2, 2016 from Meru Teaching and Referral Hospital filed with the court. By virtue of that report, the appellant was assessed to be 18 years old. That was 5 years since the date of the commission of the offence.
8. The appellant ought not to have been tried as an adult. In the absence of evidence to the contrary, the appellant was a minor at the time when he was convicted. He ought not to have been convicted and sentenced as an adult.
9. Whilst the court, on the basis of the untested evidence on record strongly disapproved the heinous act committed on the complainant who was of tender age, the trial, conviction and sentence of the appellant raised more questions than answers.
10. It was satisfactorily demonstrated that the appellant was a minor when the offence was committed. Despite that fact, he was tried as an adult, was remanded in Meru GK prison with adults and was convicted and sentenced to life imprisonment. Due to the irregularities in the trial of the appellant, there was a miscarriage of justice. The sentence itself was unlawful and in breach of the Children Act.
11. Where a trial was irregular, the court could either order a retrial or discharge an appellant where it found that a retrial would be prejudicial. In the instant case, the offence was committed and the trial undertaken when the appellant was obviously a minor. The operative age that was to be considered at the time of sentencing was that which the accused was at the time of commission of the offence. The appellant had attained 18 years. However, ordering a retrial would subject him to a trial of an adult with its attendant consequences.
12. Five years had passed since the alleged offence of defilement was committed. The appellant had been in custody for 5 years. It was unlikely that the witnesses would be able to properly recall what happened. It was also important to have in mind the fact that the complainant was at the time of commission of the offence of tender age. Making her undergo the trial and recall the trauma that she underwent 5 years ago would be prejudicial to her. A retrial of the instant case would be prejudicial to both the appellant and the complainant. The 5 years the appellant had been to prison ought to have been a lesson to him.

Appeal allowed.

Orders

i. The conviction of the appellant by the trial court was quashed.
ii. The sentence of life imprisonment imposed on the appellant by the trial court was set aside.
iii. The appellant was set free unless otherwise lawfully held.

Citations

Cases

Kenya

BK v Republic [2012] eKLR - (Explained)

South Africa

Fredricks v State 208 (11) [2011] ZASCA 177 - (Explained)

Regional Court

Okeno v Republic [1972] EA 32 - (Mentioned)

Statutes

Kenya

1. Children Act (cap 141) sections 186(b); 189; 190; 191(g)- (Interpreted)
2. Constitution of Kenya article 50(2)(h)- (Interpreted)
3. Criminal Procedure Code (cap 75) section 200(3)- (Interpreted)
4. Sexual Offences Act (cap 63A) section 8(1)(2)(7) - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. On November 16, 2011, Dennis Mwaniki Fredrick *alias* Lari (hereinafter "the appellant") was arraigned before the Principal Magistrate's Court at Chuka with a charge of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act*, No 3 of 2006. It was alleged that on July 28, 2011 at [particulars withheld] market of Gitareni Location in Tharaka Nithi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of IM, a child aged six (6) years. The appellant denied the charge but after trial, he was found guilty, was convicted and sentenced to life imprisonment.

2. Aggrieved by that decision, the appellant has appealed against the conviction and sentence. He has set out six (6) grounds which can be summarised into three (3) namely; that the trial court erred in denying the appellant his right to summon the prosecution witnesses contrary to section 200(3) of the *Criminal Procedure Code* (hereinafter "the CPC"); that the trial was marred with irregularities including failure to allow the appellant the opportunity of being represented by an Advocate contrary to article 50(2) of the *Constitution*; and thirdly that the sentence was contrary to section 8(7) of the *Sexual Offences Act*. This being a first appellate court, it is incumbent upon the court to review and analyse the facts and reach its own independent findings and conclusions. (See *Okeno v Republic* [1972] EA 32). However, in so doing, the court should always bear in mind that it did not see the witnesses testify to gauge their demeanor.

3. The prosecution case was that on a date IM ("the complainant") could not remember, the appellant picked her from her grandmother's place and told her to accompany him to his house but she declined. He however pulled her and took her to his house which had two rooms. He took her to his bedroom,

removed all her clothes, laid her on her back, removed his big *Kajuju* (penis) and inserted it into her vagina. He covered her mouth while he defiled her. She felt alot of pain. He later released her and warned her not to tell anyone about it. Because of the pain she was experiencing she told her grandmother who checked her private parts and took her to Chera Mission Hospital where she was examined, treated and given medication. The following day, she was examined at Chuka General Hospital.She identified the treatment card from Chuka hospital (Pexh1), the P3form (Pexh 2) and her light green pant (Pexh 4). The appellant did not cross- examine the complainant.

4. PW2 was Hillary Kagicho, a Senior Clinical Officer at Chuka District Hospital. He told the court how he prepared the P3 form for the complainant. That when the complainant was examined, she was found to have bruises on the minora and her hymen was not intact. She was also found to have an infection. The vaginal swab revealed the presence of spermatozoa. There was friction in the genitalia which made PW2 conclude that there had been penetration. He produced both the outpatient card and P3 form as Pexh 2 and 3, respectively. PW3 Corporal Ann Tembu told the court how a report was made at Chuka Police Station on 28th july, 2011 by the complainant together with her grandmother. The complainant was at the time of the report aged 6 years. That the complainant narrated to the police how the appellant had tricked her to his house, removed her clothes and defiled her. That because the complainant was experiencing pain in her private parts on the following day, the grandmother inquired from her what had happened and she narrated to her grandmother what the appellant had done to her. The grandmother then reported the matter to Chera Police Post whereby they were referred to Chuka Police Station. That the complainant was examined and the P3 form revealed that she had been defiled whereby the appellant was arrested on November 15, 2011. PW3 produced the birth notification (Pexh 1) and the blood stained pant (Pexh 4). The appellant neither cross-examined PW2 nor PW3. He also told the court that he did not know how to defend himself and did not therefore offer any defence.

5. At the hearing, the appellant relied on his written submissions. He submitted that PW2 did not produce any report connecting the appellant with the defilement of the complainant. That when the new trial magistrate took over, section 200 of the CPC was not complied with. He further submitted that the trial court was biased against him and that at the time of the offence he was only aged 14 years old. On his part Mr Ongige for the state did not oppose the appeal. He submitted that the issue of the appellant's age was crucial before the trial court but that it was never dealt with. That when the trial court passed sentence on the appellant it failed to consider his age yet that issue had been raised by both the appellant and the court itself. That the assessment report dated 27/4/2015 was itself not conclusive. Counsel therefore submitted that there had been a mistrial.

6. I have reviewed the trial court record and considered the respective parties' submissions. The first ground was that the trial court erred in denying the appellant the right to recall the prosecution witnesses contrary to section 200(3) of the CPC. The appellant argued in his submissions that his rights under section 200 was not explained to him. I have carefully considered the record. The record shows that the complainant first testified on September 5, 2012 and PW2 testified on November 8, 2012. On September 18, 2013 the court that took over the conduct of the matter recorded that section 200 of the CPC had been complied with. Before then, the court had just ordered the case proceeds from where it had reached. However, on December 2, 2013 after the accused insisted that he wanted the complainant be recalled, the trial court ordered that the case do start de novo. It is after this that the complainant to and PW2 were recalled and testified afresh. That being the case, there is no basis in the complaint that the trial court denied the appellant his right to recall the prosecution witnesses. The same is dismissed.

7. The second ground was that the trial was marred with irregularities including the denial of the appellant the opportunity to be represented by an Advocate. The record shows that on an undisclosed

date, application was made by the appellant made an application to be represented by an Advocate. The court ruled as follows:-

> " Subject request dated 0.10.13 noted subject advised that there are no *pro bono* advocates assigned to handle such matters only murder offenders benefit from such services."

8. Again on 21st November, 2013, the appellant indicated that he will wait until he gets an advocate. In order to proceed with the trial. The record shows that nothing came out of the appellant's protestations that he required an advocate.

   Article 50(2)(h) of *Constitution* provides that:-

> " 50
>
> (2) Every accused person has the right to a fair trial which includes the right-
>
> (h) to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

9. From the foregoing, it is clear that it is a constitutional right for an accused person to be assigned an advocate where substantial injustice will result. The nature of the offence.The only criteria is "if substantial injustice will otherwise result." To my mind, substantial injustice may include a severe sentence, say long incarceration like 20 years imprisonment or life or death. It will also include instances where prima facie, an accused is seen either not to comprehend the proceedings or one way or another might not be able to defend himself properly. It is therefore erroneous for the trial court to have denied the accused the services of an advocate on the basis that what was before it was not a murder trial. With due respect, the trial court misdirected itself on that point.

10. The other issue is, the age of the appellant arose in his undated application received by the court on October 9, 2013. In that application, the appellant requested for a counsel on the basis that he was a minor. Section 186(b) of the *Children Act* cap 141 of the Laws of Kenya provides:-

> " 186. Every child accused of having infringed any law shall
>
> (a) ....
>
> (b) if he is unable to obtain legal assistance be provided by the government with assistance in the preparation and presentation of his defence."

11. Although I will later on in this judgment address the issue of the appellant's age, it is clear from the record that even after the appellant raised this issue, the court failed to deal with it. The record is clear that the appellant was not only unable to cross- examine the prosecution witnesses, forcing the trial court to have him thumb print the court proceedings to show that he did not have questions for the complainant as he did not have an identity card, but that on March 16, 2015, the appellant is recorded as telling the court;

> " I am not ready to proceed because I do not know how to defend myself."

The appellant ultimately did not offer any defence and was convicted and sentenced to life imprisonment.

12. In my view, once the appellant indicated way back on October 9, 2013 that he was a minor and he needed legal counsel, the trial court should have activated section 186(b) of the *Children's Act* and have the government assist the appellant in the preparation of his defence. This need came out forcefully when the appellant was later on unable or failed to cross- examine the complainant on August 20, 2014 forcing the trial court to have him thumb print the proceedings as evidence of his failing to ask any questions. The need was further buttressed when the other two (2) prosecution witnesses testified and there was no cross-examination whatsoever that was forthcoming from the appellant. It is regrettable that the trial court came to realise this mistake at the time of delivery of judgment. On April 24, 2015, the court recorded the following:-

> "I note belatedly that due to an oversight, I did not order for the accused's age assessment when he made an application filed on 9/10/13 to be produced (sic) with prison services on the basis that he is minor. For those reasons, I defer his Judgment and direct that:-
>
> 1. The accused person be escorted to Chuka District Hospital for a detailed age assessment. Report to be prepared by a qualified personnel.
> 2. Mention on 27/4/2015 for further directions. Accused to be remanded at Chuka Police Station."

13. To this court's mind therefore, the appellant's trial was mirred with serious irregularities which render his conviction unsafe.

14. The last ground was that the sentence was in breach of section 8(7) of the *Sexual Offences Act*. The appellant submitted that he was aged 14 years in 2011 when the offence was committed. Mr Ongige for the state did not oppose the appeal on the ground that despite the age of the Appellant being an issue at the trial, the trial court had failed to address it.

15. This court has already indicated that as early as October 9, 2013, the appellant had indicated to the trial court that he was a minor. The trial court indicated belatedly on April 24, 2015 that out of oversight, it had failed to order the appellant's age to be assessed. The trial court then proceeded to order for the appellant's age to be assessed and adjourned the judgment to April 27, 2015. On 2April 7, 2015, the prosecutor indicated to the court that the appellant was taken for age assessment on that day. The Judgment was then reserved for delivery on April 28, 2015 when it was duly delivered without any reference to any assessment report whatsoever.

16. What is the importance of the appellant's age in the case? When the police presented the charges against the appellant, they strangely indicated in the charge sheet that he was an adult. The appellant insisted vide his application dated October 9, 2013 that he was a minor. A trial of a minor is not to be undertaken like any other trial. A minor has to be remanded not in a prison but a remand home. On conviction, the use of the words conviction and sentence are prohibited (section 189 of the *Children's Act*). Once found guilty, a minor is not to be imprisoned in the normal prison (section 190 ofthe *Children Act*) but is to be placed in a borstal institution (section 191 (g)). In this regard, the law requires that where a minor is charged with an offence, the provisions of the *Children's Act* be applied. That is a right of an accused minor. It cannot be derogated except on good grounds. The trial court ordered for the Appellant's age assessment on 24/4/2015. There is nothing to show that there was any report presented in court on April 28, 2015 when the judgment was being delivered or whether the court considered any such age assessment when sentencing the appellant.

17. The court has seen on record a handwritten document with a stamp from Chuka Police Station dated 27/4/15. It purports to be an Age Assessment report. It is signed by someone shown to be an officer from the Chuka District Hospital. It shows that based on some x-ray of both wrists the age of the person examined was above 18 years. That report is unreliable for three (3) reasons; firstly, save for the stamp of the Medical Superintendent, Chuka District Hospital, there is nothing to show that the document emanated from that hospital. Such a serious document is supposed to be on the letter head of such an institution. The court order was that the age assessment was to be undertaken by an authorised personnel from that facility. The name and official position of the person who signed is not clearly shown in that document. Secondly, the document is written by three hands, ie. there are three different handwritings. The first wrote the names of Dennis Mugambi Mbongo and the Reference "Age Assessment," the second wrote the report and findings, while the third cancelled the names Mugambi Mbongo and super imposed the names Mwaniki Fredrick. There is no explanation why the document was by three different persons. Thirdly, and most important, the document seems to have related to one Dennis Mugambi Mbongo. However, the names Mugambi Mbongo were cancelled and replaced with the appellant's latter two names Mwaniki Fredrick. The cancellation is not counter signed. All these discrepancies and alterations were not explained. Accordingly, the report cannot be said to be an authentic age assessment report for the appellant from Chuka District Hospital in terms of the trial court's order of April 24, 2015.

18. During the hearing of this appeal, having seen the record and alarmed by how the appellant had failed to cross-examine the prosecution witnesses as well as his failure to offer a defence, this court ordered on May 26, 2016 that the appellant be mentally assessed. He was duly examined and a report dated June 2, 2016 from the Meru Teaching and Referral Hospital was filed which stated as follows:-

> "He is a 18 year old male, has not been to school. He was a herder. Orphaned. Lived with paternal grandparents. He understands the charges he is facing of defilement......No chronic illness. No family history of mental disorder. He does not abuse any psychoactive substance.....................Normal mental state examination. Fit to plead."

19. By virtue of the report, the appellant was assessed in June, 2016 as being of 18 years five (5) years since the date of the commission of the offence. In 2014, the trial court found that he did not have any identify card and thereby subjected him to thumb printing the proceedings to show his acceptance that he had no questions for the complainant. This court saw the appellant in court. He looked young and naive. It was clear that he was either a minor or had just left the age of minority. That being the case, the appellant should not have been tried as an adult. In the absence of evidence to the contrary, when the appellant was convicted, he must have been a minor. He should not have been convicted and sentenced as an adult.

    Section 8(7) of the *Sexual Offences Act* provides:-

> "(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act."

    Further, section 190 of the *Children's Act* provides the methods of dealing with minor offenders. None of it is life imprisonment which the trial court metted out to the appellant.

20. Whilst this court, on the basis of the untested evidence on record strongly disapproves the heinous act committed on the complainant who was of tender age, the trial, conviction and sentence of the

appellant raises more questions than answers, as has already been set out above. In the case of *BK v Republic* [2012] eKLR Mbogholi J held:-

> " A miscarriage of justice, notwithstanding the seriousness of the offence, was visited upon the appellant herein. With respect therefore I agree with the learned counsel for the appellant that the law was breached in the sentencing of appellant. For the avoidance of any doubt, the material dates in any criminal proceeding is that of the commission of the offence and not that of conviction." (emphasis added.)

The court proceeded to acquit the appellant in that case.

21. In the South African case of *Fredricks v State* [208(11) [2011] ZASCA 177 the court held that:-

> " Sentencing is clearly the most difficult part of criminal proceedings. It involves a careful and dispassionate consideration of balancing the gravity of the offence, the interests of society and the personal circumstances of the offender (See *S v Zinn* 1969 (2) SA 537 (A) at 540G) not forgetting, the interest of the victim. It becomes more onerous where a child is the offender and the offence is a very serious one. In the present case the robbery involves the use of a firearm and a knife whilst the rape is of a child under the age of 16 years. A decision regarding an appropriate sentence becomes even more difficult- when a juvenile has to be sentenced for having committed a very serious crime like in this case. Whilst the gravity of the offences call loudly for severe sentence with strong deterrent and retributive elements, the youthfulness of the appellant required a balanced approach reflecting an equally strong rehabilitative component. After all, the appellant was an immature youth merely 14 years old. Although youthfulness remains a strong mitigating factor, one cannot ignore the sad reality that, nowadays it is the youth that is engaged in violent and serious crimes...
>
> The trial court attached very little or no value to his personal circumstance. It appears to me that the trial court over-emphasised the seriousness of the offences at the expense of his youthfulness..
>
> In conclusion, I find that the trial court and high court misdirected themselves by imposing a lengthy sentence of imprisonment ignoring that the appellant was a child at the time of the commission of the offences. This court is therefore at large to consider the sentence afresh and impose what it considers to be an appropriate sentence."(Emphasis added.)

22. In the present case, the court is satisfied that the appellant was a minor when the offence was committed. Despite that fact, he was tried as an adult, was remanded in the Meru GK prison with adults, was convicted and sentenced to life imprisonment. This court finds that because of the irregularities alluded to above, there was a miscarriages of justice. The sentence itself was unlawful and in breach of the *Children's Act*. It is trite that where a trial is irregular, the court can either order a retrial or discharge an appellant where it finds that a retrial will be prejudicial. In this case, the offence was committed and the trial undertaken when the appellant was obviously a minor. As the courts held in the above two cases, the operative age that is to be considered at the time of sentence is that which the accused was at the time of the commission of the offence. The appellant is now over 18 years. Ordering a retrial will subject him to a trial of an adult with its attendant consequences. Further, the offence was committed five (5) years ago. He has been in custody all the whie. It is unlikely that the witnesses will be able to properly recall what happened. It is also important to have in mind the fact that the complainant was at the time of tender age. To make her re-undergo the retrial and recall the trauma she underwent five (5) years ago at this time will be prejudicial to her. In this regard, a retrial of this matter

will be prejudicial to both to the appellant and the complainant. The five (5) years the appellant has been in custody must have been a lesson to him. It is so hoped.

23. In the premises, the conviction and sentence cannot stand. The conviction is hereby quashed and the sentence set aside. The appellant is to be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT CHUKA THIS 21ST DAY OF JULY, 2016.

A. MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all the parties.

A.MABEYA

JUDGE

21/7/2016