



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 29 OF 2014

BETWEEN

GODFREY OTIENO OCHUNGAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. A.R. Kithinji, Ag. SPM dated 30th April 2014 at Senior Principal Magistrate's Court at Maseno in Criminal Case No. 546 of 2013,)

JUDGMENT

1. The appellant, **GODFREY OTIENO OCHUNG**, was charged with the offence of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act, 2006*. The charge stated that on 6th June 2013 at *[particulars withheld]*, Kisumu West District, he intentionally caused his penis to penetrate the vagina of AWO, a child aged 10 years. He was convicted and sentenced to 21 years' imprisonment.

2. Although the appellant raises several grounds of appeal in his petition of appeal, one of the grounds is sufficient to dispose of this appeal. When the complainant (PW 1) testified, she was not cross-examined nor was the appellant given an opportunity to cross-examine her. Ms Osoro, learned counsel for the respondent, submitted that this was not necessary because the child gave unsworn testimony and that he cross-examined the other witnesses.

3. The right of the accused to confront the evidence against him forms part of the right to a fair trial. **Article 50(2)(k)** of the Constitution speaks of the right, "*to adduce and challenge evidence*". It does not matter that the child gave unsworn testimony. The Court of Appeal discussed this issue in *Nicholas Mutuke Wambuke v Republic MSA Criminal Appeal No. 373 of 2006 (UR)* and had this to say;

The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined..... it would appear that misconception arises from a view that because accused persons are not cross examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.

That thinking is expressed in Section 208 of the CPC which governs hearing of criminal proceedings in the Magistrates' courts. It provides that during the hearing, "the accused persons or his advocate may put questions to each witness produced against him." Accordingly, all

prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in all criminal trials to obviate an otherwise stable case from being lost on that omission.

4. In the circumstances the appellant's right to a fair trial were violated and the resulting conviction cannot be upheld.

5. Before I finalize this judgment, I would like to comment on the order of the trial magistrate regarding witness statements. The Court did not direct that the accused be furnished with statements at the first instance. It is only after the second prosecution witness had testified that the Court directed that he be supplied with statements. When the matter came up for hearing, the accused indicated that he was not ready to proceed because he did not have statements as he did not have money. The trial magistrate responded thus:

There is no provision for supplying accused with statements free of charge. He must provide money for photocopying otherwise the case proceeds and he can refer to the prosecution's file.

6. This was a misdirection of the learned trial magistrate's part as **Article 50(2)(j)** of the Constitution requires the accused, "*to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence*". The Court of Appeal in **Simon Githaka Malombe v Republic NYR CA CRA No. 314 of 2010 [2015]eKLR** made it very clear that the accused was entitled to witnesses statements at the cost of the state through the Office of the Director of Public Prosecutions.

7. I now turn to whether I should order a retrial. The principles governing whether the appellate court should order a retrial should were summarized by the East Africa Court of Appeal in **Fatehali Manji v Republic [1966]EA 343** 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.

8. Having regard to the seriousness of the offence and the fact that the offence attracts a life sentence and given that there is overwhelming evidence against the appellant, I shall order a retrial.

9. I quash the conviction and sentence. I order a retrial and for that purpose, the appellant shall therefore remain in custody and shall be taken to plead before the Senior Principal Magistrate's Court at Maseno on **5th December 2016**.

DATED and DELIVERED at KISUMU this 30th day of November 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Osoro, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.