



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO.44 OF 2014**

**S K K.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in the judgment dated 31<sup>st</sup> July 2014 in Kericho CM CR. No.11 of 2013 by Hon. L. Kiniale)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement of a girl aged 13 years contrary to section 8 as read with section 8 (3) of the Sexual Offences Act, No.3 of 2006. The particulars of the offence were that on the 26<sup>th</sup> day of January 2013, at [particulars withheld] area of Kipkelion District within Kericho County unlawfully and intentionally did an act which caused penetration of his penis into the vagina of W C a girl aged 13 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual offences Act, No.3 of 2006. The particulars of this offence were that on the 26<sup>th</sup> day of January 2013 at [particulars withheld] village of Kipkelion District, Kericho County unlawfully and intentionally indecently assaulted W C aged 13 years by touching her private parts namely vagina

3. The appellant was tried before Hon. J. Ndururi (Principa; Magistrate) and later before the Acting Senior Resident Magistrate, Hon. L. Kiniale. He was convicted on the main count of defilement and sentenced to 20 years imprisonment.

4. Dissatisfied with both conviction and sentence, the appellant filed a Memorandum of Appeal dated 6<sup>th</sup> august 2014. At the hearing of his appeal, he presented an undated Petition of Appeal containing Amended Grounds of Appeal together with written submissions which he requested to rely on. The appellant presented his appeal in person while the State was represented by learned State Counsel Mr. Lopokoyit. The appeal was canvassed before me on 26<sup>th</sup> September 2016.

5. The appellant raises the following grounds in the Amended Grounds of Appeal.

***1. That the pundit trial magistrate erred in both law and fact when she conducted an unfair trial by denying me chance of cross-examination by PW1 and PW2.***

***2. That the learned trial magistrate erred in law and facts when she convicted me in the present case yet failed to find that the testimonies of the victim and her alleged eye witness contradicted.***

**3. That the pundit trial magistrate erred in law and facts when she relied on exhibited P3 from that had a fatal omission.**

**4. That the learned trial magistrate erred both in law and fact when she convicted me on the resent case by making a very partial evaluation.**

**5. That the learned trial magistrate erred in law and fact when she dismissed my defence by shifting burden of proof against me.**

6. As the first appellate court, I have the duty to re-evaluate the evidence and reach my own conclusions – see... in which the court stated as follows:

7. The State called 5 witnesses. PW1 was the complainant, a minor who told the trial court that she was 10 years old. After conducting a *voire dire*, the trial magistrate then hearing the matter, Hon. Ndururi, Principal Magistrate concluded that she understands the importance of telling the truth but did not understand what it means to take an oath. He ruled that she should give unsworn testimony.

8. In her testimony, PW1 stated that she knew the accused who is called chairman and stayed in the same area as she did, her home being near his. She testified that on 26<sup>th</sup> January 2013 at about 5.00 p.m, she was on her way home from the posho mill where she had gone to grind flour. She was with her younger brother, B K. She further stated that the accused held her, took the flour that she was carrying and put it down. He then covered her mouth with his hands, removed her underpants and threw it away. He then took off his trousers put her on the ground and did ‘*tabia mbaya*’ to her. She further testified that she felt pain in her private parts. The accused then told her that if she told anyone, he would kill her. That he also gave kshs.10/- which she refused. She took her flour and went home and told her mother. She was taken to hospital in Sungunyak and Fort Tenan Hospitals by her mother and they also went to report at Fort Tenan Police Station.

9. PW2 was M R, the complainant’s sister. Her evidence was that B C, her son, had told her that his grandmother had sent him and Winnie to grind maize at the posho mill. On their way back, they had met the accused who had got hold of PW1, showed her some money then used her. She went and confronted the accused, then took PW1, who was walking with difficulty to Sungunyak dispensary. She further stated that there was pus coming from the complainant’s vagina, and they were referred to Fort Tenan Sub-district hospital where PW1 was treated. They reported the matter to Chepkechei A. P. Camp and later Fort Tenan Police Station.

10. In cross-examination by the accused, PW2 stated that the accused had defiled the complainant a week before PW2 came to know of it. She also stated that the complainant had not told anyone until her condition worsened.

11. PW3 was B C, a minor, who also gave unsworn evidence. He testified that he knew the complainant, and the accused, who is also called chairman. He stated that he and PW1 had met the accused on their way from the posho mill. They met chairman, who carried PW1 into the coffee bushes belonging to M. He further testified that the accused put PW1 on the ground, then mounted her. That chairman showed them some money but did not give them, then he told them to go away.

12. PW3 further stated that they did not tell anyone what happened, but after some time, he told his mother who took PW1 to Sungunyak hospital and fort Tenan and that they also went to Fort Tenan Police Station. Like PW1, PW3 was not cross-examined by the accused.

13. PW4 was Rose Munyaka, a Clinical Officer attached to Fort Tenan Sub-District Hospital. Her evidence was that she examined PW1, who had been escorted to the hospital by her sister and police officers, on 4<sup>th</sup> February 2013. She examined PW1 and found that she had normal outer genitalia but there were signs of infection, and a yellowish discharge could be seen. Her labia minora were bruised and her hymen was torn. Tests proved negative for HIV, syphilis and pregnancy though numerous pus cells indicating a sexually transmitted disease were seen. Her conclusion was that PW1 had been defiled

11 days earlier. She produced a P3 form with respect to her.

14. PW4 also gave evidence with respect to the examination of the accused, and produced a P3 form with respect to him. She testified that he was examined for syphilis and HIV, with a negative result for syphilis but HIV positive. Her opinion was that the accused had defiled the complainant.

15. In cross-examination by the accused, she stated that PW1 had been found to have a sexually transmitted disease, was walking with a limp and had bruises on her private parts. She was found to be HIV negative but the accused was found to be HIV positive. In re-examination, she stated that it was not possible for the HIV test to turn positive on 4<sup>th</sup> February 2013.

16. The fifth prosecution witness, PW5, was No.62491 Sergeant Wilkister Odhiambo, attached to Fort Tenan Police Station. She was the investigating officer. She stated that she received a report on 3<sup>rd</sup> February 2013 from the father and sister of PW1 with respect to her being defiled. She noted that PW1 was limping and had difficulty walking and she stated that she had been defiled by someone called 'chairman'. The accused who was known to A. P. Officers from Kipteres AP Camp was arrested and brought to Fort Tenan Police Station and PW5 escorted both PW1 and the accused to Fort Tenan Sub-district Hospital on 4<sup>th</sup> February 2013.

17. At the close of the prosecution case, the accused indicated that he would give unsworn evidence. When the matter came up on 27<sup>th</sup> January 2014, Hon. Ndururi was unavailable, and the matter was placed before Hon. Kiniale, Ag SRM. Section 200 (3) was explained and the accused elected to proceed from where the matter had reached. He gave unsworn evidence and called two witnesses.

18. The accused gave an alibi defence. His unsworn statement was that he was a casual worker. That on 26<sup>th</sup> January 2013, he worked till 5.00 p.m at a job he had got digging holes, then he and his boss went to Mtarakwa centre. They then returned at about 6.00 – 7.00 p.m, went to a hotel at Chepkechei, then went home.

19. His first witness, I R, a bursar at [Particulars Withheld], testified that the accused worked for him. On 26<sup>th</sup> January 2013, they were drilling holes from 8.00 p.m (sic) till 4.30 p.m, when they went for lunch. They then left for Mtaragon trading centre, and returned at about 7.00 p.m. In cross-examination, he stated that the accused was his servant and had started working for him since 2012. He also stated that they were not drilling holes but just measuring them and that they never left each other from 8.00 to 4.00 p.m.

20. DW2, J K's evidence was that I R and the accused were measuring coffee holes until 3.30 p.m and that they found him at Chepkechei Centre at around 6.00 p.m. They took tea together at Chepkechei, then return around 7.00 p.m. In cross-examination, he stated that both the accused and PW1 were neighbours and that a sister of the complainant had a grudge against the accused and is the one who brought the case. He also testified that he and the accused ate lunch at the house of I R.

21. In her judgment, the trial magistrate analysed the prosecution and defence cases. She set out the issues for determination as being the age of the minor, whether there was an act of penetration, whether it was the accused who defiled the complainant and whether the prosecution had proved its case beyond reasonable doubt. She found that the child was a minor and on the second issue, that there was penetration, as both minor witnesses had given concise evidence with respect to the accused mounting PW1. She also found from the evidence of the clinical officer that the minor had been defiled.

22. The court concluded that the prosecution had proved its case, noting that the evidence of PW1 had been corroborated by that of PW3. The evidence of PW4 was also accepted by the court as showing that there had been defilement. She also found that the complainant knew the accused very well.

23. With respect to the defence witnesses, the court found their evidence to be mere afterthoughts and contradictory. The Court considered the evidence of DW1, who stated that DW2, his boss, came later and

paid workers then they went for late lunch, and that he was digging coffee holes. She noted that DW2 contradicted the accused as he said they were not digging coffee holes but just measuring them.

24. With respect to DW3, the Court noted that he only met with the accused and his boss later at Chepkechei, so he could not account for the whereabouts of DW1 and DW2. She also noted that there are gaps and contradictions which leave room for doubt in the defence case, and that it is questionable that DW1 and DW2 never left each other's sight on the material day. The trial court also dismissed the allegation of a grudge between the accused and the complainant's sister, noting that even the accused had not raised it.

25. At the hearing of this appeal, the State Counsel conceded to grounds 1 and 5 of the Amended Grounds of Appeal but supported the conviction of the appellant.

26. I have considered the appellant's appeal and his submissions with respect thereto. I have also considered the concession by the State with respect to grounds 1 and 5 of the appellant's grounds of appeal. The record of the trial court does indicate that the accused did not cross-examine PW1 and PW3. These are the minor witnesses who were put through a *voire dire*, and the trial court concluded that they did not understand the nature of an oath.

27. Under section 208 of the Criminal Procedure Code, the trial court is required to inform an accused person of his right to cross-examine prosecution witnesses, and to record his response in that regard. Section 208 provides as follows:

***“(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).”***

***(2) The accused person or his advocate may put questions to each witness produced against him.***

***(3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.*** (Emphasis added)

28. The importance of cross-examination of prosecution witnesses by an accused persons is underscored further by the provisions of section 302 of the Criminal Procedure Code which provides that:

***“The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution.”***

29. Whether through an oversight or a misapprehension of the position in law regarding the unsworn evidence of minors, the trial court in this case did not comply with the requirements of section 208 of the Criminal Procedure Code. The appellant did not cross-examine the two minors who were key to the case of the prosecution, one of whom was the complainant, and the other an eye witness to the alleged offence. There is no indication on the record that the complainant was given a chance to cross-examine the witnesses, nor of what he elected to do with regard thereto.

30. The Court of Appeal has considered the question whether a minor who gives unsworn evidence should be subjected to cross examination. It has held in the case of **Nicholas Mutula Wambua & Another vs Republic Mombasa Criminal Appeal No. 373 of 2006 (UR)** that sections 208 and 302 of the Criminal Procedure Code permit the cross-examination of a witness who had given evidence not on oath. With respect to a child witness, it was held in the case of **Sula vs Uganda [2001] 2EA 556** cited with approval by the Court of Appeal sitting in Nyeri in **Criminal Appeal No. 12 of 2014- DW vs Republic** that:

***“A child who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.”***

31. That being the position in law, I believe that there was a mistrial of the appellant in this case, and I find that on the basis of the first ground of appeal that was conceded by the State, the conviction and sentence in this matter cannot stand.

32. What is the court to do in the circumstances? I have considered the record of proceedings before the trial court, and noted the evidence that was before the court. The appellant was charged with a very serious offence, and it is in the interests of justice that he be granted a fair trial, but that the victim of his alleged offence gets a chance at securing justice. In the circumstances, I believe the best order to make in this matter is to direct that it be tried afresh, with the court seized of the trial on the lookout to ensure that the requirements of the law with regard to trial, in particular the provisions of section 208 and 302 of the Criminal Procedure Code, are complied with.

33. In making this order, I am cognizant of the principles on the basis of which a trial should be ordered. In the case of **Fatehali Manji Vs Republic [1966] EA 343** the court stated as follows:

*“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose 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 own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.”*

(See also *Makupe vs Republic* (1984) KLR 523)

34. In the case of **Philip Kipngetich Terer vs Republic, Criminal Appeal No. 327 of 2010**, the Court of Appeal sitting in Kisumu, after considering various authorities on the circumstances under which a retrial should be ordered, expressed the view itself as follows:

*“From these authorities, it is clear that in deciding whether or not to order a retrial, the court must strike a balance between the interest of justice on the one hand and those of the accused person on the other.”*

35. The matter is therefore remitted to the Chief Magistrate’s Court in Kericho for retrial. The matter shall be transmitted to the Chief Magistrate’s Court as soon as possible for mention for the purpose of taking directions on the hearing of the matter.

**Dated, Signed and Delivered at Kericho this 23<sup>rd</sup> day of November 2016**

**MUMBI NGUGI**

**JUDGE**