REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO.103 OF 2013

JOHN KAKUMI KIMAU...................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the original conviction and sentence in Mukueni Principal Magistrate's Court Criminal Case No. 589 of 2010 by Hon. J. Karanja, SRM on 4/8/2011)

JUDGMENT

1. **John Kakumi Kimau,** the appellant was charged with the offence of defilement of a girl under the age of eleven (11) years contrary to **Section 8(2)** of the **Sexual Offences Act, No. 3** of **2006.** Particulars thereof being that on the 8th day of November, 2010 in **Makueni District** within **Eastern Province** unlawfully caused penetration with his male genital organs to **KK** a girl under the age of eleven (11) years.

2. In the alternative the appellant was charged with indecent assault of a girl contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars thereof being that on the 8th day of November, 2010 in **Makueni District** within **Eastern Province** unlawfully indecently assaulted **KK** by touching her private parts.

3. Having denied the charge he was tried, convicted and sentenced to life imprisonment.

4. Being aggrieved by the conviction and sentence thereof, he now appeals on grounds that:-

i. The entire trial process was a nullity as the charge was defective;

ii. There was a crucial irregularity in the course of the trial which deprived the appellant of his fundamental rights in regard to a fair trial when the charge was amended and **Section 214** of the **Criminal Procedure Code** was not complied with;

iii. No *voire dire* examination was conducted by the trial magistrate to establish if the child was intelligent;

iv. The age of the complainant was not established; and

v. Medical evidence was adduced by a Clinical Officer who legally was not a Medical Officer.

5. Facts of the case were that the appellant took **PW1, KK** to her bed and put what she described as *'something'* into her. In the meantime **PW2, Benjamin Kitonga Kisuu** learned that the appellant was with PW1. He went to his house and found PW1's clothes having been removed. She was on the bed and was crying. He took away the child. He reported the matter to the police. **PW3, No. 73107 Cpl (w) Agnes Ikiba** commenced investigations. PW4, J**oseph Kiptoo Biwott,** a Clinical Officer examined her and found her underpants soiled but there were no blood stains.

6. A vaginal examination conducted by PW4 also revealed bruises on the labia minora and the hymen was perforated. He concluded that there was evidence of penetration.

7. When put on his defence, the appellant stated that he was working by the riverside when village elders arrested him. He was taken to hospital the following day. Thereafter he was charged.

8. At the hearing of the appeal the appellant relied upon written submissions.

9. In response thereto, **Mrs Abuga,** learned State Counsel opposed the appeal. She submitted orally that the appellant was recognised as the person who took away the complainant. She was later found naked inside his house. There was proof that the act constituting the offence was committed. The defence was a narrative of how he was arrested. She called upon the court to dismiss the appeal.

10. I have considered the evidence on record, and submissions by both the appellant and the state counsel.

1. This being the first appellate court, its duty is to subject evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see nor hear witnesses testify. (***See Okeno –versus- Republic [1972] E.A. 32).***

12. The learned trial magistrate has been faulted for not complying with the provisions of **Section 214 (1) (i) ii)** of the **Criminal Procedure Code** which provides thus:-

> ***"1). Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***

Provided that -

> ***(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
>
> ***(ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination".***

13. It is submitted that the charge was amended after three (3) witnesses had testified. However, the appellant was not accorded the opportunity of exercising his right of having them re-called to testify afresh, this, in his opinion was prejudicial to him as he was denied his constitutional rights as provided by **Article 25 (c)** of the **Constitution.**

14. According to **Article 25(c)** of the **Constitution** the right to a fair trial cannot be limited. Where a charge is amended the court has a duty of explaining to the accused person his right to have witnesses who had testified recalled to testify afresh or be subjected to cross-examination. **Section 214 (1) (iii)** states:-

"...***the accused <u>may demand</u> that witnesses or any of them be recalled...*** *emphasis mine.*

The accused person can only form an opinion to have them recalled or not if the provision of the law is explained to him and reflected on the court record. (Also see ***Harrison Mirungu Njuguna -versus - Republic - Criminal Appeal No. 90 of 2004)***

15. In the instant case charges amended were read to the accused person but **Section 214(1) (ii)** was not complied with. Initially the appellant had been charged with attempted defilement. The amended charge was defilement. Failure to give the appellant an opportunity of recalling witnesses who had testified to clarify any issues that may have arisen was prejudicial to the appellant.

16. Failure by the trial court to comply with the law was a mistrial. Accordingly, following the reason given I quash the conviction and set aside the sentence imposed.

17. Consequently, the question I must address is whether I should order a retrial.

The holding in the case of ***Fatehali Manji –versus- Republic [1966] E.A. 343,*** sums-up the criteria for ordering a retrial. It was stated thus;-

> ***"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 purpose of enabling the prosecution to fill up gaps in evidence at the first trial... each case must depend on its own facts and circumstances and order for retrial should only be made where the interests of justice require it".***

18. Per the observation of the court, the complainant was *'a minor of very tender years'* such that she could not be sworn. There is however evidence of PW2 her father who found her with the appellant on the bed. The child was crying. On being examined it was proved that the child had been defiled. Technicalities raised were not sufficient for quashing the conviction. Mere technicalities cannot be used to frustrate the ends of justice.

19. In the premises, I find that justice demands a retrial in this case. Accordingly, I order a retrial before another court of competent jurisdiction. Mention before **Makueni Principal Magistrate's Court** on the **4th February, 2015.**

20. In the meantime, the Appellant shall be held in custody.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28th** day of **JANUARY, 2015.**

L.N. MUTENDE

<u>**JUDGE**</u>