



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL APPEAL NO.47 OF 2009**

**JACKSON KIBET RUTO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal against the Conviction and Sentence by the Senior Principal Magistrate Hon. W. Nyarima at Kericho dated 11<sup>th</sup> August, 2009.)*

**J U D G M E N T**

1. **Jackson Kibet Ruto** (appellant) was charged with the offence of defilement of a girl of ten (10) years contrary to Section 8 (3) of the Sexual Offences Act No.3 of 2006.

The particulars being that the appellant on the 17<sup>th</sup> day of February 2006 at *[particulars withheld]* Estate Brooke in Kericho District within the Rift Valley Province, unlawfully and intentionally had carnal knowledge of **M C** a girl aged ten (10) years.

2. He faced an alternative count of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006.

The particulars being that the appellant on the 17<sup>th</sup> day of February, 2006 at *[particulars withheld]* Estate Brooke in Kericho District within the Rift Valley Province, unlawfully and intentionally, indecently assaulted **M C**, a girl aged ten (10) years by touching her private parts namely vagina.

3. He pleaded not guilty and the case proceeded to full hearing with the prosecution calling a total of eight (8) witnesses.

4. The appellant was acquitted of the principal charge and convicted on the alternative count. He was sentenced to three (3) years imprisonment and was later released on bond pending appeal.

5. Being dissatisfied with the judgment he appealed through Mr. Orina advocate against both conviction and sentence citing the following grounds;

*(a) That the learned trial Magistrate erred in law and fact in convicting the Appellant against the weight of evidence.*

*(b) That the learned trial Magistrate erred in law and fact in convicting the Appellant on uncorroborated evidence.*

(c) *That the learned trial Magistrate erred in law and fact in considering extraneous issues in convicting the Appellant.*

(d) *That the learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant on the evidence which was at variance with the charge.*

(e) *That the learned trial Magistrate erred in law and fact in awarding a sentence that was harsh and excessive in the circumstance.*

(f) *That the learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant on a defective charge.*

(g) *That the learned trial Magistrate erred in law and fact in failing to consider the appellant's defence in its entirety.*

(h) *That the learned trial Magistrate erred in law and fact in failing to give judicious legal grounds for his findings.*

6. The Respondent filed a cross appeal citing the following grounds;

(a) *That the learned trial Magistrate erred in law and fact in acquitting the respondent in the first charge against the weight of evidence.*

(b) *That the learned trial Magistrate erred in law and fact in sentencing the accused person to three (3) years imprisonment a sentence which is at variance with the law.*

(c) *That the learned trial Magistrate erred in law and fact in failing to consider the appellants evidence in its entirety.*

(d) *That the learned trial Magistrate erred in law and fact in failing to take into consideration judicial legal grounds in his findings.*

7. A summary of the prosecution case is that PW1 a minor aged ten (10) years was outside her parent's house on 17<sup>th</sup> February, 2007 at 8.00am at **[particulars withheld]** when the appellant called her to his house. She went and he requested her to enter the house and directed her to the bedroom. She was asked to remove her clothes which she did and he defiled her.

8. She reported to her sister (PW3) and cousin (PW4) and was taken to the Kericho District Hospital the same day. The parents of the child (PW6 & PW7) were notified of the incident.

9. PW8 No. 35421 PC. **Joseph Chebii** arrested the appellant after being informed of the incident on 21<sup>st</sup> February, 2007.

PW9 Yego Kirwa is the clinical officer who examined PW1 on 21<sup>st</sup> February, 2007. He found evidence of penetration plus infection of an STD (EXB4). The appellant was examined on 9<sup>th</sup> March, 2007 and the tests for STD & HIV were both negative (EXB 3&6).

10. In cross-examination he said the STD in PW1 was detected on 27<sup>th</sup> March, 2007 when she filled the P3 form. He further stated that the appellant was examined on 22<sup>nd</sup> February, 2007.

11. The appellant in his defence gave an unsworn statement and called one (1) witness. He denied the charge saying he reported on duty on 17<sup>th</sup> February, 2006 at 5.00am as he was in shift A. He completed his shift at 10.00am arriving at his house at 10.10am. He changed his clothes and left. He arrived back on 18<sup>th</sup> February, 2006 at 7.00pm. He was informed of the defilement of

a child on 19<sup>th</sup> February, 2006 and heard nothing more about it until 21<sup>st</sup> February, 2006 when he was arrested. The tests done on him were negative yet those done on the child were positive.

12. His witness (*J B L*) explained that the appellant went home on 17<sup>th</sup> February at around 10.00am returned on duty on 18<sup>th</sup> February, at 7.00pm.

13. When the appeal came for hearing Mr. Orina for the appellant submitted on three main issues.

*(i) That the evidence tendered was at variance with the charge sheet. The charge sheet was never amended.*

*(ii) The appellant was convicted of an offence that was non-existent at the time of the alleged offence.*

*(iii) The evidence adduced was contradictory.*

14. The State through Mr. Mutai Senior Counsel conceded the appeal on the following grounds;

*(i) The charge was defective. The learned trial Magistrate held so but went ahead to acquit on the principal count and convict on the alternative.*

*(ii) The charge sheet showed the offence was committed before the commencement of the Sexual Offences Act.*

*(iii) The evidence adduced was at variance with the particulars in the charge sheet. The error is not curable.*

In so conceding it means the state abandoned its cross appeal.

15. This is a 1<sup>st</sup> appeal and this court has a duty to reconsider and re-evaluate the evidence on record together with the grounds of appeal and arrive at its own conclusion. See **Okeno V R 1972 EA 32; Mwangi V R (2004)2 KLR 28.**

16. The issues that have been raised about the charge sheet and conceded to by the State will dispose of this appeal. I therefore wish to deal with the said issues.

17. The appellant was charged under the Sexual Offences Act which came into operation on 21<sup>st</sup> July, 2006. The particulars in the principal and alternative count state that the offence occurred on 17<sup>th</sup> February, 2006. It is obvious that the Sexual Offences Act could not apply to such an offence.

18. The evidence adduced in Court referred to the date of occurrence as 17<sup>th</sup> February, 2007. Well if this was the date then the Sexual Offences Act was applicable.

The only hitch was that the particulars of the charge and the evidence adduced were at variance. There was nothing that stopped the prosecution and/or the Court from arresting the anomaly by having the charge amended as provided for under **Section 214** of the **Criminal Procedure Code.**

19. The record shows that the appellant made his defence based on the dates given in the charge sheet as 17<sup>th</sup> February, 2006 and not 17<sup>th</sup> February, 2007 and this prejudiced him seriously.

20. The principle of Law governing charge sheets is that an accused person should be

charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused person may be able to plead to a specific charge that he can understand. This enables the accused person to prepare his defence to the charge.

21. In this case there was no Sexual Offences Act in existence as at 17<sup>th</sup> February, 2006 when the alleged offence is said to have occurred.

22. The charge in this case was defective to the extent that it applied the law retroactively instead of retrospectively.

23. The learned trial Magistrate found the charge defective and acquitted the appellant of the principal count but went ahead to convict him on the alternative count. An alternative count is dependent on the principal count. It cannot stand on its own. If the principal count is defective it goes with the alternative count, he therefore erred in making the findings he did.

24. Having made the above findings, I will not go far to look at the other grounds.

25. In light of the above finding, plus the concession of the appeal by the State it follows that there is no way the cross petition of appeal can see the light of the day. It is dismissed.

26. The result is that the Appellants' appeal is allowed. The conviction is quashed and the sentence set aside. The appellant to be released unless held under a separate warrant.

**Dated, signed and delivered in open court this 23rd day of April, 2015.**

**H.I.ONG'UDI**

**JUDGE**

**In the presence of**

M/s Mwangi for State

Mr. Orina for Appellant present

Appellant- Present in Person

Lagat- court assistant

Interpreted- English/Kiswahili