REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 85 OF 2014

B M K.……..…….....…..……APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. W. K. Cheruiyot Ag. SRM in Criminal Case No. 250 of 2011 delivered on 27th May 2014 at the Senior Resident Magistrate's Court at Tawa)

JUDGMENT

The Appellant has appealed against his conviction and sentence of twenty (20) years imprisonment by the trial Court. The Appellant was charged in the trial Court with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the offence were that on the 15th day of December 2010 at [particulars withheld] village, Kako location in Mbooni East District within Makueni County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of A N K, a child aged 14 years.

In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that that on the 15th day of December 2010 at [particulars withheld] village, Kako location in Mbooni East District within Makueni County, he intentionally and unlawfully did an indecent act to A N K by touching her private parts namely vagina with his penis.

The Appellant was arraigned in the trial court on 14th July 2011 where he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to twenty (20) years imprisonment. The Appellant is aggrieved by the judgment of the trial magistrate, and preferred this appeal against the conviction and sentence. The grounds of appeal are in a Further Amended Memorandum of Appeal dated 21st July 2015 and filed in Court on 22nd July 2015.

These grounds of appeal are that there was no sufficient evidence to warrant the conviction; the complainant's testimony was uncorroborated; the offence was not reported immediately after commission; evidence of age by birth certificate admission was done improperly; the trial magistrate did not consider the Appellant's mitigation in sentencing him; and that the Appellant was not afforded fair hearing in that the trial magistrate denied the accused the right to be represented by an advocate of his choice, and for reason that the Appellant was not afforded adequate time to prepare for his defence.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called eight witnesses. PW1 who was the complainant testified that on 15th December 2010 at 11.00 am she had gone

to visit her aunt accompanied by her sister M K. They arrived at her aunt's but did not find her at home. The Appellant then came and told PW1 that his mother was calling her. She went with him to his house and no one was at home. He then led her to a room with a bed, removed his shorts, overpowered her, undressed her, covered her mouth and had sex with her. PW1 testified then put on his short and left, and that she also got dressed and went back home with her sister. She stated that she did not tell her sister or mother what had happened.

PW1 further stated that she later told her mother she had missed her periods and they went to hospital on 22nd August 2011 where she was told she was pregnant. She later gave birth to a baby boy named M M on 25th August 2011. PW1 testified that they reported the defilement incident at Mbumbuni Police Station on 7th July 2011, and was issued with a P3 form which she filled on 11th July 2011. She also stated that blood samples were taken from her, the Appellant and her child for examination, and showed that the chances were that the Appellant was 99.99% the father of her child.

PW2 was M K the sister to the complainant, who on her part testified that on 15th December 2010 at 11 am she went with her sister to visit her aunt. She confirmed that they did not find their aunt, and that the Appellant came and asked PW1 to accompany him to his house claiming that PW1 had been called by his mother. She said that PW1 came back 30 minutes later and told her that they should go home. Later on 7th July 2011, her mother told her to go to the police station to record a statement since PW1 was pregnant, and that she recorded her statement on 9th July 2011. PW2 testified that she knew the Appellant before 2010, but had not seen him with PW1 before that date.

PW3 was R M, the complainant's mother, who stated that PW1 was born on 28th February 1997, and produced PW1's birth certificate as an exhibit. She stated that on 15/12/2010 she went to church at 10.00am, and that later at 5.00p.m when she came home she found that her daughters had gone to visit their aunt. She stated further that in February 2011, she noticed that PW1 was not attending school regularly and was spitting severally. Upon inquiring, PW1 told her that when they visited their aunt on 15th December 2010, the Appellant took her to his house and had sex with her.

PW3 testified that she summoned the Appellant and his mother to her home, however when they did not respond she reported the matter to Mbumbuni police station. She stated that the complainant filled a P3 form and gave birth to a baby boy on 25/08/2011. She also stated that a DNA analysis had been carried out.

PW4 was Onesmus Katua a clinical officer at Makueni District Hospital who testified that on 11/07/2011 he had filled a P3 form for the complainant. He stated that the complainant was found to be pregnant following an alleged defilement. He also stated that the complainant was attending their prenatal clinic from 1st October 2010 and he produced the prenatal card and P3 form as exhibits.

PW5, Cpl Davis Sigel was the investigating officer in the case. He testified that on 07/07/2011 at around 1.00 p.m. he was at Mbumbuni police station when the complainant's mother went in to report defilement of the complainant in the year 2010 by one B M. On 09/07/2011 the mother and the complainant went to the same station where they recorded a statement. He stated that he issued the complainant with a P3 form which was duly filled at Makueni District Hospital and returned to him. The Appellant was then later arrested.

He confirmed that the complainant was pregnant and later given birth, and that a DNA examination was conducted on PW1, the infant and the Appellant after a court order was granted for the same. He stated that he is the one who took the blood samples from the three, and that the report from the government analyst indicated that the Appellant was 99.99% the biological father of the child born by the complainant. He produced the exhibit memos as exhibits in court.

PW6 was Henry Kiptoo Sang, a government analyst based at the government chemist laboratory in Nairobi, testified that on 13/09/2011 they received blood samples for the Appellant and the child M M. On 16/09/2011 they received another blood sample marked A N K, accompanied by a police memo

requesting them to determine the paternity of the said child. He stated that after conducting a DNA analysis, they concluded that there was a 99.99% chance that the Appellant was the biological father of the child who was the complainant's son. He went on to produce the exhibit memos and the analyst report as exhibits.

PW7 was one W T who testified that he was the head teacher of [Particulars withheld] Primary School, where PW1 was a pupil. He stated that the complainant started missing school in January 2011. Upon inquiry they discovered that she was pregnant. He stated that upon discussions the complainant dropped out of school. He went on to produce the school register for class 8 in the year 2011 as an exhibit.

The last prosecution witness, PW8, was P.C Simon Wambua who testified that on 14/07/2011 he was at Wote town when he was approached by one female adult at around 1400 hours, who requested that he arrests the Appellant. The allegations were that he had defiled her daughter. He stated that he arrested the Appellant at Wote bus stage and took him to Makueni Police Station, and later taken to Mbumbuni police station where he was charged.

The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in that respect. The Appellant gave sworn evidence and called one witness. He stated that he had denied the charges facing him, and had asked the complainant why she had kept quiet for eight months. He further stated that the complainant was his cousin. He testified that the complainant could not explain why she had not screamed or informed her mother on the offence. He hence denied committing the offence.

DW2 w F M M, the grandfather of the Appellant who testified that on the material date he was at his farm, and had not seen the complainant going to the house of the Appellant. He claimed that he did not know the complainant, and that the case against the Appellant as a fabrication. He also stated that the Appellant had told him that he did not commit the offence. He confirmed that he was not at the scene of the crime.

The Issues and Determination

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The appeal was canvassed by way of written submissions. The Appellant's Advocates, J. Kamanda & Co. Advocates filed submissions dated 5th August 2015. The Appellant stated that he was not afforded the right to fair trial as enshrined in Article 50(2) of the Constitution, in that he was not afforded adequate time to prepare a defence, and that he was denied the right to choose and be represented by an advocate. The Appellant drew the Courts attention to the proceedings of 3rd June 2013 and 8th July 2013 before the trial Court in this regard.

The Appellant further submitted that the discretionary power granted to the Courts under section 283(1) of the Criminal Procedure Code to grant adjournments is exercised depending on the reasons given by the parties and the particular circumstances of each case. It was the Appellant's argument that he should have been granted an adjournment on 8th July 2015, in order to get another advocate to represent him in the matter. He argued that the discretion was abused and was not exercised judiciously, and can be interfered with by the appellate court, as the Court disregarded the fact that the Appellant had an Advocate on record during the trial and he relied solely on him to represent him. Further that the trial Court misdirected itself by denying the adjournment on the ground that the Defence had also adjourned the matter on 3rd June 2013, when in fact the said adjournment was requested by the prosecution.

It was urged that the Appellant was thus ambushed as he was being asked to defend himself whilst being unprepared, and that he had a right to choose and be represented by an Advocate, and the trial Court denied his application to appoint and advocate to represent him. The Appellant cited the cases of **Kiriisa V. Attorney General and Another, (1990-1994) EA 258** and **Mbogo & Another V. Shah, (1968) EA**

93 in this regard.

The Respondent further submitted that the age of the complainant was not sufficiently proven in evidence. It was argued in this regard that the charge sheet indicated her age to be 14 years, whereas the complainant in her testimony stated her age was 13 years and later that she was 15 years of age. Further, that the trial magistrate found the Appellant to be 13 years and should have taken note of the fact that the complainant might have been older and ordered for an age assessment. The Appellant also contended that the birth certificate that was admitted as evidence, and that was used to inform the court on the age of the complainant was dated 11th January 2011 while the offence had occurred on 15th December 2010, and was clearly obtained for the sole purpose of securing a conviction against the Appellant.

Lastly, the Appellant claimed that there was insufficient evidence to convict him, and that the evidence of PW6 who was the government analyst was to be treated with caution, as the samples that were tested and admitted by the said witness were not submitted at the same time. Further, that the exhibit memo of the sample of the child M M, the complainant's son, was not produced by the said expert witness.

In opposing the appeal the State filed submissions by Mamba Vincent, the prosecution counsel, which were dated 20th August 2015. The learned counsel argued therein that this case was one of recognition and not mere identification as the Appellant was well known to the complainant. Further, that the evidence of PW1 and PW2 placed the Appellant at the scene of the crime.

It was also submitted by the State that the trial court was satisfied that the complainant was a child of 13 years, and that her testimony was sufficient as per section 124 of the Evidence Act. Lastly, the learned counsel submitted that the samples of the Appellant and the complainant had been taken for analysis at the government chemist, and a proper report was tendered in court showing the Appellant was 99.99% the biological father of M M, the child born out of the defilement.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and I find that the issues raised in this appeal are firstly, whether the Appellant's right to a fair trial was violated. If not, then the Court will proceed to consider the remaining two issues as to whether the age of the complainant was proved and whether the Appellant's conviction for the offence of defilement was based on sufficient evidence.

On the first issue, the Appellant claimed that his right to a fair trial as enshrined Article 50 (2) the Constitution were violated, as he was not availed adequate time to prepare a defence and to be represented by his advocate. Article **50(2)** of the Constitution provides as follows;

> **"Every accused person has the right to a fair trial, which includes the right to:-**
>
> ***(c) "to have adequate time and facilities to prepare the defence.***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence."***

I have perused the record of the trial court, and note that on 3rd June 2013 the prosecutor indicated that the complainant and her mother were not bonded and had not arrived. He asked for another hearing date, and the court set the hearing for 8th July 2013. The Advocate for the Appellant later on that day sought a time allocation of 10.30am on the set hearing date, which application was allowed by the trial Court.

On 8th July 2013 the record shows that the proceedings in the trial court were as follows:

> **"Prosecutor: I have three witnesses.**
>
> **Court: Matter shall proceed at 10.30 a.m.**

W. K. CHERUIYOT

Ag. Senior Resident Magistrate

<u>Later at 10.37. a.m.</u>

Coram as before

Accused: My advocate is not here, I am unable to reach him on phone.

Court: The matter was fixed for 10.30 a.m. at the specific request of the counsel on record, the matter shall proceed for hearing.

W. K. CHERUIYOT

Ag. Senior Resident Magistrate

Accused: I pray for time to get another advocate. I don't know why counsel not in court.

Prosecutor: Today date was taken in presence of counsel for the accused. My witnesses have travelled from Mombasa. I also have witnesses who are school children. I pray the matter proceed for hearing.

W. K. CHERUIYOT

Ag. Senior Resident Magistrate

Accused: I have continuously attending court. I don't know what happened to my advocate.

W. K. CHERUIYOT

Ag. Senior Resident Magistrate

Court: I have considered the application made by the accused. Today's date was taken by complainant. The counsel has not arrived. Accused similarly does not know where he is. The accused has a constitutional right to be presented.

However, the complainant also has a right to have her case determined with speed. I note that the complainant herein is a minor and it is said she had travelled all the way from Mombasa. The defence on 03/06/2013 also adjourned the matter when the witness had again travelled the same distance. There is a risk of losing the minor's evidence if matter is adjourned. I shall therefore decline to allow the application for adjournment and order the matter to proceed for hearing.

W. K. CHERUIYOT

Ag. Senior Resident Magistrate

Prosecutor: I pray PEX 1, 2 and 6 be returned back.

W. K. CHERUIYOT

Ag. Senior Resident Magistrate

Court: I allow the matter to start de novo, PEX 1,2 and 6 be released to prosecution.

W. K. CHERUIYOT

Ag. Senior Resident Magistrate"

I am of the opinion that although it is important to conduct proceedings at good speed, this should not be done at the expense of the procedural rights of an accused persons as guaranteed by the Constitution. The right to adequate time to prepare ones defence guards against an unduly hasty trial, and when it comes to assessing whether the accused had adequate time for the preparation of his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and the stage of the proceedings.

In particular an accused person must be given additional time after certain occurrences in the proceedings in order to adjust his or her position and prepare his or her case adequately. The relevant occurrence in the present appeal was the non-appearance of the Appellant's advocate at the hearing on 8th July 2013, and it is evident from the repeated requests by the Appellant on the said date that he was not ready to proceed with the hearing in the absence of his advocate who was previously representing him. I therefore agree with the Appellant that asking him to proceed with the hearing in the circumstances was an ambush on the Appellant, and in violation of his right to have adequate time to prepare his defence.

In **Collins Odhiambo and Others v Republic [2014]eKLR** the Court of Appeal dealt with the issue of the accused's request for documents as follows:

> **Before we conclude this judgment, one other matter has caught our attention which would suggest that both courts below may not have adequately evaluated the evidence which was adduced at the trial. On 14th December, 2005 the appellant applied for production of the Occurrence Book (OB) of 4th March, to 8th March 2005. The learned trial magistrate allowed the application but the record does not show that the said OB was ever produced. Even when the appellant reminded the court, that he had applied to have the OB produced and that his case was just "fitina" (malicious), nothing was done about his plea. Neither the learned trial magistrate nor the learned Judges of the High Court mentioned the appellant's plea for production of the OB in their judgments. In the absence of any direction regarding the OB by the two courts below it is not possible to appreciate how the contents of the OB would have impacted on the case put forth by the prosecution.**
>
> **We take this opportunity to caution courts of first instance and first appellate courts that they should be careful not to be accused of ignoring pleas made by the accused/appellants especially when they are not represented. Indeed in such cases the courts should be in the forefront in championing the unrepresented parties' fair trial rights."**

I wholly adopt these sentiments, and hold that they also apply to a request by an accused person for an adjournment to prepare his defence.

On the argument that the Appellant's right to be represented by an Advocate was violated, I note that the right to legal representation must also include the right to be afforded a reasonable opportunity of securing it. Therefore, a court is obliged to consider an application by an accused for a postponement in order to enable him to obtain legal representation, and a refusal to grant such a postponement may amount to an irregularity. Where an accused's legal representative withdraws from the case or is not present as was the case in this appeal, the appropriate procedure to be employed by a Court should be to ask the accused whether he wished to have the opportunity to instruct another legal representative and/or whether he wishes to undertake his own defence. The failure to do so by the trial Court was irregular and invalidated the proceedings.

However, it must also be stated that in circumstances where an accused has sufficient opportunity to obtain legal representation and fails to arrange this, he cannot subsequently attack the proceedings unless he can furnish an acceptable explanation for his failure.

I therefore find for these reasons that the refusal by the trial Court to grant the Appellant a postponement of the trial for the purpose of enabling him to obtain a new advocate violated his right to have adequate time to prepare his defence, and to procure legal representation. I also note that this irregularity prejudiced the Appellant as the trial magistrate on that date ruled that the trial was to start *de novo*, without the Appellant having the benefit on legal advice on the issue, and three prosecution witnesses then proceeded to give evidence on that date including the key witness who was the complainant. I am therefore constrained to quash the conviction and sentence on the ground that he was not accorded a fair trial by the trial Court.

The only outstanding issue then is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal 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."**

In **Mwangi v Republic [1983] KLR 522** the Court of Appeal held that:

> "**We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."**

I have reviewed the evidence before the trial Court and it is my view that it raises the possibility of a conviction. In addition, it is my view that taking into account the time that has lapsed, the witnesses will not be difficult to secure and a retrial will therefore not be difficult. I therefore allow the appeal, quash the conviction and sentence of the Appellant by the trial Court. I direct that the Appellant shall be retried by any other magistrate other than Hon. W.K. Cheruiyot at the Tawa Law Courts, and for that purpose he shall remain in custody and shall be taken before the Senior Resident Magistrate at Tawa Law Courts on **3rd December 2015** to plead to fresh charges.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 19th DAY OF NOVEMBER 2015.

P. NYAMWEYA

JUDGE