



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 129 OF 2013

MOHAMMED KIETI KITHUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court
Criminal Case No. 847 of 2012 by Hon. E.M. Muiiru, R.M on 24/5/13)*

JUDGMENT

1. **Mohammed Kieti Kithuku**, the appellant herein was charged with the offence of Defilement contrary to **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence thereof being that on the **14th** day of **September, 2012** at [**Particulars Withheld**] **village Kibwezi** District within Eastern Province intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of **A K M** a child aged **14 years**.
2. In the alternative, the appellant was charged with committing an Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence thereof being that on the **14th** day of **September, 2012** at [**Particulars Withheld**] **village Kibwezi District** within **Eastern Province** intentionally and unlawfully touched the vagina of **A K M** a child aged 14 years.
3. He was tried, convicted on the main count and sentenced to **twenty (20)** years imprisonment.
4. Being aggrieved by the conviction and sentence thereof he appealed on grounds that:-
 - i. The age of the complainant was not proved;
 - ii. Medical evidence adduced was unreliable and did not link the appellants to the offence;
 - iii. The charge was incurably defective.
5. Facts as presented by the prosecution were that on the **14th June, 2012** at about 2.00am, PW1 **A K M** was asleep. She felt cold and woke up only to find the appellant having inserted his penis into her vagina. She had slept with other people in the house. She tried pushing away the appellant in vain. She screamed. Her brother, PW2, **M M** woke up and switched on the light. The accused was naked. Her parents woke up and raised an alarm. Neighbours went to their aid. The appellant was arrested and taken to **Kibwezi Police Station**. The complainant was subjected to medical examination. Investigations were concluded and the appellant was charged.
6. In his defence the appellant opted to remain silent.

7. This being a first appellate court, it is duty bound to re-consider the evidence, evaluate it and draw its own conclusions in deciding whether the judgment of the trial court should be upheld. (See **Okeno versus Republic [1972] E.A. 32**).

8. A perusal of the proceedings of the Lower Court shows that it is not specifically stated that **Section 211** of the **Criminal Procedure Code** was complied with. **Sub-section(1)** of the above mentioned Section provides thus:-

“1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)”.

9. On the 14th May, 2013 the record shows what transpired in court which I wish to reproduce thus;-

“Before me. E. M.Muiru, RM

Prosecutor – IP Ngetich

CC –Mwiwa

Accused – present

Court –Upon analyzing the evidence on record, I find that the accused person has a case to answer.

E.M. Muiru

Resident Magistrate

Accused person has opted to remain silent and await the judgment of the court.

E.M. Muiru

Resident Magistrate

Court –Judgment on 24/5/13

E.M. Muiru

Resident Magistrate”

10. Procedurally, the law requires the accused to address the court. The record does not show if he was given an opportunity of addressing the court. It is stated he opted to remain silent. The question to be posed is whether he understood what he was required to do. What exactly was explained to him? The omission to specifically state compliance with Section 211 of the Criminal procedure Code would have been curable as a technicality if the appellant had participated in proceedings by tendering his defence.

11. The record is also silent on whether he was told of the right to call witnesses following his election to remain silent pursuant to his constitutional rights.

12. It is apparent that what happened was prejudicial to the appellant.

13. This being an error on the part of court the issue to be considered is whether a retrial should be ordered. The principle upheld in ordering a retrial that is acceptable to courts is that each case must depend on the particular facts and circumstances of the case but an order should be made where interest of justice requires it. (See *Richard Omolo Ajuoga versus Republic Criminal appeal No. 223 of 2003; Pascal Ouma Ogolo versus Republic -Criminal Appeal No. 114 of 2006; Benard Lolimo Ekimat versus Republic Criminal Appeal No. 151 of 2004*).

14. A consideration of facts presented clearly show that a verdict of guilty may be returned (*See Mwangi versus Republic[1983]KLR 522*).

15. The appellants were convicted on the 24th May, 2013. He has been incarcerated for one year. He was required to serve a sentence of twenty (20) years. A retrial will not be prejudicial to him.

16. I therefore quash the conviction and set aside the sentence meted out. The appellant will be retried by **Makindu Court**.

17. He will be produced before the court on the 10th day of **NOVEMBER**, 2014.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of OCTOBER, 2014.

L.N. MUTENDE

JUDGE