



IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 26 OF 2014

BETWEEN

FREDRICK OKOTH OKUMU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case No. 128 of 2014 at the Chief Magistrates Court at Homa Bay, Hon. N. W. Kariuki, RM, dated 6th June 2014)

JUDGMENT

1. The appellant, **FREDRICK OKOTH OKUMU**, was charged with defilement contrary to **section 8(1)** as read with **section 8(3)** of the ***Sexual Offences Act, 2006***. It was alleged that on 1st February 2014 at [Particulars withheld] in Mbita District, he intentionally and unlawfully caused his penis to penetrate the vagina of EA, a child aged 13 years. He also faced an alternative count of an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.
2. The appellant was convicted on the principal charge and was accordingly sentenced to 15 years imprisonment. Among the complaints raised by the appellant is that his rights under the Constitution were violated as he was denied time to go through witness statements which were given late and his request for adjournment denied though he was sick.
3. I have reviewed the proceedings and they show that the accused was arraigned in court on 4th February 2014 when he pleaded not guilty. After the plea was taken, the learned magistrate ordered that the accused be supplied with witness statements. The matter proceeded for the hearing of the complainant's evidence that afternoon without objection. After the hearing the matter was adjourned for hearing on 11th February 2014.
4. On 11th February 2014, the prosecutor stated that he had four witnesses present. Initially the accused was ready to proceed but he informed that court that he was not ready to proceed as he did not have statements for the witnesses present and that he only had the witness statement of the complainant who had testified. The court then requested if the copies could be availed by 2.30 pm and the prosecutor agreed. The proceedings were as follows;

Accused

I pray for adjournment to allow me to go through the witness statement properly

Prosecutor

I pray that we proceed with the minor in the afternoon. He can read the statement. It will reduce the chance of interference.

Court

Its 10.48am. The accused shall be provided with witness statement of the minor. We shall proceed at 2.30pm without fail. [Emphasis mine]

5. The matter then proceeded at 2.30 pm where the child testified as PW 2. The prosecution then called PW 3 to testify. After the witness testified, the appellant applied for an adjournment as follows;

Accused

I wish to apply for an adjournment. I feel sickly. I have no appetite and have dizziness.

Prosecutor

We have been here since morning. He didn't mention it. He is developing cold feet. He has not availed any medical evidence to that effect. The court has come all the way to Homa Bay to listen to the case.

Accused

I was told it was one witness.

Court

The accused is clearly not visibly sick on observation. The record clearly shows that the prosecutor told the court that he has 4 witnesses including a minor. I believe he is trying to delay the hearing. The matter shall proceed. [Emphasis mine]

6. The hearing proceeded thereafter and the prosecution called 2 more witnesses. The court proceedings were finalized at 4.55pm.
7. In my view, the appellant was seriously prejudiced in preparing and conducting his defence. While I accept that there may be instances, where a child and vulnerable witness is entitled to protection, it must also be borne in mind that the accused has rights guaranteed by the Constitution. **Article 50(2)(j)** of the Constitution provides that, “Every accused person has the right to a fair trial, which includes the right —to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.’
8. It is clear that the appellant requested for statements to enable him prepare for the case. The prosecutor had indicated that he had only the witness statement for the child (PW 2) who proceeded to testify. While there may have been a basis to insist on the child witness (PW 2) being heard on account of her vulnerability, the court in its ruling made in the morning was clear that the matter would proceed with the child witness and indeed when the appellant applied for an adjournment later than afternoon, he alluded to this fact which the learned magistrate overlooked in rejecting the application for adjournment.
9. The right to receive witness statements is not a perfunctory right. It is a right to enshrined in the Constitution and has been emphasized from time to time by our courts (see **Thomas Patrick Cholmondeley v Republic CA Criminal Appeal No. 116 of 2007 [2008] eKLR**, **Dennis Edmond Akaa and Others v Ethics and Anti-Corruption Commission Nairobi Petition No. 317 of 2012 [2012]eKLR**). It enables the accused prepare for his defence. The accused, who was not represented, could not be expected to read the statements for all the witnesses between 10.30 am and 2.30 pm then proceed to examine all the witnesses who were called on that afternoon. In any

case there was no basis for ascribing any delay on the appellant as he was entitled to an adjournment to prepare his defence.

10. I therefore find that the accused did not have a fair trial and as a result I am constrained to quash the conviction and sentence. As the appeal is on account of a defect in the trial and the complaint leading to the filing of charge occurred in February 2014, I do not think a retrial would be difficult.

11. In the result, the conviction and sentence are quashed. The appellant is to be retried before the Mbita Law Court and shall be detained in custody until 1st December 2014 when he shall be taken before the court to plead to fresh charges.

DATED and DELIVERED at HOMA BAY this 28th day of November 2014

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.