



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CRA NO 141 OF 2011**

*(Arising from original conviction and sentence by Hon R.O. OIGARA, SRM in Kimilili CRC No 843 of 2010)*

**DENIS MASIBO KIMBOTI** ..... **APPELLANT**

**Versus**

**REPUBLIC** ..... **RESPONDENT**

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**JUDGMENT**

**Introduction**

[1] The Appellant was charged with defilement of a child aged between 12 years and 15 years contrary to section 8 (1) and (3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that:

**Denis Masibo Komboti: On the 3rd day of August 2010 at about 7.00 p.m. at [particulars withheld] Mt. Elgon within western Province willfully (sic) and unlawfully committed an act which caused penetration with a child namely R.W a child aged 13 years.**

[2] After the case was fully heard, the Appellant was convicted for the offence of defilement under section 8 (1) as read with section 8 (3) of the Sexual Offences Act, and sentenced to imprisonment for life.

**The Appeal**

[3] The Appellant was aggrieved by that conviction and sentence and he filed this appeal.

[4] The Petition of Appeal was filed on 26/8/2011 and it contained 7 grounds of appeal.

[5] During the hearing the Appellant handed over a document titled “*SUPPLEMENTARY GROUND OF APPEAL*” dated 21/3/2013. The document contains 11 grounds of appeal as well as arguments in support of those grounds. He relied on those submissions entirely and asked the court to consider them. The submissions were accepted by the court.

[6] Through those submissions, the Appellant substituted his earlier grounds of appeal for those in the written submissions. The prosecution did not oppose the substitution. I shall,

therefore, consider only the grounds contained in the written submissions.

#### **DETERMINATION BY COURT**

[7] The Appellant put forth 11 grounds of appeal which I have carefully considered. I have also meticulously perused the record of appeal and thoughtfully analysed the submissions of the Appellant and the Prosecution. I am convinced, for reasons which I shall record, that I should determine only ground number four (4) reproduced below:

**4. THAT, the learned trial magistrate erred in law and fact by failing to consider that the appellant was not given the opportunity to cross examine PW1, PW3, and PW5 as required by the law to test the credibility of the prosecution evidence and meets the end of justice to a fair and impartial hearing as guaranteed under Article 50(1) and (2) of the current 2010 constitution.**

[8] The Appellant argued that he was not allowed an opportunity to cross-examine PW1, PW3 and PW5. From the record, the Appellant was afforded an opportunity to cross-examine PW5, except that he did not put any questions to that witness. It should be understood that failure by the accused or his counsel to put any questions to a witness after being called upon to do so by the court, is not denial of an opportunity to cross-examine the witness. But it is quite another thing when; the court expressly denies cross-examination of a witness; or totally fails to call upon the accused to cross examine the witness; or there is nothing on record to show the accused was afforded an opportunity to cross-examine the witness in question.

[9] From the record, there is nothing to show that the Appellant was called upon by the trial court to cross-examine PW1 and PW3. It was incumbent upon the trial court to have informed the Appellant of the right of cross-examination, especially where he was not represented by a legal counsel, and should have recorded the fact that the Appellant did not have any question to put to the witnesses if that was the case. That should be the standard procedure in a criminal trial. Therefore, that failure by the trial court was a fatal omission which entitles the Appellant to assert that he was not afforded the opportunity to cross-examine those witnesses.

[10] I would want to believe, presumably, the trial court was acting under a misconception that a child of tender age who gives an unsworn statement as a witness for the prosecution, should enjoy the protection that the accused enjoys when he makes unsworn statement in his defence. That is not it. The very nature of a criminal proceeding clothes the accused person with certain staple protections in the Constitution and Statute law as part of the right to fair hearing, say, right to remain silent or give unsworn statement without being liable to cross-examination. In law, there are no such corresponding rights that accrue to the witnesses for the Prosecution. This matter was settled by the Court of Appeal in **MSA CRA No.373 of 2006 Nicholas Mutula Wambua v Republic** where it quoted with approval the decision of the Supreme Court of Uganda in **Sula v Uganda [2001] 2 EA 556** that:

*“The Second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined”.*

[11] That thinking is expressed in Section 208 of the CPC which governs hearing of criminal proceedings in the Magistrate's courts. It provides that during the hearing, *“the accused persons or his advocate may put questions to each witness produced against him”*. Accordingly, all

prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in all criminal trials to obviate an otherwise stable case from being lost on that omission.

[12] The trial court, therefore, fell into an error when it failed to afford the Appellant an opportunity to cross-examine PW1 and PW3. The conviction is, therefore, quashed.

[13] The trial court committed yet another judicial error. It sentenced the Appellant to life imprisonment for the defilement of PW1 who was of the age of 13 years. The appropriate penalty for the offence charged is prescribed in section 8 (3) of the Sexual Offences Act which provides for a minimum of 20 years imprisonment. I would not term the sentence to have been manifestly harsh for the sentence in question is not the sentence provided for under section 8 (3) of the Sexual Offences Act. The sentence was, therefore, illegal and is hereby set aside.

### **Re-trial**

[14] Should I order a re-trial? I have considered the entire case and all the evidence adduced. Although there was no prayer for a re-trial, the principles for re-trial as enunciated in **Benard Lolimo Ekimat v R Criminal Appela No. 151 of 2004** envisage a situation where the court could order a re-trial depending on the facts and circumstances of the case if the interests of justice require it. This is one of the fit cases where a re-trial should be ordered. The error committed by the trial court entitles the Appellant to have the conviction and the sentence set aside, which I have done. However, I do not think the law will ever deny the Appellate court the power to exercise discretion within known legal principles on re-trial of cases where the interests of justice require it. Accordingly, I order the case to be re-tried without any delay. The re-trial should proceed, as far as possible, on day to day basis. The original file of the trial shall be transmitted to a magistrate of competent jurisdiction, other than the trial magistrate herein, for hearing of the case to its logical conclusion.

### **Reasons for not re-evaluating the evidence herein**

[15] I promised to render the reasons for not determining all the grounds of appeal. I considered all the evidence and believed this case was fit for re-trial. A complete evaluation of the evidence adduced before the trial court may occasion prejudice to the entire case, for, there is real possibility that the prosecution may call all the witnesses who have testified already. It is not far-fetched to expect that the Appellate Court may make adverse findings in the appeal which by extension may affect the re-trial. Accordingly, it would not be appropriate or necessary to carry out a complete evaluation of the current evidence on record given the nature of the decision herein.

**Dated, signed and delivered in open court at Bungoma this 22nd day of July, 2013**

**F. GIKONYO**

**JUDGE**

### **In the presence of:**

Mr. Kamau for the State

Appellant in person present

**COURT:** Judgment delivered in open court.

**F. GIKONYO**

**JUDGE**