REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO 104 OF 2010

MICHAEL KAMORU GUANTAI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

INTRUDUCTION

The charge

[1] The Appellant was charged with defilement of a child aged less than 11 years contrary to section 8 (1) and (2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that:

> **MICHAEL KAMORU GUANTAI: On the 23rd day of September 2006 at *[particulars withheld]* in Meru North District within Eastern Province, defiled J G a child aged 7 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 (2) 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 carried 8 grounds of appeal.

[5] During the hearing the Appellant submitted that he was never allowed to cross-examine PW1.

The Respondent opposed the appeal

[6] Mr Ongige opposed the appeal on behalf of the state. Although he submitted that there was sufficient evidence on which the Appellant was convicted, he submitted further that he is amenable to a retrial, for he was of the view that failure to allow cross-examination of PW1 affected the rights of the Appellant. He said the prosecution witnesses are still available and that there will be no difficulties in re-prosecution of the case. The Appellant also informed court in his reply that he was amenable to a re-trial.

DETERMINATION BY COURT

[7] I have carefully and meticulously perused the record of the trial court. And I have thoughtfully considered the submissions of the Appellant and the Prosecution on re-trial. I am convinced, for reasons which I shall record, that I should determine only the ground on failure to allow the Appellant to cross-examine PW1.

[8] From the record, the Appellant was not afforded an opportunity to cross-examine PW1. But I should think it important to mention that, there is a whole world of difference in law between; having no questions to the witness; and being denied an opportunity to cross-examine a witness. 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 or a denial of a right. But it is quite another thing when the trial court; 1) expressly denies cross-examination of a witness; or 2) totally fails to inform the Appellant of the right of cross-examination; or 3) fails to call upon the Appellant to cross examine the witness; or 4) it records nothing or there is nothing on record to show the Appellant was afforded an opportunity to cross-examine the witness in question. The latter situations amount to denial of a right in law and would certainly affect the trial.

[9] From the record, there is nothing to show that the Appellant was informed of the right to cross-examine PW1 or was called upon by the trial court to cross-examine PW1. 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 if the Appellant did not have any question to put to the witness, it should have recorded that fact. That is the law and should be the standard procedure in a criminal trial. Thus, 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. It is a kind of judicial error on which a court of law may ordinarily quash the conviction and set aside the sentence which I hereby do. But I need to add that, the court could still uphold a conviction in a case where the Appellant was not allowed to cross-examine a witness as long as the evidence of the witness who was not cross-examined was not relied upon in the conviction, and *''without that evidence there is an overwhelming story case against the accused"*. The following passage in the decision of the Court of Appeal in MATTAKA & OTHERS v REPUBLIC [1971] E.A. 495 pp. 503 illustrates that approach;

> *"We agree, but we would add that we think that the failure of a trial Court to allow cross-examination of the accused by another will ordinarily result in the quashing of a conviction when the trial Court has relied on the evidence on which it was sought to cross-examine, unless without that evidence there is an overwhelming story case against the accused."*

That cannot be said in the present case as the evidence of PW1 was central in the conviction. It is also a kind of judicial error on which a court of law may order a retrial. Before, I make the order of retrial, let me state the following.

[10] The court had occasion to consider a similar situation in **BGM HCCRA NO 141 OF 2011 [2013] eKLR,** and rendered itself thus:

> *[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 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.

Re-trial

[11] Should I order a re-trial? I have considered the entire case and all the evidence adduced. The principles for re-trial are enunciated in **BENARD LOLIMO EKIMAT V R CRIMINAL APPELA NO. 151 OF 2004** and 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 Determining all Grounds of Appeal

[12] I promised to render the reasons for not determining all the grounds of appeal. I perused and considered all the evidence and I believe 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.

ORDERS

[13] I hereby quash the conviction and set aside the sentence. The Appellant shall be set to liberty forthwith unless lawfully held in custody. The Appellant shall be admitted to bail on the terms that were set by the trial magistrate on 28.9.09.

[14] I also order a re-trial of the case by magistrate of competent jurisdiction, other than the trial

magistrate herein, for hearing of the case to its logical conclusion. Needless to say the trial shall be in accordance with the applicable criminal law, criminal procedure and law of evidence which govern trials before a subordinate court.

Dated, signed and delivered in open court at Meru this 22nd October, 2013

F. GIKONYO

JUDGE