



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NUMBER 41 OF 2012

SIMON GITHINJI MBORA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Siakago 531 of 2010 by S.M. Mokuu PM on 29th February, 2012)

JUDGMENT

The appellant in this case was charged with the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act and the alternative charge of an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was convicted and sentenced to life imprisonment. He appealed against conviction and sentence.

In his appeal, he contended that the learned Magistrate based the conviction on evidence of the child when he did not have an opportunity to cross-examine the child.

Learned State Counsel for the state argued that as the child was examined and found incapable of giving sworn evidence, there was no right for the appellant to cross-examine the accused.

According to the record, the Magistrate conducted the *voire dire* examination and concluded that, “***the witness is knowledgeable, however, she does not understand the nature of an oath. She shall give unsworn statement herein.***” The child, PW 1, gave unsworn testimony. The record does not show that the appellant was given an opportunity to cross-examine the child. As a result, the appellant was convicted on the basis of the evidence of the direct evidence of the child which was corroborated by other evidence.

It is a fundamental right of every accused to confront his or her accuser and to ask questions. Article 50 (1) of the Constitution which enables the accused to “adduce and challenge evidence” underpins this right which is part of the right to a fair trial. Of course where a child is involved, the court will provide appropriate safeguards.

In the absence of an indication in the record that the appellant was given the opportunity to cross-examine the complainant, the appeal must be allowed. The conviction is quashed. In light of the circumstances of the case, I order a re-trial of the appellant.

D.A.S MAJANJA

JUDGE

16.10.13

Court:

Judgment read and delivered in open court this 16th day of October, 2013

D.A.S MAJANJA

JUDGE

16.10.2013

In the presence of

M/S Aluda for state

Appellant

Njue – Court clerk.