

REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 319 of 2010

CHRISPUS MASAKA APPELLANT

=VERSUS=

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 78 OF 2009 of the Resident Magistrate's Court at Wundanyi: F.K. Munyi – R.M.)

JUDGEMENT

The Appellant **CHRISPUS MASAKA** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Wundanyi Law Courts. The Appellant had been arraigned before the trial court on 10th February 2009 facing a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) as read with SECTION 8(2) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were given as follows:

“On the 1st day of February 2009 at [particulars withheld] within Coast Province, had unlawful carnal knowledge of A W a girl of the age of 7 years.”

In addition the Appellant faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**. The Appellant entered a plea of ‘**Not Guilty**’ to both charges and his trial commenced on 30th April 2009. The prosecution led by **CHIEF INSPECTOR OMBOGO** called a total of four (4) witnesses in support of their case. The complainant **A W** a girl of 7 years told the court that on 1st February 2009 her grandmother went out to graze livestock leaving her at home with her younger brother **M** and the appellant. The Appellant took her into the house placed her on the bed and defiled her.

On his part the Appellant gave an unsworn defence in which he denied having defiled the child at all. On 28th May 2010 the learned trial magistrate delivered her judgment in which she convicted the Appellant of the main charge of defilement.

I have carefully perused the record of the trial before the lower court and I have noted a serious anomaly which to my surprise appears not to have been noticed or addressed by the learned State Counsel. On 30th April 2009 the record shows that the complainant was called to the stand to give her evidence. The trial magistrate did conduct a ‘**voire dire**’ examination in accordance with Section 19 of the Oaths and Statutory Declarations Act. The court found that the complainant being a child of tender years did not understand the nature and/or meaning of an oath and ruled that the child give unsworn testimony. At page 4 of the record the complainant did give unsworn testimony. However the Appellant **was not** accorded an opportunity to cross-examine the child. This is a serious and fatal omission by the trial court. Natural law demands that one must be allowed to face his accuser. In this case the accuser was the complainant. The Appellant was fully entitled to test the evidence of this child by way of cross-examination. The fact that the child made an unsworn statement did not negate the right of the Appellant to cross-examine her. The trial magistrate after recording the unsworn statement of the child immediately proceeded to place the 2nd witness on the stand. Failure to accord the Appellant the right to cross-examine

the complainant nullifies the whole trial. On this basis alone this appeal succeeds. I quash the conviction of the Appellant and set aside the term of life imprisonment imposed on him.

I have considered the serious nature of the charge as well as the fact that the complainant was a minor. I have also considered the fact that the omission which led to nullification of the trial cannot be blamed on the prosecution. The Appellant having been sentenced in May 2010 has served roughly two years out of a life term of imprisonment. Based on the above considerations I find that a re-trial would not unduly prejudice the Appellant. As such I do hereby direct that the Appellant be returned to Wundanyi Law Courts for plea to be taken afresh. Mention on 14th November 2012 before the magistrate in charge at Wundanyi Law Courts

Dated and Delivered in Mombasa this 9th day of November 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Tanui for State

Appellant in person