



**Masheti v Republic (Criminal Appeal 66 of 2018)
[2023] KEHC 20425 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 66 OF 2018
WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

BONIFACE MASHETI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. Dennis Ogal, Resident Magistrate, RM, in Hamisi SRMCSO No. 2 of 2017, of 30th June 2017)

JUDGMENT

1. The appellant, Boniface Masheti, had been charged before the primary court, of the offence of defilement, contrary to section 8(1), as read with section 8(2), of the *Sexual Offences Act*, No 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on December 31, 2016, at Kipchekwen Sub-Location, Hamisi Sub-County, within Vihiga County, he intentionally and unlawfully caused his penis to penetrate the vagina of TM, a child aged 7 years. The appellant denied the charges, on January 4, 2017, and a trial ensued, where 4 witnesses testified.
2. PW1, TM, was the complainant. She described how she was coming from the stream, met the appellant, who called her, pulled her to his house, removed her underwear, removed his trousers, and inserted his penis into her vagina. She reported the matter to her mother. PW2, RNM, was the mother of PW1. She noted that PW1 was in pain and was uncomfortable, and she established that her clothes had bloodstains, she was not walking properly and was in pain. PW1 told her what the appellant had done to her. She thereafter took PW1 to hospital. PW3, Kosgei Erick, was the clinician who prepared and presented the P3 Form on PW1. He noted a broken hymen, vaginal walls were reddish, and a foul-smelling discharge was oozing out. Laboratory tests revealed traces of blood in her urine and epithelia cells. PW1 had been treated earlier, elsewhere, before she was examined by PW3, for the purposes of filling the P3 Form. PW4, No xxxx Danstone Wangila, was the investigating officer.



3. The appellant was put on his defence, *vide* a ruling that was delivered on April 20, 2017. He made an unsworn statement. He denied the charges. He did not testify about the date when the offence was allegedly committed, but on the events on the day of his arrest.
4. In its judgment, the trial court found the appellant guilty on the main charge, which it found to have had been proved beyond reasonable doubt. He was convicted under section 8(3) of the [Sexual Offences Act](#), instead of section 8(2), under which he had been charged. He was sentenced to life imprisonment.
5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that Article 50(2) of the [Constitution](#) was violated; there was no evidence on identification; the evidence was flimsy; among others.
6. The appeal was canvassed by way of submissions. Both sides submitted in writing. In his written submissions, the appellant argues that the sentence was excessive, the evidence was inadequate, Article 50(2)(j)(g)(h) of the [Constitution](#) was violated, and his mitigation was not considered. The respondent submitted on compliance with Article 50(2)(j), pointing out that though the court had ordered that the appellant be supplied with the prosecution evidence, he was required to pay for it, and there was no evidence as to whether the same was ever paid for or ever supplied. It is conceded that that constitutional provision was violated, and that the appeal ought to be allowed, and a retrial ordered.
7. As the appeal is conceded by the respondent, I need not belabour the point. The [Constitution](#) does not pass the cost of accessing the prosecution evidence to the accused person. Passing that cost to the accused would be an impediment to access to justice, and the State should provide the evidence free of charge, or at its own cost.
8. Other than the matter of furnishing the accused with evidence, Article 50(2) also talks about the accused being informed of his right to an Advocate of his own choice, and where he cannot afford one, an Advocate be provided by the State, where the charge faced is complex, or he is indigent or injustice would otherwise be occasioned. The charge faced by the appellant exposed him to mandatory life imprisonment, upon conviction. The trial record is silent on whether the trial court informed the accused of those rights, as required by the [Constitution](#). The silence in the record would suggest non-compliance.
9. The failure to comply with those 3 constitutional dictates rendered the trial unfair. Article 2(4) of the [Constitution](#) provides that any act by anyone, including the court, which violates any of the provisions of the [Constitution](#), renders the act invalid. The failure, therefore, by the trial court, to comply with those provisions in Article 50(2), amounted to violations or contraventions or non-compliances, which tainted the proceedings from inception, rendering the entire trial a nullity. That then meant that there was a mistrial. I hereby, therefore, declare that the trial of the appellant herein, in Hamisi SRMCSO No 2 of 2017, was a mistrial. The respondent has invited me to order a retrial. As the respondent has the constitutional mandate to make decisions on public prosecutions, and is ready to prosecute the appellant afresh, I do hereby order that the appellant be retried.
10. Consequently, I do hereby quash the conviction of the appellant, in Hamisi SRMCSO No 2 of 2017, on June 30, 2017, and set aside the sentence imposed on him. The prisons authorities shall hand him over to the police, who shall forthwith present him to the Hamisi Magistrate's court, for his retrial, by a magistrate, other than Hon Dennis Ogal. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

W MUSYOKA



JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Edward Makokha Oduor, the appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

