



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 154 OF 2019

JOHN MWASI MWACHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence of Hon. I. G. Ruhu - RM., dated 20th September, 2019 in the SPM'S Court at Kimilili S. O. A. In Criminal Case No.26 of 2019, Republic vs John Mwasi Mwachi)

JUDGEMENT

The appellant has appealed against the prescribed minimum and mandatory sentence of 20 years' imprisonment in respect of the offence of defilement contrary to section 8 (i) as read with section 8(3) of the Sexual Offence Act No.3 of 2006.

In his petition of this court, the appellant has raised 8 grounds of appeal; which are as follows:

“1. That, the trial magistrate erred both in law and facts by failure to analyze the whole evidence where age as major ingredients in a sexual offence was not proved p3 and witnesses stated age of complainant as 17 years yet the charge shows 14 years.

1. That, the charge sheet is incurably defective. The OB No.XX/XX/X/2019 DEFERS WITH OB NO. XX/XX/2019 P3 age 14 years differs with 17 years between charge and evidence in p3 and witnesses' evidence.

2. That, witnesses are not credible they gave contradictory inconsistency and contradictory evidence contrary to section 163 cap 80.

3. That the appellant was not scientifically tested DNA forensic tests to prove the guilt hence appellant was prejudiced and section 36(i) S.O.A no. 3 of 2006 grossly violated.

4. That the present case was not proved to the regained standard. It was farmed fabricated coached against the appellant as it lacked probative values to sustain a conviction hence bad in law.

5. That the sentence against the appellant is excessive deeming and arbitrary given that both death and life sentence convicts have their sentences reduced to as low as 10 years, 12 years and 15 years by different counts through the republic cite FRANCIS K. MURUATETU AND ANOTHER – VS REPUBLIC petition no.15 of 2006.

6. Those crucial witnesses were never summoned to testify.”

In his written submissions the appellant has submitted that the hearing commenced notwithstanding that he was not ready to proceed. According to the record of the proceedings, as at that time, the appellant had not been supplied with witness statements. The appellant now submits that this was a violation of his rights under article 50(ii)(c)(j) of the 2010 Constitution of Kenya. This submission is supported by the record of the proceedings of 19th March, 2019 which are as follows:

“19.3.19

Before I. G. Ruhu – RM

Prosecutor: Thuo

Court Assistant: Anthony

Accused present

Prosecutor: Matter is coming up for hearing. I am ready to proceed with 5 witnesses.

Accused: I am not ready to proceed as am yet to be supplied with copies of witness statements.

Court: I have observed that the victim is a pupil/student. We will take the evidence of the said witness and statement of the victim forthwith. Other statements to be supplied before next hearing date. Hearing after call over.”

I find that the Constitution guarantees to an accused in terms of article 50(2)(c) (j) and (k) the right to the following:

“(c) to have adequate time and the facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;”

It is clear from the foregoing that the accused was not supplied with witness statements in good time to enable him prepare for his defence. He was therefore prevented from conducting an effective cross-examination. The fair trial rights of the accused were infringed because the trial court was of the view that since the victim was a pupil/student, who was aged 14 years, her evidence had to be taken immediately.

I bear in mind the provisions of article 53(2) of the Constitution which direct that: -

“a child’s best interests are of paramount importance in every matter concerning the child.”

These provisions could not have formed the basis for infringing the fair trial rights of the accused. The fair trial rights of the accused were not depended upon the victim being a 14 year old pupil.

In the premises I find that the accused did not have a fair trial in the lower court. It was therefore a defective trial. I find that it is academic to consider the other grounds of appeal; since it is not the duty of this court to answer academic questions; since the foregoing ground of appeal has disposed of the real main issue in the appeal. See *The Attorney General V Ally Kleist Sykes* (1957) EA 237 at page 258 para. F & G.

In the circumstances I find that his appeal succeeds solely on this failure to accord the appeal a fair trial with the result that the conviction and sentence are hereby quashed.

The only issue left for consideration is whether I should order for a new trial. I find from the evidence of the victim (PW1), the registrar of births (PW2 – Herbat Omondi Orenge), Mathayo Wafula (PW3), Hannington Wafula (PW4), Abraham Wekesa (PW5), Patrick Kipkemoi Koech (PW7), Dabson Nyongesa Wafula (PW8) and No.73691 P. C. Silas Cherono (PW9) that if their evidence is believed a conviction might result.

I further find that the accused has been in custody since 20th September, 2019 which translates to a period of about two years. I also find that the penalty provided for is a mandatory minimum sentence of 20 years’ imprisonment.

After taking into account the foregoing matters, I find that it is in the interest of justice that a re-trial should be ordered in terms of section 354(3)(a)(i) of the Criminal Procedure Code [Cap 75] laws of Kenya.

I therefore order that the accused be re-tried by another magistrate of competent jurisdiction; other than the one who convicted and sentenced him.

In the interim period the accused will remain in custody pending his production in the court of the Chief Magistrate at Bungoma for retrial purposes as soon as practicable.

JUDGMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT BUNGOMA ON THIS DAY OF THE 9TH SEPTEMBER, 2021

J. M. BWONWONG’A

JUDGE

In the presence of

C/A – Kizito

The appellant

Ms. Nyakibia for the Respondent