



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL APPEAL NO. 127 OF 2017**

**CHARLES MAKORI MISATI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the judgment (conviction and sentence) of Hon. Ng'ang'a, SRM, delivered on 30/8/2017 in the Chief Magistrate's court at Narok, in Criminal Case No. 15 of 2015 R. V. Charles Makori Misati)***

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of twenty (20) years imprisonment in respect of the offence of defilement contrary to section 8 (1) of the as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. Ms. Torosi, counsel for the respondent has supported both the conviction and sentence.
3. The appellant, has in his amended grounds of appeal raised three grounds of appeal in his petition of appeal.
4. It is ground 3, which raises weighty issues of law. In that ground the appellant has faulted the trial court for failing both in law and fact to find that he was not accorded a fair trial. The appellant has cited article 50 (2) of the 2010 Constitution of Kenya which reads: ***“every accused person has a right to a fair trial which includes the right: -***

***(c) to have adequate time and facilities to prepare a defence.”***

5. The appellant has submitted that on 5<sup>th</sup> May 2017, he made an application to have two witnesses who had testified to be recalled for further cross examination. These were the complainant and her father (Pw 2). The reason he gave for doing so was because there were questions he had not asked them since; ***“I did not get a chance as I did not have statements.”***

6. In response to the application of the appellant, the prosecutor stated in part that: ***“...I am not aware if the witnesses can be found.”***

7. In his ruling the court stated that: ***“... I have considered the application on the record, there is no indication statements had been supplied. On that basis I allow the application by the accused to recall Pw 1 and Pw 2 for further cross examination.***

**Orders:**

- 1) ***Pw 1 and Pw 2 to be recalled for further cross examination.***
- 2) ***Statements to be supplied today by close of business.***
- 3) ***Mention 23/05/2017 to confirm supply of statements.”***

8. On 23/05/2017, the appellant confirmed having been supplied with copies of those statements.

9. The appellant has submitted that it was not fair for him to proceed with the trial without those statements. According to the appellant he was denied the equal protection of the law as required by article 27 (1) of the Constitution which reads: ***“(1) every person is equal before the law and has the right to equal protection and equal benefit of the law.”***

10. The record of the proceedings shows that the court fixed the case for hearing on 21/7/2017. On that date the prosecutor informed the court that they had not been able to trace Pw 1 and Pw 2. The prosecutor also told the court that the complainant minor was said to be having

an affair with a teacher at [particulars withheld] primary school and that they left the home area to unknown destination. The court granted the prosecution a mention on 25/7/2017 for the investigating officer to attend court. On that date the investigating officer, No. 772999 Cpl Joyce Ruto (PW 4) attended court. She informed the court that when the case came for plea, Pw 1 and Pw 2 insisted that they had settled. She beseeched them to attend the court during the first hearing. When she called them they refused to take her call. She then liaised with the head teacher, who told her that the complainant minor had removed from school. She was told they had relocated to unknown destination.

11. Following, the explanation of the investigating officer the court vacated its earlier order, which had required the recall of Pw 1 and Pw 2. It then ordered the hearing to proceed. As a result, the prosecution then called No. 772999 Cpl Joyce Ruto (Pw 4), who testified and thereafter the prosecution closed its case.

12. The appellant was then put on his defence. The appellant elected to make an unsworn statement, denying the offence. He stated that on 1/3/2017 he left church. DMO (Pw 2), the father of the complainant went and had him arrested him saying that he had sexual intercourse with his daughter. He was then taken to Narok police station. He stated that Pw 2 had a dispute with his father. He finally stated that did not know the complainant and he was suffering for an offence that he did not commit.

13. Ms. Torosi, counsel for the respondent submitted in opposition to the appellant's submission that he did not have a fair trial. She submitted that the appellant had been given ample time to cross examine FK (Pw 1), who was the complainant and his father (Pw 2). According to her, the appellant was not prejudiced as he was given enough time to cross examine them. She further submitted that the attempted failure to recall Pw 1 and Pw 2 was frustrated by forces beyond the control of the police.

14. I have considered the rival submissions of the appellant and counsel for the prosecution. I find that on the evidence the appellant cross examined both Pw 1 and Pw 2 without having been supplied with their witness statements in terms of article 50 (2) of the 2010 Constitution of Kenya which reads: ***"every accused person has a right to a fair trial which includes the right: -***

***(2) (c) to have adequate time and facilities to prepare a defence."***

15. In this regard, I find that the prosecution failed in its disclosure obligations to timeously supply the statements to the appellant. This lack of timeous disclosure had the effect of disabling the appellant from conducting an effective cross examination. It therefore follows that the right of the appellant to effectively cross examine Pw 1 and Pw 2, which is guaranteed by article 50 (2) (k) of the Constitution was also breached.

16. Furthermore, despite the court ordering that Pw 1 and Pw 2 be recalled for further cross examination, the order was not executed since both Pw 1 and Pw 2 had relocated to unknown destination. According to the explanation of the investigating officer, Cpl Joyce Ruto, both Pw 1 and Pw 2 told her that they had settled the matter. This was when the case came for plea.

17. I do not agree with the prosecution that the appellant was not prejudiced by the absence of Pw 1 and Pw 2 for further cross examination. I find that the right of the appellant to effectively cross examination Pw 1 Pw 2 rendered his trial fatally unfair. In other words, he was materially prejudiced.

18. I also find that it was within the power of the prosecution to timeously supply the statements to the appellant. The prosecution by their failure set in motion the events that rendered the trial unfair. They are therefore to blame for the unfair trial that resulted due to their failure to timeously supply the statements. I therefore reject their submission that the appellant was not prejudiced.

19. In the premises, I find that ground 3 is meritorious and I hereby uphold it

20. In the light of the foregoing findings, I find that it is moot or academic to consider and making findings in respect of the remaining two grounds of appeal, since the findings of the court in respect of those grounds depended upon the issue as to whether the appellant had a fair trial. The reason for this is that the primary duty of the court is to resolve the real issues in dispute. See the ***Attorney General V Ally Kleist Sykes [1957] EA 257***. It is clear that the issues raised in grounds 1 and 2 are now moot or academic.

21. The appeal of the appellant succeeds with the result that the conviction and sentence are hereby quashed.

22. Since the trial of the appellant was unfair, the only issue now remaining for determination is whether or not I should order for a re-trial before a competent magistrate, pursuant to the court's powers in terms of section 354 (3) (a) (i) of the Criminal Procedure Code (Cap 75) Laws of Kenya. The answer to this issue lies in the inability of the police to trace the key witnesses namely Pw 1 and Pw 2. It seems the complainant (Pw 1) and her father (Pw 2) were not interested in the prosecution of the appellant, hence their relocation to an unknown destination. In the circumstances, an order for the re-trial of the appellant will be an exercise in futility. I therefore decline to order for the re-trial of the appellant.

23. The upshot of the foregoing is that the appellant is hereby ordered set free unless held on other lawful warrants.

Judgement signed, dated and delivered in open court this 19<sup>th</sup> day of February, 2020 in the presence of the appellant and Ms. Torosi for the respondent.

**J. M. Bwonwong'a**

**Judge**

**19/2/2020**