REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 29 OF 2018

ROMANUS OJERO ANDERE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From the judgment, conviction and sentence by Hon E.N.Wasike in Bondo PM Sexual Offence Case No 47 of 2017 dated ……

JUDGMENT

1. The appellant was charged with ***defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act no. 3 of 2006.*** The particulars of the offence were that on the 23.11.2017 at about 1300hrs in Gem Sub-County within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of MA[full name withheld] a child aged 15 years. The appellant also faced an alternative charge of ***committing an indecent act with a child contrary to section 99(1) of the sexual offences act no. 3 of 2006. it was alleged that*** on the 23.11.2017 at about 1300hrs in Gem Sub-County within Siaya County, intentionally and indecently touched the vagina of MA[full name withheld] with his penis a child aged 15 years.

2. The appellant denied the charges and on being placed on his defence he testified on oath and called one witness.

3. This being a first appellate court, this court is obliged to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses they testified.

4. Revisiting the evidence before the trial court, I have made the following initial and preliminary observations which are critical as they go to the root of the trial:

5. Fundamentally, the trial court record shows that albeit the witnesses were sworn to testify, and were cross examined, there is nothing on record to show in which language the witnesses whether for the prosecution of defence testified. In other words, the learned trial magistrate did not indicate, on the record, the language in which the witnesses testified. In **FRANCIS KOIKAI KATIKENYA Vs REPUBLIC, CRIMINAL APPEAL NO. 280/2006**, the Court of Appeal held as follows:

"A careful reading of Sections 197 and 198 Criminal Procedure Code, clearly shows that failure to show, demonstrably, the language used in Criminal proceedings, will, in an appropriate case, this being one, vitiate the trial. True, as Mr. Kaigai submitted, the appellant was given an opportunity to, and he cross-examined various witnesses. However, he faced capital charges and he stands convicted of the same. It may not be possible to fathom the extent of any prejudice that might have occasioned to him."

6. On that basis alone, the Court of Appeal allowed the appeal.

7. In the instant appeal, the appellant utilized the opportunity to cross-examine the prosecution witnesses. However, that would not reverse the legal requirement imposed on the trial court, to indicate on the record the language spoken by the witnesses as they testified.

8. Article 50(2)(m) of the Constitution guarantees every accused person the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. The plea was taken in Kiswahili language on 8/12/2017 and thereafter the prosecution witnesses were lined up to testify against the appellant commencing with the complainant as PW1who all gave evidence on oath and albeit she was said to be a minor aged 15 years old, no voire dire examination was carried out on her. The language of interpretation at the *coram* level is stated to be ENG/KISW/DHOLUO. However, there is no indication as to which of the three languages the witnesses testified in.

9. In **DEGOW DAGANE NUNOW Vs REPUBLIC, CRIMINAL APPEAL NO. 233 of 2005 (Unreported),** the Court of Appeal stated:

"Of course there was, right from the beginning of the trial an interpreter be present in court; that is clearly shown in the record of the

Magistrate. What is not shown throughout the record is the language in which the appellant or the witnesses addressed the Magistrate."

10. The Court then went further to state as follows in the judgment:

> ***"The provisions show that the question of interpretation of evidence to a language which an accused understands is not a matter for the discretion of the trial Magistrate. It must be done, and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak."***

11. Having made it clear that section 198 of the Criminal Procedure Code and section 77 (2) of the Repealed Constitution gave to an accused person the right to be tried in a language he understands, the Court of Appeal concluded as follows:

> ***"It is the responsibility of the trial courts to ensure compliance with those provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place."***

12. There is nothing useful that I can add to that statement of law.

13. For want of the language in which the witnesses including the appellant and his witness gave evidence, I find and hold that the trial of the appellant was fatally vitiated. I quash the appellant's conviction and set aside the sentence of 20 years imprisonment imposed on him.

14. On whether to order for a retrial, I note that the offence charged is serious and the appellant has not served the sentence imposed substantially. For the above reason, I find that it is in the interest of justice to order for a retrial of the appellant who has served only two years of the twenty years in prison.

15. Accordingly, I order that the appellant shall be produced before Bondo Principal Magistrate's Court for retrial before any other Magistrate competent to hear and determine the case against him, considering that Hon E.N Wasike has since been transferred from the station.

16. Orders accordingly.

Dated, Signed and Delivered at Siaya this 10th Day of February 2020

R.E.ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Okachi SPPC for the Respondent

CA: Brenda and Modestar