



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 110 OF 2019

Samson Matheka NgoliaAppellant

-Versus-

Republic..... RESPONDENT

(Being an appeal from the original judgment of Hon. Mwaniki (SPM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 309 of 2014 delivered on 11th March, 2019).

JUDGMENT

1. **Samson Matheka Ngolia** the Appellant was charged and convicted of the offence of defilement. The complainant was aged 16 years. Upon conviction he was sentenced to 15 years' imprisonment.
2. Being dissatisfied with the judgment he filed this appeal citing the following amended grounds:
 - a. That**, the learned trial Magistrate erred in law and in fact by conviction without regard to his basic right of disclosure of the prosecution evidence which was intended to be brought against him as laid down under Article 50(2)(c)(j) of the constitution of Kenya 2010.
 - b. That**, the learned trial Magistrate erred in both points of law and facts by convicting him on a fatally defective charge sheet.
 - c. That**, the learned trial Magistrate erred in law and in facts when he convicted him by failing to consider one of the key ingredients establishing the offence of defilement i.e. penetration which was not established beyond reasonable doubts as established by law.
 - d. That**, the learned trial Magistrate erred in law and facts by convicting him while he failed to consider that the prosecution evidence was untenable, unworthy, contradictory, inconsistency, and full of lies hence not capable to pass the test of credibility.
 - e. That**, the learned trial Magistrate erred in law and facts by convicting him in absence of expert evidence and ignoring other vital witnesses.
 - f. That**, his conviction based on the evidence was manifestly unsafe.
3. The prosecution's case is premised on the evidence of three (3) witnesses. Pw1 (MM) was the complainant while Pw2 **AKM** is Pw1's mother. Pw3 **No. 106831 PC Chepkurui** was the investigating officer who had taken over from some other officer.
4. This being a first appeal this court has the duty to re-analyse and reconsider the evidence on record and arrive at its own conclusion. See **Okeno –vs- Republic (1972) E.A 32, Boru & Anor –vs- R (2005) I KLR**.
5. Upon perusal of the record herein I do note that the Appellant was released on cash bail of Kshs.30,000/= by the trial court. He was placed on his defence on 27th February 2018 and the matter set for defence hearing on 16th July 2018. He stopped coming to court and a warrant of arrest was issued against him and his cash bail forfeited.
6. On 7th February 2019 and in the absence of the Appellant the prosecution applied for the defence case to be closed and judgment made. The court granted the order sought.
7. Judgment was then again delivered in the absence of the Appellant and he was sentenced to 15 years' imprisonment. This was on 27th May 2019.

8. The Appellant was finally apprehended and arraigned in court on 13th June 2019, when he was informed of the outcome of the case and he was committed to prison to start serving sentence.

9. The charge facing the Appellant is a felony. Section 206 Criminal Procedure code which deals with instances where parties do not appear after an adjournment provides as follows:

Section 206(4) *If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.*

10. My view is that when an accused is facing a felony the court should be abit hesitant in proceeding with the case in the accused's absence unless the circumstances really call for it. In the instant case a warrant of arrest was issued but before its execution the trial court closed the defence case without giving him a hearing. A judgment was then delivered and a sentence passed in his absence.

11. Further on sentence section 216 Criminal Procedure Code provides: -

“The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence at it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.”

The Appellant did not have any opportunity to mitigate as is required by the law.

12. My finding is that failure to accord the Appellant an opportunity to defend himself violated Article 25 (c) of the constitution which provides: -

Despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited –

(c) the right to fair trial;

And

Article 50(2) (a) (c) (e) (f) (i) (j) (k) and (p) of the constitution which provides: -

(2) Every accused person has the right to a fair trial, which includes the right –

a) To be presumed innocent until the contrary is proved;

c) To have adequate time and facilities to prepare a defence;

e) To have the trial begin and conclude without unreasonable delay;

f) To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

i) To remain silent, and not to testify during the proceedings;

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;

p) To the benefit of the least severe of the prescribed punishments for the offence has been charged between the time that the offence was committed and the time of sentencing; and

13. In the interest of justice, I set aside all the proceedings and orders made on 7th February 2019. The judgment delivered on 27th May 2019 is set aside and the resultant sentence set aside.

14. The Appellant shall be arraigned before any Magistrate at Makueni Law courts besides Hon. Mwaniki on 20th July 2020 for purposes of taking directions on how to proceed with his defence.

15. If the Appellant is convicted the trial court must take into account, the period he has been in prison since the time he was committed.

Orders accordingly.

Delivered, signed & dated this 15th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge