



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCRA NO. 18 OF 2019**

**CHRISTOPHER NJERU GITHINJI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original conviction and sentence of Hon. M. Sudi S.R.M, dated 20<sup>th</sup> June 2019 at the Chief Magistrate's Court at Chuka in SO case No. 16 of 2016).**

**J U D G M E N T**

The Appellant was charged before the Chief Magistrate's Court Chuka with the offence of defilement contrary **to Section 8(1) and (2) of the Sexual Offences Act in Criminal Case No. 16/2016**. It was alleged that on 9<sup>th</sup> October 2016 at around 6.00 pm within Tharaka Nithi County the Appellant unlawfully and intentionally caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of one AN a girl aged eleven years. The Appellant pleaded not guilty when he was arraigned in court on 17<sup>th</sup> October 2016.

1. After a full trial was conducted, the Appellant was found guilty, convicted and sentenced to imprisonment for ten years. The Appellant was dissatisfied with the conviction and sentence and filed this appeal which raised seven grounds. The Appellant sought and was granted leave to file amended Petition of Appeal. The Petition was filed on 24<sup>th</sup> February 2020 and raises the following grounds:-

**1. That the learned trial magistrate erred in law and fact when she failed to note that there was no presence of spermatozoa in the victim's vagina during examination, that the vagina had no injuries and no genital bruises or lacerations were noted and proceed to hold that the medical evidence corroborated the victims testimony of penetration.**

**2. That the learned trial magistrate erred in law and fact when she held that the absence of the hymen in the vagina was corroboration for proof of penetration.**

**3. That the learned trial magistrate erred in law and fact by convicting the appellant only on the strength of testimony of a single witness whereas that witness was not a truthful witness.**

**4. That the learned trial magistrate erred in law and fact by failing to ensure that the appellant was provided with the witness statements by the respondent at the commencement of the trial.**

**5. That the learned trial magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies .**

**6. That the learned trial magistrate erred in law by disregarding the appellant's defence without giving cogent reasons for the same.**

2. The applicant prays that the appeal be allowed, the conviction and sentence be set aside and the appellant be set free.

3. The respondent opposed the appeal and prays that the conviction and sentence be upheld.

4. The brief facts of the case are that the complainant who was then a girl aged twelve years gave her evidence on oath and told the court that on 9<sup>th</sup> October 2016 at about 6.00 pm, on a Sunday, she was accompanied by her cousin FK and reached a place called Kaugori. She met with the Appellant and he asked her where she was going. The complainant told her that she was going to Ikuu. The Appellant offered to

take her there. The Appellant had a motor cycle. The complainant had known him before. On the way the Appellant headed to another direction. The Appellant went and parked the motor cycle at a gate then held the complainant by the hand and warned her not to scream. The Appellant removed keys from his pockets and entered the gate then opened a door. He led the Appellant into a house and closed the door behind him. He then removed her clothes then removed his penis. The Appellant laid her on the bed and penetrated her vagina with his penis. The Appellant kept the complainant in his house upto 8.00 pm. The Appellant experienced pain as the Appellant inserted his penis all the way inside her vagina. The Appellant did not use a condom. It was her first time to engage in such act. She did not see blood but she was watery.

5. The Appellant wore his clothes and the complainant wore hers. He led her outside and dared her not to tell anyone or he would strangle her. He carried her gain upto Ikuu and she went home.

6. The Appellant did not tell her mother what had happened. K informed the complainant's mother. She was taken to the AP Camp. The Appellant was arrested. The complainant was escorted to Chuka Hospital for treatment. She was examined by Josph Mwenda (PW5). On examination, the hymen was missing but no genital bruises or lacerations, no discharge or blood was noted. She was examined on 12<sup>th</sup> October 2016 which was three days after the incident. The P3 form PRC Form and treatment notes were produced as exhibit P2 a, b and c respectively. The Appellant was then charged with this offence.

The Appellant gave unsworn Statutory Statement in his defence and told the court on the material day between 2.00pm and 3.00 pm he carried three girls on his motor bike and dropped them at Kibiru. Later on Tuesday he was arrested and shown three girls who he said he had seen them before. He was then charged in court.

7. This appeal proceeded by of written submissions. For the Appellant, submissions were filed by Muthomi Gitari & Co. Advocates. For the State, submissions were filed by the D.P.R.

8. I have considered the proceedings and Judgment before the lower court, and the submissions. This is a first appeal and this court has a duty to re-evaluate the evidence which was tendered before the trial court, analyse it and come up with my own independent decision. I however supposed to bear in mind that unlike the trial court. I had no opportunity to see and hear the evidence of witnesses when they testified and observe their demeanor and leave room for that. See the case of Okeno -v- Republic 1972 E.A 32. In the case of Kiilu & Another -v- Republic (2005) KLR 177. The Court of Appeal stated with regard to the duties of the 1<sup>st</sup> Appellate Court:

**“ An Appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision int evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions..**

**It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make tis won findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”**

### Analysis of the Evidence

PW 1 AN a girl aged twelve (12) years testified on Oath after *Voire Dire* examination. The trial magistrate found that she was intelligent and understands the value of the Oath. She was at that time, a class eight (8) pupil at K.P.S. She told the court that on the material day at 6.00pm that is 9<sup>th</sup> October 2016 which was on a Sunday she was in company of her cousin at Cheera. She met the appellant who asked her where she was going and upon telling him that they were going to Ikuu, he offered to take them there. The Appellant had a motor cycle which was blue in colour. She testified that on reaching Ikuu the Appellant changed direction and went to a place where there was a gate made of timber. The Appellant parked his motor cycle and grabbed her hand. The Appellant dare her not to scream. The Appellant opened the gate then led her inside a room which he opened. The Appellant removed her clothes and also removed his leaving only a vest. The Appellant laid her on the bed and took his thing for urinating (Kitu ya kukojoa) and put it insider her organ used for urinating. He kept her inside his house until 700-800 pm. The complainant testified that she felt pain in her vagina as the Appellant inserted his organ all the way inside and did not use a condom. The complainant told the court that it was her first time to have sex. She did not see blood but she was watery. The Appellant wore his clothes and she wore hers. He opened the door and warned her not to tell anyone or he would strangle her.

9. The complainant testified that when she reached home she did not tell her mother. She ran away to go to the river and on coming back she found the kitchen open and she slept. The next day she went to school. Late her mother took her to the AP and was asked who she was with and she told them it was the appellant. He was arrested. She told the court that she was taken to hospital three days after the incident when the matter was reported.

In cross-examination the complainant told the court that they were two when the Appellant carried them. She further testified that she did not scream as the Appellant threatened to kill her and she felt shy to tell her mother what happened.

FK (PW2) was then a child aged 12 years and after a *Voire Dire* examination, the court found that she was intelligent and understood the value of the Oath. Her testimony was that on that material day she was with the complainant and another girl when they met the Appellant and he asked them where they were going. He offered to give them a lift. The Appellant had a motor cycle which was blue in colour. The Appellant carried her and the complaint upto to a place where there was a wooden gate. He then held the complainant by the hand and led her to a house. The Appellant and the complainant entered the house and remained inside upto 8.00 pm. When they came out the complainant was crying and when she asked her what the problem was, she refused to tell her. The Appellant then carried them on the motor bike and dropped them on the way. The complainant went to her place and she went home. The next day the complainant told her that she had not slept at home. The complainant's mother then asked her where she was and she told her where she had gone. On Tuesday the complainant was found and she was taken to AP's Camp.

10. In cross-examination she told the court that there were other people but she did not scream as she did not know what the Appellant had gone to do inside the house.

11. JCG (PW3) is the complainant's mother. She told the court that on 9<sup>th</sup> October 2016 at 10.00 am K& A left for Cheera. Later K (PW2) went back at 8.00pm. (PW1) did not go back home. She asked K (P2) who told her that they returned and each went her way. She started looking for the complainant and found her sitting down alone. Ikuu road at 9. 00 pm. The complainant ran away and she chased her. She refused to say where she came from. She took her to the AP's Camp where she said she was taken to a house by the owner who had a motor bike. The AP went to the house with PW2. The Appellant was arrested. He said he did not know the children. The complainant was issued with a P3 form. PW3 testified that the complainant was aged twelve (12) years and she produced the birth certificate showing that the complainant was born on 22<sup>nd</sup> May 2005.

12. In cross-examination PW3 testified that the Appellant was arrested on a Tuesday. That she knew the incident and reported same day on Sunday. That it is PW2 who said it was the Appellant.

13. No. 106622 P.C Homan Nasibo Hassan (PW4) testified that she is attached at Gender Desk Chuka. On 11<sup>th</sup> October 2016 she was called by AP officers over a suspected who had molested one A, a child. Sergeant Njoka went to Ikuu AP Camp and found the Appellant who he took to Chuka Police Station. The next day the complainant went to Chuka Police Station and she took her to hospital. The complaint informed that the Appellant took her to his house and defiled her. She told the court that the incident was on 9<sup>th</sup> October 2016, on 11<sup>th</sup> October 2016 F (PW2) informed the complainant's mother who in turn reported to AP's.

14. Joseph Mwenda (PW5) is the clinical officer who examined the complainant and found that the hymen was missing. He told the court he examined the complainant three days after the offence was committed and injuries would be in the process of healing.

15. The prosecution closed its case after calling the five witnesses. The court gave a ruling that a prima facie case had been established on the main count of defilement and ordered that the Appellant would be put on his defence.

16. The Appellant proceeded to give unsworn statement and stated that on the material day he was on his daily operations as a boda boda operator when he carried three (3) girls who asked him for a lift. He took them to Ikuu market. At 6.00 p.m he saw them at Ikuu market and he asked for work. They said they had Kshs.50/- He carried them to Kibiru and dropped them and then came back. Later on Tuesday at night he was told he was being looked for by the AP. He went to the AP Camp and met three girls. He said he had seen them. He was arrested. He said he did not know why he was arrested.

17. The trial magistrate in her Judgment held that the prosecution had proved the ingredients required under the charge of defilement under **Section 8(1) of the Sexual Offences Act** and had proved their case beyond any reasonable doubts. She proceeded to find the accused person guilty as charged and sentenced him to imprisonment for ten years.

### **18. Analysis and Determination:**

The Appeal proceeded by way of written submissions. The Appellants in his first ground in the amended petition is contending that the trial magistrate erred by finding that the testimony of the complainant was corroborate by the medical evidence and yet there was no presence of spermatozoa or injuries. It is submitted that the clinical officer (PW5) testified that there were no bruises or laceration on the genitalia, no discharge or blood was noted. That the injuries would not have healed by the time she was taken to hospital. That the doctor's evidence revealed that she was not defiled and the absence of a hymen is not sufficient proof that it was the Appellant who was responsible. It is submitted that the hymen may be broken through other activities like games and not necessarily through penetrative sex. That it is only the evidence of PW1- which links the Appellant to the offence.

19. On behalf of the State it was submitted that the testimony of PW1 was corroborated by that of PW2. That the testimony of the complainant was consistent, credible and truthful. That the complainant gave evidence on how she was penetrated by the Appellant. That the testimony of the complainant did not require corroboration as the court found she was truthful.

20. On medical evidence the State submits that the complainant was examined three days after the offence was committed and she had changed her clothes and taken a bath. That as a result the evidence was washed away. That the complainant gave evidence that the appellant inserted his penis into her vagina and thus penetration was proved. That medical evidence is not the sole proof of penetration in sexual offences. I will consider this ground based on two issues, that is penetration and Evidence of a single witness.

### **Penetration:**

The Appellant was charged with Defilement contrary to **Section 8(1) (2) of the Sexual Offences Act**. The section provides:

**“ (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”**

The prosecution needs to prove three key ingredients which are that the Appellant penetrated the genital organ of the complainant, namely vagina with his genital organ, namely penis. Penetration need not be complete insertion of the male genital organ. **Section 2 of the Sexual offences Act** defines penetration as follows:-

**“ Means the partial of complete insertion of the genital organs of a person into the genital organs of another person.”**

The complainant gave graphic evidence on how the Appellant defiled her. At page 10 of the record line 1-6 this is what the complainant told the court;

**“He took his thing for urinating (kitu ya kukojoa) and put it inside my organ used for urinating.**

**He kept me in his house until 7-8.00pm**

**I felt pain in my vagina (organ for urinating)**

**He inserted his organ all the way inside. He did not use a condom. It was the first time I had sex. I did not see blood but I was watery.”**

I find that this evidence proves beyond any reasonable doubts that there was complete insertion of the male genital organ. Penetration was proved beyond any reasonable doubts. This is well corroborated by the medical evidence (PW5) which confirmed that the hymen was missing in a child aged eleven years. The absence of injuries does not rule out penetration. The offence was committed three days prior to the date the complainant was examined by (PW5). The injuries according to PW5 were in the process of healing and could have healed depending on the nature of the injuries. There is no requirement under the Sexual offences Act that penetration be proved by the presence of spermatozoa. What the court has to determine is whether there was complete or partial insertion of the male organ. The material evidence is the oral evidence of the complainant which is direct or the circumstantial evidence. It is dependent on whether the court believes the evidence. Upon evaluating the evidence, I find that the trial magistrate arrived at the proper finding that penetration was proved.

#### **Evidence of a single witness**

In Sexual Offences the law is trite that the court can convict based on the sole evidence of the victim if the court is satisfied that he or she is telling the truth. **Section 124 of the Evidence Act** provides:-

**“ Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

The trial magistrate at page 39 of the record gave reasons for believing the evidence of the complainant. It is my finding that the evidence of the complainant was believable and furthermore was well corroborated by the testimony of PW2 and that of PW5. This is not a case where the conviction was solely based on the evidence of the complainant, there was material undisputed evidence to corroborate the testimony of the complainant. It has now been settled by decisions of this court and the Court of Appeal that the fact of defilement and penetration does not require prove by medical evidence but by the oral evidence of the complainant or circumstantial evidence. See **AML -v- Republic (2012) eKLR** where the Court of Appeal stated that-

**“ The fact of rape or defilement is not proved by a D.N.A test but by way of evidence.”**

The emphasis is on the evidence of the victim. In this case the evidence of the complainant is credible and reliable and has proved the fact of penetration to the standard required.

It was also corroborated. The trial magistrate properly addressed her mind to the evidence and the law.

21. The second ingredient that the prosecution had to establish is the age of the complainant. Proof of age of the complainant in Sexual Offences is crucial since the Act prescribes the punishment base on the age of the child. In this case the Appellant was charged under Section 8(2) of the Sexual Offences Act which relates to defilement of Children aged eleven (11) and below. In this case the complainant was born on 22<sup>nd</sup> May 2005 as shown on the birth certificate which was produce as exhibit. At the time the offence was committed the complainant was aged eleven (11) years. I find that age of the complainant was proved.

22. Finally, the prosecution was supposed to prove the identity of the perpetrator. The Appellant was identified by PW1 &2. In his defence the Appellant admitted that he had carried the complainant and two other girls. This happened in broad day light. The Appellant confirmed that he had carried the girls twice. Although he claims that he was implicated, I find that this is new evidence which he does not have the luxury of relying on at this stage. In the amended grounds of appeal and in his original grounds of appeal there was no allegation that the trial magistrate omitted some of the evidence. The submission that some evidence is missing is an afterthought which is not true and is rejected. I find that the Appellant was identified as the perpetrator in circumstances which favoured a positive identification. I rely on that evidence of PW1& 2 to hold that the Appellant was identified as the perpetrator.

The prosecution was supposed to prove the three ingredients which constitute the charge of defilement which are age of the complainant, penetration and the identity of the perpetrator. The prosecution discharged this burden and proved the charge against the Appellant beyond any reasonable doubts.

23. The Appellant has raised the issue whether the failure by the prosecution to provide the Appellant with the prosecution witness statement in advance as provided for under **Article 50(2) (j)** violated his constitutional right to a fair trial and vitiated the entire trial.

The Appellant submits that he was not supplied with witness statement prior to the trial or during trial. It is submitted that the statements were supplied on 19<sup>th</sup> June 2020 after PW1 & PW2 had testified. He submits that **Article 50(2) (j)** of the **Constitution** gives an accused person the right to be informed in advance of the evidence the prosecution wishes to rely on and have reasonable access to that evidence and to have adequate time and facility to prepare his defence. This he submits is the right to fair trial designed to protect individuals from the lawful and arbitrary curtailment or deprivation of the basic rights and freedoms. The most prominent of which are the right to life and liberty of the person. He relies on the Supreme Court of Kenya decision in *Francis Karioko Muruatetu & Another -v-Republic Petition No.15/2015* where the court stated:-

**“ Indeed the right to fair trial is not just a fundament right. It is one of inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c ) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and Public faith in the justice system would inevitably collapse.”**

He submits that the right is guaranteed under **Article 14** of the International Covenant on Civil and Political Rights. That it is among the fundamental rights and freedoms that may not be limited. He has also relied on the case of *Patrick Gulbert Cholmondeley -v- Republic (2008) eKLR* where the Court of Appeal held that to satisfy the requirements of a fair trial the prosecution is under a duty to provide an accused person with, and to do so in advance of the trial all the relevant material such as copies of statements of witnesses and documentary exhibits to be produced at trial. He has also relied on the Supreme Court of India in the case of *Natasha Singh-v- CB 2013 5 SCC 741 and -R-V- Ward 1993 3 ALL ER 557* for the same proposition. He submits that failure to provide him with the prosecution witness statements in advance as provided under **Article 50(2) (j)** violated his constitutional right to fair trial and vitiated the entire trial.

24. For the State it is submitted that this ground is far fetched and an afterthought. That the Appellant did not raise the issue that he had not been supplied with statements and documentary exhibits. On 19<sup>th</sup> June 2017 the court directed that statements be supplied to the Appellant at his cost. The Appellant never raised the issue that he had not been supplied with statements.

**25. Article 50(2) (j)** provides:-

**“ Every accused person has the right to a fair trial which includes the right- *to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access that evidence.*”**

It requires that the accused be informed of the evidence in advance and to have reasonable access to the evidence. It entails a right to fair trial. **Article 24 of the Constitution** provides that a right or fundamental freedom shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society and based on human dignity, equality and freedom. However despite this provision, the right to fair trial is one of the rights that cannot be limited, this is provided under **Article 25** of the **Constitution**.

The question is whether the right was violated. This being an appeal the court can only rely on the record to determine whether **Article 50(2) (j)** was complied with. In determining this question, the importance of a record of the lower court which this court has to rely on cannot be gainsaid. The record of the lower court in an appeal like the present one is the fundamental reference point in the administration of justice. This court has to rely on that record entirely to determine the matters in the dispute. I have perused the record of the lower court. There is no indication that the Appellant was given the statements of witnesses and the documentary exhibits which the prosecution relied on. On 19<sup>th</sup> June 2017 page 15 of the record the trial magistrate casually made an order that the appellant be supplied with statements. There is no confirmation whether the statements were supplied. The trial magistrate as the presiding officer of the court has a duty to ensure as early as possible that the accused person is supplied with statements and exhibits to afford him adequate time and facilities to prepare his defence. **Article 50(2)(c )** of the Constitution gives the accused person the right- **“to have adequate time and facilities to prepare a defence.”** This is also a matter of access to justice which is provided under **Article 48** of the **Constitution**. It is my view that the appropriate time to supply an accused person with the evidence required under **Article 50(2) (j)** is immediately upon entering a plea of not guilty to afford him sufficient time to scrutinize the evidence and to prepare his defence. The duty abides during the pretrial period and during the trial. Statements being supplied after the key witnesses have testified violates the rights of an accused to a fair trial. The prosecution had a duty to supply the appellant in advance of the trial the statements of witnesses and documentary exhibit which it relied on at the trial. Failure to comply with **Article 50(2) (c) and (j)** vitiated the entire trial as these rights cannot be limited. They afford protection to an accused who has the right throughout the trial to be presumed innocent until proven guilty.

26. Having found that the rights were violated, the next consideration is for the court to determine the remedy available to the appellant. This court is dealing with an appeal. Applications for redress or denial, violation, infringement of rights are considered under **Article 23** of the Constitution. **Sub-article (3)** gives the relief which the court may order. This court was moved to consider the violation as vitiating the trial before the trial court. I find that the violation does not entitle the appellant to an acquittal. The trial which violated the rights of an accused was null and void. The appropriate remedy is to order a retrial since the prosecution had a good case and I believe they will be able to avail the witnesses. This will also ensure that justice is done for all the parties.

27. Although upon evaluating the evidence it is my finding that the charge was proved beyond any reasonable doubts, since the accused was not afforded a fair trial, the appeal on the above ground must succeed.

#### **Conclusion:**

I find that ground No. 4 on the amended Petition of Appeal succeeds. I therefore allow the appeal. I order that a retrial shall be conducted in

the Chief Magistrate's Court at Chuka before a magistrate with jurisdiction other than Hon. M. Sudi. The Appellant shall be set at liberty and be remanded at Chuka Police Station. He be produced before the Chief Magistrate's Court at Chuka on **14<sup>th</sup> December 2020** for plea taking.

**Dated, signed and delivered at Chuka this 10<sup>th</sup> day of December 2020.**

**L. W. GITARI**

**JUDGE**

**10/12/2020**

The Judgment has been read out through skype, Mr. Muthomi for the Appellant.

**L.W. GITARI**

**JUDGE**

**10/12/2020**