REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 21 OF 2017

CHARLES KYUSYA MASUVI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mutomo Senior Principal Magistrate's Court Criminal Case (S.O.) No. 1 of 2017 by Hon. S. K. Ngii S R M on 26/04/17)

J U D G M E N T

1. **Charles Kyusya Masuvi**, the Appellant, was arraigned in Court having been accused of defiling a minor and attempting to defile another. After being taken through full trial he was convicted and sentenced to **life imprisonment** on the first count and **10 years imprisonment** on the second count respectively.

2. Aggrieved, the Appellant appeals on grounds that his fundamental rights were infringed, evidence adduced by the Prosecution was contradictory; the charge was defective, his defence that was cogent was rejected and key ingredients of the offence were not proved beyond reasonable doubt.

3. Facts of the case were that on the **7th** day of **February, 2017,** children among them the Complainants herein were from school. On their way home they stopped to eat some wild fruits when the Appellant requested them to accompany him to his home. On arrival at his house he made others remain outside while he entered the house with the two (2) Complainants, that he made them to lie on his bed and inserted his genital organs in theirs in turns. The children cried and he released them. They went home and reported to their guardian and parent respectively. The matter was reported to the police who investigated, arrested the Appellant and charged him.

4. When put on his defence, the Appellant stated that on the material date he left his place of work, went home and swept his compound. At **2.00 p.m.** he went to his sister's place where he stayed until children left school. One of the children, **N** accompanied him so as to cook for him. On their way to his place he saw four (4) children who were collecting fruits from a nearby tree. He collected firewood and proceeded home. One of the children who was by the roadside accompanied **N's** sister as he went to his house with **N.** Later on, at **7.30 p.m.** he went to where the children were and told them to go home. Later on he heard a person asking the children why they did not take home the firewood. He told her that he had asked them to go home but all was in vain. They had supper and **Ruth Mutinda** went to his home and the three (3) of them left for her home. Thereafter he left for his home later in the night. In the morning he was woken up by **Kineene Lazaro** and asked about land. He asked him to escort him to some place. On their way they found a crowd of people and he was arrested. He called **Ruth** and **N** as witnesses to corroborate his allegations.

5. The Appellant canvassed the Appeal by way of written submission. He urged that his rights as enshrined in **Article 50(2)(h)** of the **Constitution** were infringed as the Court notified him of his right to legal representation and allocated a hearing date and since he was not aware of the rights the trial continued as scheduled. That **Article 20 (2) (j)** was also contravened since the trial Magistrate informed him of the right to be supplied with witness statements but still proceeded with the case before he was availed time and adequate materials to facilitate him.

6. That the charge was defective as the time the offence was committed was not disclosed. That the charge was amended but he (Appellant) was not accorded an opportunity to plead to the altered charge or even given the opportunity to re-examine witnesses who had testified. In this regard he cited the case of **Harrison Mirungu Njuguna vs. Republic Criminal Appeal No. 90 of 2004** where the Court of Appeal held that:

> ***"The right to hear the witness gives evidence afresh on the amended charge or to cross-examine the witness further is a basic right going to a root of a fair trial."***

7. That evidence adduced by PW1 and PW2 was contradictory and the alibi defence put up and corroborated by his witnesses was disregarded for no apparent reason.

8. In response the State through learned State Counsel, **Mr. Mamba** opposed the Appeal. By way of oral submissions he based his arguments on the initial Petition of Appeal but not the amended one. He urged that the Appellant was positively identified as the perpetrator of the offence of defilement. That medical evidence tendered established that PW1 suffered bruises which was consistent with penetration and the minor could not have colluded to lie against the Appellant. He could not have been framed up.

9. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. **Article 50(2)(h)(j)** of the **Constitution** provides thus:

> ***"(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(h) To have an advocate assigned to the accused person by the***
>
> ***State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***
>
> ***(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"***

This is a matter where the Appellant has stated that he was informed promptly of the right to representation but substantial injustice resulted as he was frail and of old age therefore an advocate should have been availed to represent him at the expense of the State. The Appellant was informed of his right to legal representation at his first appearance in Court. However, he agitates that he was not availed legal representation by the State. It has been previously held that the applicability of that provision of law is to be progressively realized. Currently the right is available where "substantial injustice" is likely to occur. This would be in a case where the Accused is to be sentenced to death in case of a conviction **(see David Macharia Njoroge vs. Republic, Criminal Appeal No. 497 of 2007 (2011) eKLR).** In the premises the Appellant was not prejudiced.

11. The Appellant also contends that he was prejudiced as he was informed of the right to be supplied with witness statements promptly but this was not done. From the record of the Court it is apparent that at the first appearance in Court, the Appellant was informed of the right to be provided with witness statements. In the same vein the Court directed the Prosecution to ensure that the Appellant was furnished with the witness statements on the same day. When the matter came up for hearing on the date scheduled the Appellant indicated that he was ready to proceed. Four (4) witnesses testified. However, when the matter came up for hearing on the next scheduled date the Appellant notified the Court that he was not ready to proceed as his statements were far. The Court rejected the Application on the grounds that the Accused could not be heard to allege that he was not prepared for the hearing yet he was aware of the date for hearing and had been supplied with witness statements. From what is on record, it is apparent that witness statements were provided as required by the law. The allegation that statements were far is not comprehensible as the Appellant proceeded with the case where four (4) witnesses testified. The Magistrate did not fall into error in rejecting the application.

12. On the same date **(12th January, 2017)** after the trial Magistrate declined to allow the application by the Appellant he allowed an application by the Prosecution to amend the charge sheet. Charges were read to the Appellant who pleaded and the matter proceeded to hearing. It is now contended by the Appellant that he was prejudiced as **Section 214(1) (i)** of the **Criminal Procedure Code** was not complied with. **Section 214** of the **Criminal Procedure Code** provides thus:

> ***"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that—***
>
> ***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
>
> ***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***
>
> ***(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.***
>
> ***(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."***

13. Indeed the charge was amended. I have perused the record. What is available is the altered charge sheet. However, the amended charge sheet does not seem to form part of the record. Therefore I cannot tell whether or not the charge as amended was defective. Secondly in the application by the Court Prosecutor he stated the reason why the charge was being amended. It was to correct the age of the Complainant from eight (8) years to seven (7) years. After the amendment of the charge the Appellant was called upon to plead to the amended charge which he did. However, he was not notified of his right to demand for re-calling of any of the witnesses who had testified for purposes of giving their evidence afresh or just to be cross-examined further if necessary. He contends that he was prejudiced for not being given an

opportunity to cross examine witnesses who had testified. In the case of **Josphat Karanja Muna vs. Republic (2009) eKLR** the Court stated:

> ***"…..That the spirit of Section 214 is to afford an accused person the opportunity to recall and cross examine witnesses where the amendments would introduce fresh elements or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or a word."***

14. This is a matter where three (3) witnesses had testified. If the amendment introduced a new ingredient or matter then it necessitated re-calling of witnesses who had testified therefore the Appellant was prejudiced. In the result, the trial was vitiated.

15. The error having been made by the Court the question to be posed is whether a re-trial should be ordered.

16. In the case of **Fatehali Manji vs. Republic (1966) EA 343** it was stated thus:

> ***"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."***

17. This is a case where the age of the Complainants was proved. The Complainants identified the Appellant as the perpetrator of the offence and in the case of the 2nd Complainant there was proof of penetration into her genitalia. In the premise, it is my considered view that there should be a re-trial. Therefore I quash the conviction and set aside the sentences meted out. The Appellant shall be produced before **Mutomo Senior Principal Magistrate's Court** on the **17/1/19** for re-trial before a Court of competent jurisdiction other than the one presided over by **Hon. S. K. Ngii.**

18. It is so ordered.

DATED, SIGNED and DELIVERED at KITUI this 9TH day of JANUARY, 2019.

L. N. MUTENDE

JUDGE