



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NO. 5 OF 2017

MICAH KIMUTAI LANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant **MICAH KIMUTAI LANGAT** was charged with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that, on the 27th day of February 2011 at [particulars withheld] village in Transmara East District within Rift Valley province wilfully and unlawfully had carnal knowledge of CC a girl aged 11 years. He also faced an alternative charge of indecent act with a girl contrary to section 11 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that, on the 27th day of February 2011 [particulars withheld] village in Transmara unlawfully indecently assaulted CC by touching her private parts namely vagina.

2. The appellant was convicted of defilement and sentenced to life imprisonment. His appeal is against the conviction and sentence.

3. The appellant raises the following issues in his petition; that the conviction was on mistaken identity, that he applied for statements and was not supplied with the documents thus his rights were violated, that there was contradictory evidence on the complainant's age, the evidence was hearsay, his rights were violated when he requested that the case starts afresh in accordance with section 200 of the Criminal Procedure Code, the medical report did not connect him to the offence and that the court did not consider his defence that there existed a boundary dispute between and the complainant's family. The prosecution submitted that there was no merit in the appeal as their case was proved beyond reasonable doubt.

4. As the first appellate court, I should evaluate the evidence and come to my own conclusion but also take into consideration that I neither saw nor heard the witnesses when they gave evidence. (**See Okeno v R (1972) EA 32**)

5. Pw1, CC, testified that on 27/2/2011 she went to her aunt's place. Her aunt left her with the children. The appellant had come to her aunt's place to take utensils from her aunt's place for a function and asked her aunt if she was going for her function. There was light in the house. After her aunt left for the function she locked the door with the padlock, put a drum and beam and sufuria so that if someone touched it she would hear. At about 3am the appellant entered the house and threatened he would kill her. She slipped off and dashed out. The appellant chased her and she fell. The appellant held her and covered her mouth, removed her pant opened his zip and had sexual intercourse with her after placing her on the ground. He had sexual intercourse with her at intervals up to 5am. She bled and felt pain in her vagina. He threatened to kill her if she told anyone. After that he pushed her into the forest. She was rescued by a lady. The appellant went back to their place and sat there listening to find out if what he did had been known. He was arrested.

6. Pw2, HB, testified that on the 27/2/2011 she sent Pw1 to her sister's place. Pw1 told her that the appellant defiled her. Pw1's legs were swollen she had bruises.

7. Pw3, WK, testified that she went for a party on the 27/2/2011 at 7pm. She left Pw1 with the children. She returned to her house at 4am. The door was open the children were not there. She searched for them and found 3 of them at her maiden home. She asked for Pw1. Pw1 was found in the maize plantation. Pw1 told her she had been defiled by the appellant. She had injuries on her knees and bruised hands. She took her to the police and then to hospital. The appellant was arrested at her place. The appellant was a neighbour. She saw him at the tea party but he left. The appellant had been to her house.

8. Pw3 Samuel Kiprono Rotich a village elder testified that on the 27/2/2011 he found the appellant arrested. The appellant is known to him.

9. Pw5 EK testified that the appellant broke the door and chased them. It was night. Pw1 was with them. Their mother was not at home. The appellant is known to him. There was a lamp. He heard the appellant tell Pw1 that he was going to kill her.

10. Pw6 Patricia Onguti a medical officer testified that on the 28/2/ 2011 she examined Pw1. She had a hypermic genitalia, hymen was

perforated, and there was a foul smell and a white discharge on the external genitalia. The vaginal swab showed there was presence of epithelial cells. She concluded that there was penetration. She examined the age of Pw1 and concluded that she was 12-13 years of age. She used the tanners method for the child. She put breast development at stage 4, the dental development was at stage 2, the 3rd lower molar was erupting and the 3rd upper molar was not present. The appellant was taken for lab tests and the HIV and Syphilis tests were both negative.

11. Pw7 No. 65947 P.C Joseph Mulinge testified that on the 27/2/2010 he received the report on the appellant's arrest. He rearrested the appellant and received the complainant's report. He took the complainant and accused for treatment. The complainant could not walk properly she was in pain on the lower parts.

12. The appellant gave a sworn statement. He stated that on the 28/2/2011 he was going to town to buy stock medicine. The complainant's mother called him. She gave him tea. There were 2 persons present they tied him. He was taken to Soit. At Soit he was told he had defiled a girl. He had never seen the girl. He wondered if he had defiled her he could not have gone to their home. During cross examination he stated that the complainant's mother is a neighbour and they have a common boundary. That on the 27/2/2011 he had gone to harvest maize he was at home. There was no party anywhere. That he has a boundary dispute with Sammy and Julius who arrested him. That there is land dispute between his mother and the complainant's mother. He has no differences with the complainant's mother.

13. I will begin with the issue raised by the appellant that he was not supplied with the witness statement and therefore his rights under Article 50 (2) (j) were violated. This issue was raised before Hon. A.K Mokoross by the appellant on the 14/8/2015. In a Ruling delivered on the 11/9/2015 Hon. Mokoross declined to have witness recalled. The ruling did not consider the appellant's request to have the witness statements. I have perused the court record and it is evident that the appellant was not furnished with witnesses statements and the documentary evidence even though he actively participate in the trial and cross examined the witnesses and even gave his defence. Was failure by the prosecution to provide the appellant with the witness statements and documentary a violation of the appellant's right to a fair trial? **Article 50 (2) (j)** of the Constitution provides for the right of the accused person, "*to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.*". The Court of Appeal whilst considering the right to a fair trial guaranteed to persons accused of an offence under Section 77 of the old constitution, in **Thomas Patrick Gilbert Cholmondeley v Republic NRB CA Criminal Appeal No. 116 of 2007 [2008]eKLR**, held as follows that:

'We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under... our Constitution, the prosecution is now 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 who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.[Emphasis mine].

In **Simon Githaka Malombe v Republic NYR CA Criminal Appeal No. 314 of 2010 [2015] eKLR**, the Court of Appeal quashed the conviction on the ground that the prosecution had failed to furnish the appellant with witness statements despite the appellant requesting for them.

In this case the trial court started the hearing without furnishing the appellant the statements and documents, there is no indication that he was given witness statements or documents. Upon making a request for the said statements the succeeding Magistrate failed to make a ruling on whether the appellant was entitled to the witness statements. The court was not amused that the appellant was making his request after having absconded for a period of three years. Guided by the provisions of Article 50 (1) (j) and the Court of appeal decisions the trial court had a duty to furnish the appellant with the statements. Failure to furnish the said statement was fatal to the prosecution case. The appellant's right to witness statements under **Article 50(2) (j)** of the Constitution was violated.

The next issue that I have to consider is whether there is need to order a retrial. In the case of **Ekimat Vs Republic [2005] 1 KLR, 182** the Court of Appeal held that:-

"A retrial should not be ordered unless the court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."

In **Opicho Vs Republic [2009] KLR, 369**, the Court of Appeal stated:-

"In general, a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was 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 was vitiated by a mistake of the trial court for which the prosecution was 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 retrial should only be made where the interests of justice required it."

In **Opicho v. R (2009)** (supra) the court observed that in serious charges such as, involving child abuse as in the case, public interest and justice would demand the prosecution of defilement cases, the Court held that,

"The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse, a phenomenon now topical on the world stage, and in this country, due to its prevalence. It is in the interest of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law. We are inclined in all circumstances of this case to order for retrial."

In the case of **Simon Githaka Malombe v Republic NYR CA Criminal Appeal (supra)** the court held as follows;

‘We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case’

In *Muiruri v Republic* [2003] KLR 552, the Court of Appeal held that a retrial will only be ordered when it is in the interests of justice and if it is unlikely to cause injustice to the appellant. The aspects the court will consider are the nature of illegalities or defects in the original trial, length of time that has elapsed since the arrest and arraignment of the appellant and whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not. The appellant sought the witness statements and the court failed to make a ruling on it thus it was the court’s fault. The offence for which the appellant was charged and convicted is serious and attracts a minimum sentence of 20 years. In this case the trial began in March 2011 and in August 2011 the appellant absconded and was arrested in August 2015, he was convicted and sentenced in 2017. Considering the evidence adduced in the interest of justice a retrial should be conducted.

18. I therefore allow appeal, quash the conviction and sentence and direct that the appellant shall be retried on the same charges before a Magistrate of competent jurisdiction. The appellant shall remain in custody and shall be taken to the Magistrates Court at Kilgoris on **18th of March 2019** for re-trial.

Dated signed and delivered at Kisii this **13th** day of **March 2019**

R.E.OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno Senior Prosecution Counsel/Respondent

Rael Court clerk