REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 79'A' OF 2015

NGULYA KIVUSYU.....1ST APPELLANT

SOLOMON MUTHOKA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Kitui Senior Principal Magistrate's Court***

Criminal Case (S.O) No. 1 of 2012** by **Hon. B. M. Kimemia (PM)** on **25/02/15)

J U D G M E N T

1. **Ngulya Kivusyu** (1st Appellant and **Solomon Muthoka** (2nd Appellant) were arraigned in Court having been charged as follows:

Count 1 – Ngulya Kivusyu - Defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on diverse dates between **17th** and **18th** day of **January, 2012,** in **Kitui County** unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of **KJ** a girl aged **14 years.**

In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on diverse dates between **17th** and **18th** day of **January, 2012,** in **Kitui County,** indecently allowed their genital organ (penis) to come into contact with the genital organ (vagina) of **KJ** a girl aged **14 years.**

Count 2 – Ngulya Kivusyu - Defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on diverse dates between **17th** and **18th** day of **January, 2012,** in **Kitui County** unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of **KM** a girl aged **14 years.**

In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on diverse dates between **17th** and **18th** day of **January, 2012,** in **Kitui County,** indecently allowed his genital organ (penis) to come into contact with the genital organ (vagina) of **KM** a girl aged **14 years.**

Count 3 – Solo Muthoka - Gang Rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **19th** day of **January, 2012,** in **Kitui County** in association with another not before Court unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of **KJ** a girl aged **14 years.**

In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **19th** day of **January, 2012,** in **Kitui County,** indecently allowed his genital organ (penis) to come into contact with the genital organ (vagina) of **KJ** a girl aged **14 years.**

Count 4 – Solo Muthoka - Gang Rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **19th** day of **January, 2012,** in **Kitui County** in association with another not before Court unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of **KM** a girl aged **14 years.**

In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **19th** day of **January, 2012,** in **Kitui County,** indecently allowed his genital organ (penis) to come into contact with the genital organ (vagina) of **KM** a girl aged **14 years.**

2. Having been taken through full trial the trial Court returned a verdict of guilty against the 1st Appellant on the alternative charge to Count 1, made no finding on Counts 2 and 3 as the Complainant was not called to adduce evidence. On Count 4, the 2nd Appellant was found guilty and accordingly convicted. Each Appellant was sentenced to serve **fifteen (15) years imprisonment.**

3. Aggrieved, they appealed on grounds that can be condensed thus:

- The burden of proof was not discharged as the law demands.
- The 1st Appellant was not given a chance to cross examine the Complainant (PW1).
- Key witnesses were not availed to prove the charges.
- Both the Investigating and Arresting Officers were not called to testify to shed some light on the pertaining case.
- Crucial exhibits were not produced to prove the case.
- The Appellants' alibi defence were not considered.

4. Facts of the case were that on the **16th January, 2012,** the Complainant in the 1st and 4th Counts, respectively left home going to school at **6.00 a.m.** She encountered her schoolmate the Complainant in the 2nd and 3rd Counts, respectively. They encountered the 2nd Appellant, their former classmate at Mutito River where they stayed until **8.00 p.m.** Subsequently he escorted them to Mutito Shopping Centre and left them by the roadside. They went to the 1st Appellant's hotel who gave them food and offered them a place to sleep. On the **17th January, 2012** when the police went in search of them with their mother he hid them at some field. He took them back to where they slept the previous night. On that night he had sexual engagement with both of them. The following day he gave them breakfast and violated them sexually. In the evening, the 2nd Appellant went and took them home. On their way the 2nd Appellant took them to the river where he also violated them sexually. In the meantime, her mother, PW2 **EMM** who was looking for her reported the matter to the Chief, PW3 **Lawrence Kitheka Joseph.** Acting on information received they went to the river where they found the two (2) Complainants sitting with two lads, the 2nd Appellant being one of them and **Wambua** who escaped. The Complainants led them to the hotel of the 1st Appellant. Both Appellants were later handed over to the police and charged.

5. Upon being put on their defence the 1st Appellant stated that the two (2) girls were taken to the hotel where he worked as a casual labourer on **22nd January, 2012.** They stated that it was **Wambua** who took them to the lodging. He contended that he was framed.

6. The 2nd Appellant stated that he went home from school and while there the village elder, Assistant Chief and PW2 went asking for **Wambua.** They made him go to the police station where they found the Complainants who denied the allegation that he was **Wambua** and when they took people to where they were sleeping he remained at the police station. That he was charged because he did not reveal where **Wambua** was.

7. The Appellants canvassed their Appeal by way of written submissions while the Respondent submitted orally. I have duly taken into consideration rival submissions.

8. This being a 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).**

9. It is contended by the Appellants that the trial Magistrate misdirected herself by failing to give them the opportunity of cross examining the Complainant, which was in contravention of **Article 50(2)** and **25(k)** of the **Constitution** which meant that they were not accorded a fair trial.

10. PW1, the Complainant was 14 years old. She was a child who was competent and capable of testifying. **(See Section 125 of the Evidence Act). Section 19** of the **Oaths and Statutory Declaration Act** provides thus:

> ***"(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section. (2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."***

11. Prior to the trial Court receiving evidence adduced by the Complainant it conducted *voire dire* examination. The record reads thus:

> ***"Cross examination of Child***
>
> ***KM 14 years old. I go to school [Particulars Withheld] Primary School class 4, my teacher is Mr Maki. I go to church at [Particulars Withheld] Maximum Miracle Centre. We are taught to tell truth, those who tell lies are imprisoned. I do not lie I***

don't know what the bible says about telling lies.

<u>Court –</u>

The child does not understand the importance of telling truth or even understands nature of an oath hence will call on unsworn statement."

12. Following the answers the child gave the Court was of the opinion that the child neither understood the meaning of telling the truth nor the nature of oath and proceeded to direct that she makes an unsworn statement where after she was not subjected to cross examination. What the Court failed to do was to record the terms in which it was satisfied and persuaded that the child did not understand the meaning of oath or possessed sufficient intellect. **(See John Muiruri vs. Republic (1993) KLR 445).**

Looking at the answers as captured and further, the kind of elaborate testimony that the Complainant gave it is apparent that the minor knew the difference between telling the truth and lying. She attested to what they are taught in church. The only thing she did not know was what was written in the bible and she clearly stated that she could not tell a lie as she did not know the answer to the fact as written in the bible. This was a child who possessed intelligence to state what was within her knowledge.

13. Another issue that must be addressed is whether she was a child of tender years in the circumstances. In the case of **Kibageny vs. Republic (1959) EA 92** the Court of Appeal held that:

"There is no definition in the Oaths and Statutory Declarations Ordinance of the expression "child of tender years" for the purpose of S. 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age of under fourteen years."

14. The Complainant (PW1) having been 14 years old did not require a *voire dire* examination and should have either been sworn or affirmed. In the circumstances it was unjust to deny the Appellants the opportunity of testing her elaborate evidence by not being subjected to cross examination. What transpired was obviously in breach of what is envisaged by the provisions of **Section 19** of the **Oaths and Statutory Declarations Act.**

15. The 1st Appellant sought an order for a retrial so as to be given an opportunity to cross examine the Complainant.

16. The issue to be considered is therefore whether a retrial should be ordered? 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. It was established that the Complainant herein was a minor aged 14 years. Further, the minor was examined by a Clinical Officer who established that her inner wear were blood stained and torn. She had bruises and lacerations on the labia minora and a broken hymen. Urine test carried out revealed the presence of spermatozoa. This was evidence beyond any reasonable doubt that she had engaged in penetrative sex.

18. The Complainant identified the Appellants as the individuals who had committed the act that caused penetration into her genital organs.

19. It will be in the interest of justice for a retrial to be ordered. It will also be important for the Court to consider what was not addressed by the trial Magistrate in respect of the two (2) Counts where evidence was not tendered. No evidence was adduced but the learned Magistrate misdirected herself by not making any finding instead of not acquitting the Appellants as provided by the law.

20. From the foregoing, I allow the Appeal, quash the conviction and set aside the sentences imposed against the Appellants. In the result, I direct that the case shall be heard afresh. The Appellants shall be produced before the **Chief Magistrate, Kitui** for directions on the **15th May, 2019.**

21. It is so ordered.

Dated, Signed and Delivered at Kitui this 7th day of May, 2019.

L. N. MUTENDE

<u>JUDGE</u>