



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBERS 124 OF 2014

FRANCIS MWANGI MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Resident Magistrate Hon. R. AMWAYI delivered on 26th May 2014 in Nakuru Sexual Offences Case No.187 of 2013 Republic v Francis Mwangi Maina)

JUDGMENT

1. The Appellant was charged with the offence of **defilement** contrary to **Section 8(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence as per the charge sheet being that on the 7th day of September 2013 at [particulars withheld] in Solai in Rongai District within Nakuru County the appellant unlawfully and intentionally committed an act by inserting his genital organ namely penis to the male organ of **GKM** aged 10 years which caused penetration.
2. In the alternative, the appellant was charged with offence of indecent **act** contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that the appellant unlawfully and intentionally committed indecent act to GKM aged 10 years by touching his private parts (anus).
3. The appellant pleaded not guilty and the matter proceeded on for full trial; the prosecution availed six witnesses in support of their case. At the close of hearing of prosecution, the court found that the appellant had a case to answer and placed him on his defence on 24th April 2014. He opted to adduce unsworn evidence. The Trial magistrate found the appellant guilty of the main charge; after calling for record and giving the appellant opportunity to mitigate, the trial magistrate sentenced the appellant to life imprisonment.
4. The appellant being aggrieved by the court's determination, filed this appeal on the following grounds:-
 - i. That the trial magistrate erred in failing to find that the appellant was not provided with witness statements and other documentary exhibits by the prosecution.
 - ii. That the trial magistrate erred in failing to find that the legal aid advanced to the appellant was not helpful to him.
 - iii. That the trial magistrate erred in failing to find that the medical evidence evidence adduced was not sufficient to support safe conviction.
 - iv. That the trial magistrate erred in failing to advance reason for dismissing his defence
5. The appellant filed written submissions, which he adopted during the hearing of his appeal.
6. Appellant further submitted that despite the fact the magistrate ordered that he be given statement and time to read, he had not been given witness statements at the time he testified. He pointed out page 3 of the proceedings, which indicate that he had not been given witness statements.
7. He submitted that the child was taken to three hospitals and was found not to have any infection; further that he was charged in the month of September yet the offence is alleged to have been committed in May; and between May and September, the boy never told anyone that he was defiled.
8. Appellant further submitted that contrary to the investigating officer's evidence that he was tested, he was not. He added that the child's father was arrested for refusing to testify in court.

RESPONSE BY STATE

9. Mr. Limo Counsel for the state submitted that, in the lower courts trial, the appellant was represented by an Advocate who should have ensured the appellant was supplied with the documents before proceeding with the hearing.

10. On examination of the child, the state counsel relied on P3 form signed by the doctor. He added that the court considered appellant's defence.

11. On issue of being examined by a doctor to determine if he defiled the complainant, counsel submitted that the complainant positively identified the appellant.

12. On sentence, Mr. Limo submitted that the child defiled was 11 years and the lower court was right in imposing life sentence.

REJOINDER BY APPELLANT

13. The appellant submitted that before he engaged an Advocate, he had proceeded with the hearing of five witnesses. He said the Advocate informed court that he would recall the witnesses but only proceeded with two witnesses.

14. He confirmed that the complainant was his brother's child and he therefore knew him. He however submitted that he was framed up because of a grudge between him and his brother's wife.

ANALYSIS AND DETERMINATION

15. This being the first appellant court, I am required to re-evaluate evidence adduced before the trial court and come up with an independent determination. This I do while minded of the fact that unlike the trial court, I did not have the opportunity to take evidence first hand and observe demeanour of witnesses. For that reason I will therefore give due allowance.

16. Upon perusal of evidence adduced in the trial court, I find the issue for determination is whether the appellant was accorded fair hearing in the trial court in line with **Article 50** of the **constitution** of Kenya. The appellant submitted he was not supplied with witness statements before hearing of the suit contrary to trial magistrate's directions. I note from record that on 27th September 2013, the trial magistrate ordered that, the appellant be supplied with witness statements before hearing date. On 3rd October 2013 before the hearing commenced, record show that the appellant said "**I have no statements**". The case proceeded thereafter with examination in chief of the first witness commenced. Appellant started cross-examining the witness and said he was not ready to proceed. The hearing was adjourned to 10th October 2013 when the second, third and fourth witnesses testified.

17. On 17th October 2013, Mr. Kahiga who was holding brief for Mr. Juma appeared for the appellant. He sought adjournment on ground that his instructions were limited to seeking adjournment. The court declined an adjournment and proceeded with hearing of the doctor PW5. The Prosecutor examined the doctor in chief then the Advocate who was holding brief sought adjourned for cross-examination by counsel for the appellant. On 27th March 2013, the doctor was cross-examined by Mr. Juma for the appellant. The investigating officer testified thereafter and prosecution case was closed.

18. Record show that the first witness who was stood down for cross-examination on a later date, was not recalled for cross-examination by either the Appellant or his Advocate; and PW2, PW3 and PW4 who testified before defence counsel came on record were not recalled for cross-examination. It is evident that when PW1 testified, the appellant had not been given witness statement. There is no indication that he had the statements when PW2 and PW3 testified.

19. **Article 50(2)** provide as follows:-

Every accused person has a right to fair trial, which includes the right-

(c) To have adequate time to prepare a defence

(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

20. In the instant case, contrary to the above rights accorded to an appellant person by the constitution, the appellant was not given witness statements to enable him know in advance the kind of evidence the prosecution intended to rely on and time to prepare his defence. His right as enshrined in **Article 50(2) (j)** above was breached.

21. Further, the appellant was not given opportunity to challenge evidence adduced by PW1 as her evidence was not subjected to cross examination thus being in breach of **Article 50(2) (k)** of the constitution.

22. From the foregoing, I find that the appellant was not accorded fair trial.

23. **FINAL ORDER**

1. Judgment and sentence delivered on 26th May, 2014 are set aside.
2. The appellant be retried by a magistrate other Hon. Amwayi.
3. Mention before Chief Magistrate for directions on hearing.

Judgment dated, signed and delivered at Nakuru this 19th day of Sept. 2019

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer – Court Assistant

Appellant in person

Nyakira Counsel for the state