



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL APPEAL NO. 7 OF 2019**

**JOSEPH MURIUKI MUYA...APPELLANT**

**=VRS=**

**THE REPUBLIC.....RESPONDENT**

**{Being an appeal against the Conviction and Sentence by Hon. G. Omodho – SRM Thika dated and delivered on the 5<sup>th</sup> day of October 2017 in the original Thika Chief Magistrate’s Court Criminal Case No. 3548 of 2014}**

**JUDGEMENT**

The appellant is serving a term of imprisonment for twenty (20) years for the offence of imprisonment contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. The particulars of the charge were that on 9<sup>th</sup> September 2014 in Gatanga District within Murang’a County the appellant intentionally caused his penis to penetrate the vagina of DW a child aged 10 years.

To prove the case, the prosecution called the complainant and five other witnesses. On his part the appellant made an unsworn statement in which he maintained his innocence and contended that the evidence against him was a fabrication.

After evaluating the evidence by both sides and considering the submissions of the appellant the trial Magistrate found him guilty and sentenced him to the minimum sentence prescribed for the offence. Being aggrieved the appellant preferred this appeal. The appeal is premised on four amended grounds of appeal: -

**“1. THAT, the Hon. Trial magistrate erred in matters of law and fact by not finding that there was violation of the appellants constitutional rights when he was not supplied with the witness statements despite several requests on the same.**

**2. THAT, the Hon. Trial magistrate erred in matters of law and fact by conducting the trial in violation of Section 200 (3) of the criminal procedure code laws of Kenya.**

**3. THAT, the Hon. Trial magistrate erred in matters of law and fact by relying on the incredible evidence of the prosecution witnesses to convict especially that of the complainant herself.**

**4. THAT, the prosecution’s evidence fell below the required standard in law that is prove beyond reasonable doubt.”**

The appellant canvassed the appeal through written submissions while Counsel representing the State submitted orally.

Having considered the rival submissions and having perused the record and analysed the evidence before the trial court, as I am entitled to do as the first appellate court, my finding is that whereas there is evidence that could sustain a conviction for the offence of defilement the conviction herein cannot stand. I agree with the appellant that by proceeding with the trial before he could have adequate time to prepare for it and also by proceeding before the statements of the prosecution witnesses were supplied to him the trial court violated his right to a fair trial guaranteed under **Article 50 (2) (c) and (j) of the Constitution** which state: -

**“50. Fair hearing**

**(2) Every accused person has the right to a fair trial, which includes the right—**

**(c) to have adequate time and facilities 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.”

In **Simon Githaka Malombe v Republic [2015] eKLR** the Court of Appeal held: -

“The High Court, sitting as a Constitutional Court had in the case of **JUMA -VS- REPUBLIC [2007] EA 461** reasoned as follows, and we agree;

We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence.....”

“We do not quite fathom how the Appellant can possibly be to blame for the Prosecution’s failure to supply the witnesses statements requested by the Appellant and ordered by the trial court..... The denial of witness statements in the present case reduced the trial to a farcical sham..... The result was that all of the evidence on record lacked the searching test of cross examination. Cross examination has long been described as being, quite aptly in our view, “beyond any doubt the greatest legal engine ever invented for the discovery of truth.”..... In the end, the Appellant was relegated to the position of a mere observer, a passive attendant of his own trial yet, in a criminal trial, the accused person is the most central character in the sometimes complex human drama of attempting to test the truth about criminal allegations. He cannot, by no fault of his own be made a mere spectator.....

The upshot of our consideration of this matter is that the evidence that was used to convict the Appellant was fatally wanting. He did not get a fair trial as he was entitled to. His conviction cannot stand.”

In the case of **Simon Ndichu Kahoro v Republic [2016] eKLR** the Court of Appeal stated: -

“..... It is our duty as Judges to whom the people Kenya rely to protect their rights and fundamental freedoms to live up to their expectations. It is not lost to us that the right to a fair trial is one of the fundamental rights and freedoms which may not be limited by virtue of the provisions of Article 25 (c) of the same Constitution. we do not think for a moment that the fact that the Appellant cross-examined the witnesses cured the breach of his said rights.....”

The right to a fair trial is one of the rights that cannot be limited – see **Article 25 (c) of the Constitution** and for that reason **I find merit in the appeal and accordingly quash the conviction and set aside the sentence of imprisonment for twenty years.**

However, I do find that as there is evidence that could sustain a conviction and the appellant having served only two years of the twenty years sentence and shall hence not be prejudiced, the case is suitable for retrial – (see **Opicho v Republic [2009] KLR 369**). I direct therefore that **the case shall be remitted back to the lower court for retrial after the appellant has been supplied with all the evidence the prosecution shall rely on at the trial.** It is so ordered.

Signed and dated this 15<sup>th</sup> day of October 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 17<sup>th</sup> day of October 2019.

C. W. MEOLI

JUDGE