



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

(CORAM: MAJANJA J.)

CRIMINAL APPEAL NO. 75 OF 2013

BETWEEN

HENRY IBWAGA LUGUYA.....APPELLANT

AND

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence of Hon. S.N. Mwangi, Ag. SRM dated 5th April 2012 at the Vihiga Principal Magistrates Court)

JUDGMENT

1. The appellant, **HENRY IMBWAGA LUGUYA**, was charged with the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act**. The particulars of the case were that on 11th March, 2012 within Vihiga County he intentionally and unlawfully caused his penis to penetrate the vagina of MD a girl aged 10 years. He was convicted and sentenced to life imprisonment and now appeals against conviction and sentence.

2. The thrust of the appellant's case is that the prosecution failed to prove all the elements of the offence of defilement beyond reasonable doubt.

3. Upon review of the record, I find that I must allow the appeal as the record shows that MD (PW 1) was not cross examined and nor opportunity given to the appellant to cross examine her. The elements of the right to fair trial, and particularly the right to cross-examine a witness in a criminal trial is enshrined in **Article 50 (2)(k)** of the Constitution which provides as follows, *"Every accused person has the right to a fair trial, which includes the right to ... (k) to adduce and challenge evidence"*. The right is further augmented by **section 208** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which lays out the procedure to be followed by a trial Court upon entering a plea of not guilty. It states that:

208 (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

(2) The accused person or his advocate may put questions to each witness produced against him.

(3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.

4. The right of the appellant to cross examine the witness does not diminish merely because she gave unsworn evidence for in cases of sexual offences, a conviction may result even in cases where such testimony is uncorroborated. In **Nicholas Mutula Wambua v Republic, MSA CRA No. 373 of 2006 (UR)**, the Court of Appeal dealt with the issue of cross-examination of a child of tender years who has given unsworn testimony. It quoted with approval the decision of the Supreme Court of Uganda in **Sula v Uganda [2001] 2 EA 556** where it was stated that;

The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.

5. For the reasons I have stated, I must allow the appeal. However, the evidence against the appellant is overwhelming and I see no reason why we cannot be re-tried.

6. In summary, I allow the appeal, quash the conviction and sentence. I however order a retrial and for that purpose, the appellant shall remain in custody until such time as he shall be taken before the **Principal Magistrate's Court at Vihiga** for fresh plea and re-trial on **9th April 2018**.

DATED and DELIVERED at KAKAMEGA this 3rd day of April 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.