



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 170 OF 2016**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**MUSTAFA ISMAEL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. J. Gandani, SPM dated 13<sup>th</sup> September 2012 at Chief Magistrate's Court at Mombasa in Criminal Case No. 2131 of 2010)*

**JUDGMENT**

1. The appellant, **MUSTAFA ISMAEL** was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act**. It was alleged that on the night between 10<sup>th</sup> and 11<sup>th</sup> July 2010 at [particulars withheld] village, Mombasa District within Coast Province, he unlawfully and intentionally caused his penis to penetrate the vagina of VA, a girl aged 8 years. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence.

2. When the complainant (PW 2) testified, the trial magistrate at the end of her examination in chief recorded as follows, "No cross examination of PW2 as she gave unsworn evidence." This was a violation of the appellant's fundamental rights under **Article 50** of the Constitution.

3. The right of the accused to confront the evidence against him forms part of the right to a fair trial. **Article 50(2)(k)** of the Constitution speaks of the right, "to adduce and challenge evidence". It does not matter that the child gave unsworn testimony. The Court of Appeal discussed this issue in *Nicholas Mutuke Wambuke v Republic MSA Criminal Appeal No. 373 of 2006 (UR)* and had this to say:

*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.*

*That thinking is expressed in Section 208 of the CPC which governs hearing of criminal proceedings in the Magistrates' courts. It provides that during the hearing, "the accused persons or his advocate may put questions to each witness produced against him." Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in all criminal trials to obviate an otherwise stable case from being lost on that omission.*

4. In the circumstances the appellant's right to a fair trial was violated and the resulting conviction cannot be upheld.

5. I now turn to whether I should order a retrial. The principles governing whether the appellate court should order a retrial were summarized by the East Africa Court of Appeal in *Fatehali Manji v Republic [1966] EA 343* as follows:

*In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes 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 particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.*

6. Having regard to the seriousness of the offence and the fact that the offence attracts a life sentence and given that there is overwhelming evidence against the appellant, I shall order a retrial. The appellant shall be retried and for that purpose shall remain in custody pending the taking of a plea at the Mombasa Chief Magistrate's court on **14<sup>th</sup> September, 2018**.

**DATED and DELIVERED at MOMBASA this 7<sup>th</sup> day of September 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Ogega, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.