



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 170 OF 2014**

*(An Appeal arising out of the conviction and Sentence of HON.M. NJAGE (SRM) delivered on 30<sup>th</sup> October 2014 in Eldoret CM CR. Case No.1576 of 2013)*

**KEN KIBIEGO BUNGEI.....APPELLANT**

**VERSUS**

**REPUBLIC.....REPUBLIC**

**JUDGMENT**

The Appellant, Ken Kibiego Bungei was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 26<sup>th</sup> April 2013 at Langas Estate in Uasin Gishu County, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of EN (the complainant), a child aged fourteen (14) years. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully indecently touched the vagina of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve twenty (20) years imprisonment. He was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted after he had been subjected to an unfair trial process. He faulted the trial magistrate for compelling him to proceed with the hearing of the case before he had been supplied with prosecution witnesses' statements. He was aggrieved that he had not been given an opportunity to have the doctor who had testified recalled so that he could cross-examine him. He challenged the medical evidence which was produced into evidence. It was his view that the medical evidence did not support the complainant's assertion that she had been penetrated. He took issue with the fact that the doctor who examined the complainant was not the one who was called to produce the medical report before court. He asserted that this medical evidence was wrongfully admitted into evidence. The Appellant faulted the trial magistrate for conducting a trial, which in his view, was irregular and unprocedural. He stated that he was not given an opportunity to make closing submission before the trial court reserved the case for judgment. This was a failure which negated the entire trial. The Appellant was finally aggrieved that his defence was ignored before the trial court reached the impugned verdict. It was the Appellant's case that the evidence that he had adduced in his defence raised reasonable doubt as to the credibility of the prosecution's case. In the premises therefore, the Appellant urged the court to allow his appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He also made oral submission in support of his appeal. In the submission, the Appellant asserted that the burden of establishing the charge brought against him was on the prosecution. The prosecution failed to discharge this burden. He reiterated that he had been subjected to an unfair trial process in that he was compelled to proceed with the trial when he had not been supplied with documentary evidence that the prosecution sought to rely on. He was forced to proceed with the trial even when he had informed the court that he was unwell. It was the Appellant's case therefore that he was not in a position to proceed with the case on the day the doctor was called to testify. When he applied to have the doctor recalled for cross-examination, the trial court denied his request. The Appellant submitted that since his right to fair trial was breached, the subsequent verdict reached by the court could not be sustained. On the medical evidence that was adduced, the Appellant submitted that the doctor who examined the complainant did not testify before court. The doctor who testified before court did not have the requisite competence therefore to produce the P3 form. He urged the court to strike out the P3 form which in his view was irregularly admitted into evidence. In any event, even if the evidence in the P3 form was to be considered, the Appellant submitted that the fact that the hymen was torn did not *per se* conclusively prove that there was defilement. The Appellant submitted that he was denied the opportunity to address the court at the *no-case-to-answer* stage and present his final submission after the close of the case. This irregularity, in his view, vitiated the trial. He took issue with the fact that his defence was not considered by the trial court before reaching the impugned verdict. In his opinion, if the defence had been considered, it could have raised reasonable doubt as to the prosecution's case against him.

Ms. Oduor for the State, while opposing the appeal, conceded that the Appellant had applied for the doctor to be recalled. However, the

doctor was not recalled before the prosecution closed its case. She was of the view that the failure by the trial court to allow the recall of the doctor may have prejudiced the Appellant's trial. On the question of whether the court should order a retrial, Learned State Counsel submitted that, having contacted the Officer Commanding Station of Langas Police Station, she was informed that the complainant and her relatives had relocated from the estate where they used to reside. He could not trace them because the estate was an informal settlement. She however urged the court while exercising its discretion to order that the Appellant be retried.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant by the trial court. In reaching its verdict, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence that established the Appellant's guilt on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made by the parties to this appeal. This appeal shall be disposed of by one issue: whether the Appellant's conviction was vitiated by the fact that his request to have the doctor recalled for purposes of cross-examination, which was acceded to by the trial court, was not honoured before the prosecution closed its case. On perusal of the trial court's record, *i.e.* of 1<sup>st</sup> August 2013, the Appellant requested for an adjournment on the ground that he was feeling unwell. The request for adjournment was declined by the trial court. PW1 Dr. Jane Yatich testified. She told the court that she was testifying on behalf of a colleague, Dr. Langat who had examined the complainant and prepared a P3 form. She adduced her evidence and produced the duly filled P3 form as **Prosecution's Exhibit No.1**. The Appellant did not cross-examine the doctor because he insisted that he was still unwell to conduct the cross-examination. On 14<sup>th</sup> August 2013, the Appellant requested for the doctor to be recalled because he had not cross-examined the doctor. The doctor was not recalled until the prosecution closed its case.

It is the Appellant's appeal that the failure by the trial court to have the doctor recalled for the purposes of cross-examination before the close of the prosecution's case prejudiced his case. This is more so since the doctor had told the court that she was producing the P3 form on behalf of a colleague, Dr. Langat who had examined the complainant and prepared the P3 form. On actual perusal of the P3 form, it was evident that the doctor was not candid. She was the one who prepared the P3 form and not Dr. Langat. This was material fact which would have been clarified if the doctor was recalled to enable the Appellant cross-examine her. It was clear to this court that the evidence of the doctor was factually and materially incorrect.

In its verdict, this is what the trial court said in respect of that medical evidence:

***“In relation thereto, when I evaluate evidence of the complainant, I find inter alia that; her evidence that she was defiled is corroborated by the medical evidence on record as aforesaid, her evidence that she felt pain on her abdomen during the defilement is corroborated by the P3 form in the content of which as section ‘B’ paragraph 1(d) shows that when she was examined on 28<sup>th</sup> April 2012 pursuant to the complaint of defilement the subject of this case.”***

It was clear that since the trial court relied on the said doctor's evidence as constituting corroboration of the complainant's testimony, it was apparent to this court that the Appellant's conviction cannot be upheld. The medical evidence could not constitute corroboration of the complainant's testimony taking into account that it was factually and materially incorrect. The doctor who is said to have examined the complainant told the court that she was not the one who medically examined her. As stated earlier in this judgment, this discrepancy could have been clarified if the doctor was called to be cross-examined by the Appellant. In the premises therefore, for that reason, the Appellant's appeal is allowed and the conviction is quashed.

The issue that remains for determination is whether an order should be made that the Appellant be retried. The principles to be considered by this court in determining whether or not to order a retrial are well settled. In **PNH –vs- Republic [2016] eKLR**, the court cited with approval the decision of the Court of Appeal in **Bob Ayub –vs- Republic [2010] eKLR** where it was held that:

***“We have anxiously considered whether or not to order a retrial. The relevant principles to consider when faced with such a matter have been stated severally by this court. In the case of Muiruri –vs- Republic [10] this court held inter alia as follows:***

***Generally whether a retrial should be ordered or not must depend on the circumstances of each case...It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the Appellant. Other factors include illegalities or defects in the original trial, length of time having lapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”***

Other factors to be taken into account include whether the prosecution witnesses who testified in the vitiated trial would be available to give their testimony if a trial is ordered.

In the present appeal, this court took the trouble to inquire from the Director of Public Prosecution if the prosecution witnesses will be available to testify if the trial is ordered. The court adjourned the appeal for a day to enable the prosecution contact the police from the police station where the complaint was lodged. The court was informed that the witnesses could not be traced. It is on that basis that this court reached the determination that it would serve no useful purpose if a retrial is ordered. The court also took into consideration that the Appellant had been in lawful custody for a period of more than three (3) years. This coupled with the factors stated above leads this court to the only available decision: the Appellant is ordered discharged. He shall be released from prison and set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2018**

**L. KIMARU**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 4<sup>TH</sup> DAY OF OCTOBER 2018**

**HELLEN OMONDI**

**JUDGE**