



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 31 OF 2018**

**DAVID OLE RUMPE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the Conviction and Sentence of Hon. R.M Oanda (Principal Magistrate) Dated and delivered on the 16<sup>th</sup> day of May 2018, in the original KILGORIS PMCR No. 1310 of 2016)*

**JUDGMENT**

1. The appellant was charged with defilement contrary to section 8 (1) as read with section 3 of the Sexual Offences act No. 3 of 2006. The particulars of the charge were that on 9<sup>th</sup> October 2016 in Transmara West Sub-county within Narok County intentionally caused his penis to penetrate the vagina of PM a girl aged 15 years. The appellant was also charged with an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 9<sup>th</sup> October 2016 in Transmara West Sub-county within Narok County intentionally touched the breast, buttocks and vagina of PM a girl aged 15 years. The appellant pleaded not guilty and the prosecution called a total of 7 witnesses.

2. The trial magistrate held that the prosecution had proved their case against the appellant beyond reasonable doubt and found the appellant guilty as charged.

3. The appellant challenged his conviction on the grounds set out in the petition of appeal filed on 30<sup>th</sup> May 2018 and the written submissions. The thrust of his appeal is that the charge sheet was defective; that the learned magistrate relied on evidence which was contradictory in nature including the age of the complainant; that the judgement did not disclose the offence that the appellant was guilty of and finally that the case was not proved beyond reasonable doubt.

4. As the first appellant court it is my duty to re-evaluate the evidence and reach an independent conclusion bearing in mind that I neither heard or saw the witnesses testify (see Okeno vs. Republic [1972] E.A 32).

5. The trial court found that PM (Pw2) was mentally challenged she gave an unsworn statement. The testimony of Pw2 in part was as follows:

*“Accused injured me on the stomach. He removed my clothes including my inner-wear. Accused also removed his clothes. He touched my private parts. He did there. He penetrated me. I was taken to Hospital. Accused is present in court (the child points at the accused herein).”*

6. The court proceeded to hear evidence of the other witnesses whom the trial court indicated had adduced sufficient evidence to prove that Pw2 had been defiled.

7. After the hearing of Pw2 the complainant the court did not record any cross-examination of Pw2 by the appellant. The court record reads; *Court. Due to time matter is adjourned to 6/2/2017. Mention on the 21/10/2016. Remaining witnesses to be bonded*”. On the 6/2/2017 the appellant was not ready and Pw2 was not recalled for cross-examination.

8. In the case of **HOW vs. R CRIMINAL APPEAL NO. 326 OF 2010 eKLR** the Court of Appeal dealt with this issue and held as follows;

*“There was no indication or any record to show that the appellant was afforded an opportunity to cross-examine this witness and no reasons were recorded as to why that procedure was not done. Unfortunately the appellant was unrepresented and clearly could not apprehend his right to cross-examine the witness. He clearly relied on the trial court which had a duty to invite him, at the end of the witnesses’ evidence in chief to cross-examine the witness, which invitation did not come forth in respect of this witness. We can*

find no reason for this serious omission except that we think perhaps the court erroneously felt that as an accused person who gives unsworn evidence is not to be cross-examined so would any witness who gives unsworn evidence not be cross-examined. Of course that was a misapprehension of the law. An accused person who chooses to give unsworn statement in his defence does so as a result of the provisions of the Criminal Procedure Code which protect him from being cross-examined if he chooses to give unsworn statement in his defence. It must be appreciated that the accused person cannot in law be charged with the offence of perjury in respect of a statement he gives in defence of himself in a criminal case brought against him. **That protection is not available to a witness in a criminal case (emphasis mine).** Section 208 of the Criminal Procedure Code is clear on this aspect. It states:

"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 dose 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."

(underlining supplied)

This provision is clear on the duty of the court to ensure that at the end of any evidence in chief, the accused is not only afforded opportunity to cross-examine that witness but if he is unrepresented, he is asked by the court to do so if he wishes and his answer to that question shall be recorded. The learned trial Magistrate did not do this, perhaps because he thought as we have stated that as J.S. gave unsworn evidence she would not be subjected to cross-examination. With respect he was wrong and the learned Judge of the High Court failed to note and to act on this serious failure in law.

In the case of *Sula v Uganda (2001)2 EA 557* The Supreme Court Uganda stated as follows:

"Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence."

In Kenya, that position was taken by this court in the case of *Nicholas Mutula Wambua v Republic - Criminal Appeal No. 373 of 2006* heard at Mombasa where this Court stated:

"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(emphasis mine).

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."

This is the law. We only need to add for emphasis that the proviso to Section 19 of the Oaths and Statutory Declarations Act, the section that gives guidance on the evidence of children of tender years states:

"If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of adult with imprisonment."

In our view, unless such a child's evidence is subjected to cross-examination, it would be impossible to know whether the evidence he gives is false or not. This provision in our view strongly supports the law as above that Section 208 of the Criminal Procedure Code applies to all witnesses who give evidence and is not confined to only those witnesses who give sworn evidence. It covers children giving evidence not on oath as well. Thus the learned court erred in law in failing to ask the appellant to cross-examine J.S. if he wished to do so, and the High Court erred in failing to direct its mind to that serious legal lapse. We say serious legal lapse because the conviction was based on that evidence on the main."

9. Although this issue was not raised in the grounds of appeal I note that the record is clear that the appellant was not given a chance to cross-examine the complainant on the day she testified and on the subsequent date when the prosecution witnesses were recalled to testify despite his counsel failing to attend court. In light of the Court of Appeal of decision of **HWO v R** (supra) the trial court erred in law in failing to ask the appellant the right to cross-examine the complainant. The appellant's conviction was based on the evidence of Pw2 and the other witnesses. This was a legal lapse. In my view I need not considered the other grounds of appeal with this legal lapse.

10. The next question is whether in the circumstances of the case, there should be an acquittal or a retrial be ordered. The guiding principle is that each case must depend on particular facts and circumstances of that case but an order for retrial should be made where the interest of

justice require it and should not ordered where it is likely to cause an injustice to the appellant. (**See Makupe vs. Republic [1984 KLR 523]**).The case is a 2016 case and is therefore not an old case. I have considered the matter and in the interest of justice I order a retrial. The appellant shall remain in custody and shall be taken to Kilgoris Principal Magistrate's Court to take plea on the **17<sup>th</sup> of December 2018**. The matter shall be heard before another magistrate other than R.M. Oanda PM.

**Dated, signed and delivered at KISII this 11<sup>th</sup> day of December2018.**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

**Appellant Present**

**Mr. Ollanda For the Appellant**

**Mr. Otieno Senior Prosecution Counsel**

**Ms. Rael Court clerk**