



IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 55 OF 2018

BETWEEN

MARK SAITOTI ONWONGA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the original conviction and sentence of Hon. C.R.T Ateya – RM dated 5th May 2015 at the Principal Magistrate’s Court at Ogembo in Criminal Case No. 957 of 2014)

JUDGMENT

1. The appellant, **MARK SAITOTI ONWONGA**, was charged, tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act*** (“the ***Act***”). The particulars of the charge against him were that 22ND December 2016 at Bogetenga Sub-location in Gucha South District within Kisii County he intentionally caused his penis to penetrate the vagina of AGC, a child aged 11 years.

2. Although several grounds were raised in support of the appeal, one ground only is necessary to dispose of this appeal. I would only mention here that the issue of identification of the appellant was a live issue hence the appellant applied for production of the Occurrence Book and Investigation Diary. The trial magistrate obliged and summoned the Commanding Officer of Nyamarambe Police Station. Despite the fact that the appellant refused to participate in the proceedings, the trial magistrate did not ensure that these documents were furnished to the appellant. I also note that the original investigating officer did not testify.

3. I find that the failure to accord the appellant the documents necessary to defend himself violated his right to a fair trial under Article 50(2) of the Constitution which provides that, “*Every accused person has the right to a fair trial, which includes the right — to have adequate time and facilities to prepare a defence.*” This right includes the right to be assisted by the State to acquire the necessary evidence to prepare one’s defence. In this instance the appellant had requested to be provided with specific document to enable him prepare his defence.

4. In ***Collins Odhiambo and Others v Republic KSM CA Crim. App. No. 199 of 2008 [2014]eKLR*** the Court of Appeal observed as follows:

Before we conclude this judgment, one other matter has caught our attention which would suggest that both courts below may not have adequately evaluated the evidence which was adduced at the trial. On 14th December, 2005 the appellant applied for production of the Occurrence Book (OB) of 4th March, to 8th March 2005. The learned trial magistrate allowed the application but the record does not show that the said OB was ever produced. Even when the appellant reminded the court, that he had applied to have the OB produced and that his case was just “fitina” (malicious), nothing was done about his plea. Neither the learned trial magistrate nor the learned Judges of the High Court mentioned the appellant’s plea for production of the OB in their judgments. In the absence of any direction regarding the OB by the two courts below it is not possible to appreciate how the contents of the OB would have impacted on the case put forth by the prosecution.

We take this opportunity to caution courts of first instance and first appellate courts that they should be careful not to be accused of ignoring pleas made by the accused/appellants especially when they are not represented. Indeed in such cases the courts should be in the forefront in championing the unrepresented parties’ fair trial rights.

5. As a result, I am constrained to quash the conviction and sentence. The issue I must consider is whether I should order a retrial. In ***Mwangi v Republic [1983] KLR 522*** the Court of Appeal held that;

We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might

support the conviction of the appellant.

6. I have reviewed the evidence and it is clear that there is overwhelming evidence against the appellant that may well lead to a conviction. The matter occurred within the local limits of the court's jurisdiction and the witnesses will not be difficult to secure and taking into account the time that has lapsed, I do not think a retrial would be difficult.

7. In the circumstances, I order a retrial and in that regard, I direct that the appellant shall be taken before the Magistrates Court at Ogembo on **14th December 2018** to plead to fresh charges. He shall remain in custody for that purpose.

DATED and DELIVERED at KISII this 11th day of DECEMBER 2018.

D.S MAJANJA

JUDGE

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.