



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**HIGH COURT CRIMINAL APPEAL NO. 69 OF 2016**

PHILIMON ALAMISI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*[Arising from the judgment of Hon. K. Mukabi in Sirisia P.M.C.C. NO. 23 OF 2014 delivered on 24<sup>th</sup> December, 2014]*

**JUDGEMENT**

1. This is an appeal arising from the conviction and sentence by Hon. Kimani Mukabi in S.R.M. Sirisia Criminal Case NO. 23 of 2014 where the appellant had been charged with the offence of committing an indecent act contrary to Section 11 (i) of the Sexual Offences Act of 2006. The trial court convicted the appellant of the offence and sentenced him to 10 years imprisonment.
2. Being dissatisfied with the judgment the appellant preferred an appeal on grounds that; the prosecution had not proved the charge under the provision of Section 11 (1) of the Sexual Offences Act; the evidence of the complainant did not tally with the charge; the age of the complainant was not established; the trial court failed to conduct a *voire dire* examination; that the sentence meted out was harsh and excessive; the proceedings were contrary to Section 210 and 213 of the Criminal Procedure Code and Article 50 (2) (g) & (h) of the Constitution.
3. At the hearing the defence made submissions as follows; the age of the complainant was not proved; there was no indication also whether the court believed the uncorroborated evidence of the complainant; the complainant slept in more than 1 house; prosecution withdrew an earlier charge of defilement and therefore the charge of indecent assault must equally fail; the court failed to point out section 210 & 211 of the Criminal Procedure Code, the court further failed to draw to the attention of the appellant that he had a right to an advocate, and that witness statements were not made available to the appellant at trial.
4. The State did not oppose the appeal on grounds that **PW2** contradicted **PW1** and whose evidence was uncorroborated, secondly because statements of witnesses were not supplied to the appellant.
5. This being the first appeal the court has to consider the evidence afresh, analyze and evaluate the same in order to arrive at an independent opinion bearing in mind that the trial court heard the benefit of seeing and observing the witnesses first hand. **See Okeno Vs. R. [1973] E.A.**
6. Although the State does not oppose the appeal this in itself is not binding on the court.
7. The prosecution evidence in brief was that, on the 29<sup>th</sup> of December 2013 at about 6.30 p.m the

complainant (**PW1**) left her home to attend a burial meeting at a neighbour's. At the said gathering she met the appellant, who she later left with him to his home where she spent the night. The two had sex twice in the night and in the morning the appellant disappeared.

8. **PW1 L C M T** aged 12 years recalled how she met the appellant at a funeral vigil at the neighbour's house and left with him for his house and how he defiled her twice in the night and threatened her should she raise an alarm. In the morning the appellant asked her to meet him at Toloso as he left but did not show up as agreed, which made her spend the night at another home and the following morning she reported the matter to the head teacher of [particulars withheld] Primary School, who later informed **PW3** the complainant's mother and who in turn reported the matter to the village elder and the police.

One week after the incident she was taken to hospital. She had known the appellant for 9 months.

**PW2: E T S** mother of **PW1** testified that **PW1** was born on 7.10.2002. That on 29.12.13 **PW1** went to the neighbour's for funeral arrangements but failed to return. She disappeared until 2.1.14 when the witness was summoned at Marigo and told her daughter was at the headmaster's home. She then went to the school accompanied by **PW3** the village elder and found **PW1** who informed her that the appellant got her from the funeral meeting, had sex with her and promised to marry her. On 9.1.2014 she took **PW1** to Chesikaki police station where the matter was reported and thereafter Chesikaki hospital where **PW1** was examined and a P3 form filled..

**PW3 Chestimor Muniche**, village elder of Kamaran village on his part, testified that on the 30.2.2013 he received information of **PW1's** disappearance from home. The girl was found after a day at the headmasters.

**PW4 PC Naphtali Munika Njage** attached to Chesikaki police station, received a report of defilement on 9.1.2014 from **PW1, PW2, PW3** and in the presence of the appellant. And since the alleged offence had been committed on 29.12.2013, he formed the opinion that the evidence available could not sustain a charge of defilement and therefore he proceeded to prefer the charged of indecent assault against the appellant.

He stated further that on interrogation the appellant informed him that he had been friends with **PW1** for sometime and had admitted having defiled the complainant on the material night.

**PW5 David Kimengich**, a clinical officer at Cheptais Sub-district hospital, produced the P3 form without objection on account of a colleague who filed the same. The P3 form revealed that at the time of examination **PW1's** genitalia were normal though the he hymen was missing indication that penetration had taken place.

**PW6 James Barasa** Assistant Chief Sasura Sub-location recalled that on 9.1.2014 at 2p.m **PW2 & 3** went to his house accompanied by **PW1**. He interrogated the girl who said that on 29.12.13 she was misled by the appellant and she went and spent the night with him. The appellant who was present admitted when interrogated and asked for forgiveness.

9. At the close of the prosecution case the court found the accused had a case to answer, in his defence the appellant stated that he was 21 years and did not know the appellant neither did not recall the events of 27.12.13. He was arrested by two people on the 29<sup>th</sup> of December 2013. He denied committing the offence.

10. "**Indecent act**" in accordance with the Sexual Offences Act of 2006 means an unlawful intentional act which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

11. **Section 11 (i)** of the said Act states that any person who commits an indecent act with a child is guilty of an offence and liable upon conviction to imprisonment of a term of not less than 10 years.

12. With the above facts in mind the issues for consideration herein are;

- i. If the complainant was a child within the meaning of the law;
- ii. Whether the appellant committed an indecent act against the complainant;

13. The complainant **PW1** gave her age as 12 years, so did her mother. A child is defined to be one below the age of 18 years. The trial court took notice of the fact that the complainant was a minor despite there being no documentation to that effect before court. The appellant did not dispute or cross examine or discredit evidence of the witnesses who described the complainant as such and I am prepared thereof to accept that the complaint was a minor. Indeed this is not an issue and does not form ground of appeal either.

14. There is evidence from **PW1** which evidence she reported to all other 5 witnesses and indeed the court, that there was sexual intercourse between her and the appellant the night she disappeared from home. There is also evidence from **PW4 & 6** that the appellant did admit having had carnal knowledge of **PW1** and he sought for forgiveness. The P3 form that was filled on 9<sup>th</sup> of January, 2013 almost 10 days after the alleged offence gave an indication that although there were no injuries in the genitalia of the complainant the hymen was missing. **PW4** chose to file a lesser charge against the appellant as a result of late examination of the complainant.

15. The evidence that the appellant defiled the complainant is mainly from the complainant and corroborated by medical examination. **PW1** narrated the incident in details. She was consistent as she repeated the incident to several people and I would admit the evidence under the provision of Section 124 of the Evidence Act. The other witnesses also testified that the appellant had admitted having known the complainant for 9 months and having had sex with her the night in question.

16. The issue before court therefore is whether the lesser charge of indecent act would stand in view of the evidence before court.

17. There is no doubt from the evidence of the complainant that sexual intercourse between her and the complainant occurred on the material night. Secondly the evidence of **PW4** is corroborated by **PW5** where the complainant admitted to the fact. Technically therefore there was contact between the body of the appellant and the complainant. However although there was ample evidence of the offence of defilement the police charged the appellant with a lesser charge which therefore attracts a lesser sentence which in my view was unfortunate.

18. I am of the considered opinion that it would be a travesty of justice to release the appellant based on the above fact alone.

19. The appellant asked for statements severally. The court ordered that he be supplied with them. It is indeed his constitutional right. However at some point the appellant stopped asking and he proceeded with trial. He did not raise this issue as a ground in this appeal either. I do therefore fault both the defence counsel and the prosecution for raising and relying on the same from the bar and the state conceding to the appeal on this "ground".

20. The complainant gave a sworn statement and although no *voire dire* examination was carried out. Was this fatal?

In ***Kinyua vs. R [2002]*** on the issue of *voire* in a murder trial where two school boys gave evidence and where the trial court failed to conduct a ***voire dire*** examination the court of appeal had this to say on the subject;

First, the court must ascertain whether the child understands the nature of oath. An investigation to this effect must be done by the court and if it appears that the child understands the nature of an oath, the court proceeds to swear or affirm the child to his evidence;

Secondly if the child does not understand the nature of the oath, he's not necessarily disqualified from giving evidence. The court should investigate if the witness possesses sufficient intelligence and understands the duty to tell the truth. The above investigation must be done and appear on record.

21. In this matter although the court was satisfied that the complainant was a minor no **voire dire** examination was conducted as required.

22. In **Yusuf Opicho Vs. R** where no **voire dire** was conducted and the court set aside the conviction and sentence and ordered a retrial.

23. As indicated above the trial court relied on the evidence of the complainant. This court was equally convinced by the said evidence however for the reasons above, the same may not be admissible as rules of evidence were not complied with which was in breach of the requirements of Section 19 of the Oaths and Statutory Declaration Act.

24. As to the Violence of rights of the appellant under Article 50 2 (a) (h) of the Constitution; the court takes cognizant that Article 54 (2) (h) of the Constitution provides the right to counsel at the expense of the State where substantial injustice would otherwise occur. A determination on that would be done by court. No application seeking for such provision was sought by the appellant as this is not an obvious or automatic right and I would therefore not fault the trial court on this account.

25. The trial court did make a ruling under Section 211 of the Criminal Procedure Code and the submissions on this point by counsel for the appellant is not supported by the record.

26. All in all the appeal herein succeeds on account of lack of **voire dire** examination lacking and I accordingly quash the conviction and set aside the sentence for the said reason and remit the case back to the trial court for a retrial.

**DATED and DELIVERED at BUNGOMA this 16th day of February, 2017**

**ALI-ARONI**

**JUDGE.**