



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 131 OF 2017**

**CHARLES MWANZIA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....PROSECUTION**

**JUDGEMENT**

1. The Appellant was charged with **Offence of Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006.**

2. Particulars are that, on the 3<sup>rd</sup> day of June 2013 at [particulars withheld] village in Kibwezi District within Makueni County, Charles Mwanzia intentionally and unlawfully caused his male organ namely penis to penetrate female organ namely vagina of N K a child aged nine (9) years.

3. Alternative charge was indecent Act **Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.** Charles Mwanzia, on the 3<sup>rd</sup> day of June 2013 at [particulars withheld] village in Kibwezi District within Makueni County intentionally and unlawfully touched the vagina of N K a child aged nine (9) years.

4. After trial, the Appellant was convicted and sentenced to serve life imprisonment.

5. Being aggrieved by the above decision the Appellant lodged the instant appeal and set out the following grounds in his memorandum of appeal namely:

1) **THAT**, the trial magistrate made an error in law by failing to sufficiently scrutinize the entire evidence on record as was duty bound to as a first Appellate Court.

2) **THAT** the trial magistrate made an error in law by failing to make a specific finding in relation to the burden of proves.

3) **THAT** the trial magistrate made an error in law by failing to observe that the trial magistrate failed to comply by the provisions of Section 169(1) of the CPC.

4) **THAT** I apply for a copy of court proceedings and I wish to be present in court during the hearing date of this appeal.

6. The Appellant and the prosecution opted to canvass the appeal via submissions. The Appellant filed and served the submissions along with amended supplementary grounds of appeal which he opted to argue in lieu of earlier grounds set out in the memo of the appeal.

7. The Amended Supplementary grounds of appeal are as follows:-

1) **THAT**, the Appellant was substantially prejudiced and unable to defend myself properly in that my fundamental rights to a fair and impartial trial as enshrined by Article 25(c) of the constitution was violated since I was not accorded an opportunity to cross-examine the mother of the victim minor (PW2) who was merely stood down and never re-summoned.

2) **THAT**, the entire trial was a nullity as the same proceeded on defective charge sheet.

3) **THAT**, the trial magistrate erred in both law and facts by failing to observe that the testimony of PW1 was procured by beatings and threats and was given as instructed by PW2.

4) **THAT**, the provisions of Section 169(1) of the CPC was not complied with in relation to my defence statement.

8. When the matter came for hearing, the state counsel Mr. Orinda conceded appeal and submitted that PW2 who was the prosecution's star witness was not cross examined by the Appellant who was unrepresented.

9. The court did not avail the Appellant opportunity to conduct the cross examination. This according to the state counsel rendered the entire trial into a mistrial. The proposed order is thus a retrial be undertaken. The prosecution submits that the witness will be availed.

10. The Appellant also supported retrial.

11. I have perused the proceedings, the evidence on record and the parties' submissions. I find the issues are:-

**1) Whether failure to allow the Appellant to cross examine PW2 rendered the trial a mistrial?**

**2) If above is affirmative, what is the most appropriate order?**

12. The prosecution called four (4) witnesses to prove its case. PW1 was the victim who narrated how they did bad manners with the Appellant.

13. PW2 was the victim's mother who narrated the background of the entire episode concerning the defilement of her child (PW1). She also was having custody of the exhibits.

14. However, after she was stood down the exhibits were not in court, she never called again to testify or even to be cross-examined by the Appellant.

15. The prosecution then called PW3 a doctor who produced PW1 P3 form. After that the police officer PW4 was called and the prosecution closed its case.

16. The court relied on PW1, PW2, PW3, and PW4 evidence to convict the Appellant.

17. The failure to allow the accused to cross examine the PW2 violated the principle of fair trial under Article. 25(c) as read with Article 50 (2) (k) Constitution.

18. The Appellant was entitled to be offered opportunity to challenge PW2 evidence.

19. The violation of the above right to fair trial renders the trial a mistrial and thus entire proceeding a nullity.

20. The conviction cannot thus stand and therefore same is quashed and sentence set aside.

21. However, as the prosecution has assured the court that the witnesses will be availed for retrial, I order same to be undertaken by another magistrate other than E. M. Muiro Resident Magistrate.

**SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 2<sup>ND</sup> DAY OF MAY, 2017.**

**C. KARIUKI**

**JUDGE**

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