



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 116 OF 2017

TITUS MOTUVI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged the offence of defilement of a child contrary to Section 8 (1) (2) of the Sexual Offence Act No. 3 of 2006.
2. Particulars being that between May 2015 to 3rd July 2016 in Mbooni East District within Makueni County, Titus Motuvi intentionally and unlawfully did cause his male organ penis to penetrate to the genital organ namely vagina of M N a child aged 11 years.
3. Alternative charge was committing an Indecent Act with a child contrary to Section 11 (1) of the Sexual Offence Act No. 3 of 2006.
4. Particulars being that between May 2015 to 3rd July 2016 in Mbooni East District within Makueni County, Titus Motuvi intentionally and unlawfully did an indecent act to M N a child aged 11 years by touching her private parts namely vagina with his penis.
5. The Trial Magistrate heard the case and prosecution called five witnesses. The Appellant was put on his defence.
6. Thereafter, the trial court convicted the Appellant and sentenced him to serve life imprisonment.
7. Being aggrieved by the above decision, the Appellant lodged the instant appeal and set out 6 grounds of appeal in his petition and memorandum of appeal, namely:-

a. That the evidence adduced by the prosecution witnesses was not reliable to have been employed on the basis for his prosecution.

b. That the prosecution case was not proved beyond reasonable doubts.

c. That the appellant was convicted on uncorroborated evidence.

d. That he prays to be furnished with a certified true copy transcript of trial proceedings and judgment.

e. That considering the enormity of the case consequences, the appellant should have been accorded a legal representation as per article 50 (2) (h) of the Constitution of Kenya 2010.

f. That, further substantive and pertinent grounds will be canvassed upon perusal of transcript of the trial proceedings.

8. Subsequently lodged amended grounds of appeal namely:-

- **That, the court misdirected itself by allowing minor to testify on oath without conducting *voire dire* examination.**
- **That, there was violation of Article 50(4) of the constitution due to the omission to conduct *voire dire* and**
- **The case was *not proved beyond reasonable doubt*.**

9. When the matter came for hearing, the parties agreed to rely on their submissions. The Appellant had filed and served the same.

10. State Counsel, Mr. Orinda opted to tender oral submissions. This being the first appeal the court's duty is to re-evaluate the evidence on record afresh, analyze it and come up with its own conclusion bearing in mind that it never saw the witness testifying to evaluate her demeanor. See **OKENO –VS- REPUBLIC 1972 EA P.32.**

11. The state counsel submission was that there was an error of law committed by the trial court when it swore the 11 year old minor without conducting *voire dire* to test her intelligence and to ascertain whether she understood the nature of oath.

12. He submitted that the court ought to order for retrial and assured court that the witness will be availed for retrial. He submitted that other than that legal error, the evidence on record is sufficient to warrant a conviction.

13. On his part the Appellant submitted that the trial was irregular and prejudicial to administration of justice as the court failed to conduct *voire dire* to test the child's intelligence and ascertain whether she understood the nature of oath thus fatal to prosecution case. He relied on the cases of:-

- **JOHN MUIRURI –VS- R (1983) KLR 445**
- **JOHN OTIENO OLOO –VS- R (2009) CR APPEAL 350 OF (2008)**
- **GABRIEL –VS- R (1960) EACA 159**
- **NYWELA –VS- R (1989) KLR 452.**

14. He further submitted that Article 50 (4) Constitution of Kenya was violated as court admitted illegally obtained evidence which is detrimental to administration of justice.

15. Finally the Appellant submitted that the burden of prove was not proved to the standard required by the law. He relied on **WOO LMINGTON –VS- THE DPP (1935) AC 462.**

16. The court has looked at the record and the holdings in the case of **JOHNSON MUIRURI –VS- R (1983) KLR 445** where their Lordships Madan, Prter JJ. And Chesoni Ag. JA held:-

1. “where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support there of implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly understood.

3. When dealing with the taking of an oath by a child of tender years, the injury as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath a part from the ordinarily social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of oath. The failure to do so is fatal conviction."

17. The child was proved and the court held that she was 11 years old. She was of tender years. The law requires the same child of such age to be subjected to voire dire examination prior to court making decision on whether to swear her or not.

18. The court completely ignored the process without any justification. It was thus a violation of Article 50(4) as the evidence was obtained illegally which was detrimental to the administration of justice.

19. Thus the court agrees with the prosecution that as there is sufficient evidence from other witnesses, the retrial would be the only reasonable way to go.

20. The retrial is thus ordered to be entertained by any other Magistrate, save NAFULA, Senior Resident Magistrate, Tawa.

SIGNED AND DATED AND DELIVERED THIS 2ND DAY OF MAY, 2017.

C. KARIUKI

JUDGE

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